BUTLER COUNTY COURT OF COMMON PLEAS
CIVIL DIVISION

ERIN GABBARD, et al., *Plaintiffs/Relator*, v. MADISON LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, et. al, *Defendants/Respondents.*	Case No. CV 2018 09 2028 Judge Charles L. Pater **REPLY BRIEF IN SUPPORT OF PERMANENT INJUNCTION** Trial Scheduled Feb. 25, 2019

INTRODUCTION[1]

At the heart of this case is the meaning of R.C. 109.78(D). That statute mandates: "No public or private educational institution . . . 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." (Emphasis added.) These words must be interpreted to mean what they say. Any "person" that is "employ[ed]" by a "public . . . educational institution," in a "position in which such person goes armed while on duty," must have "satisfactorily completed an approved basic peace officer training program," unless he or she has already served for twenty years as a peace officer. *Id.* That requirement is straightforward.

The Board disagrees with this textual command. In its view, the Resolution permissibly adopts a different policy—allowing teachers to be armed with only 27 hours of training (about the same amount of training required to become a local as local little league umpires). But the Board cannot simply override applicable law and impose its own policy preferences by fiat. The way to

[1] The plaintiffs filed a motion for a preliminary injunction on October 31, 2018, and the defendants filed their opposition on November 21, 2018. Since then, the parties, in consultation with the Court, have agreed to proceed to a trial on the merits on the plaintiffs' claim for declaratory and injunctive relief. The trial is scheduled for February 25, 2019. The plaintiffs file this reply brief so the record is clear as to their position and as to not waive any arguments in response to the defendants' opposition brief.

implement the policy it seeks is to first change R.C. 109.78(D) to exempt armed teachers and school staff from the explicit training requirements. But absent such a change in the law, the Board must heed state law and the General Assembly's mandate that school employees who "go armed while on duty" must be extensively trained when they carry a gun around Ohio's kids in the classroom and on the playground. Neither the Board nor this Court may second guess that policy. Under the plain text of the statute, the Resolution violates R.C. 109.78(D).

ARGUMENT

The defendants argue that R.C. 109.78(D) applies only to "security personnel" (a limitation not found in the text), and they attempt to avoid the plain text by pointing to other statutes, introducing misplaced canons of construction, and relying on three sentences on page 3050 of an appropriations bill that do not even mention arming teachers in school. These efforts all fail. In the end, the statute's text is clear, and this Court is bound to follow its plain meaning.

I. The Board's reliance on R.C. 2923.122(D)(1)(a) is misplaced.

Seeking to avoid the plain language of R.C. 109.78(D), the Board asks the Court to focus solely on another provision—R.C. 2923.122(D)(1)(a). That statute, the Board says, "leaves any training requirements up to the discretion of individual school boards" and "disposes of the allegations in the complaint." Opp. at 8; *see also id.* at 1, 9. This theory misinterprets the scope of R.C. 2923.122(D)(1)(a).

Revised Code 2923.122(D)(1)(a) prohibits any person from bringing a firearm into a school unless such person falls into a narrow category of individuals, including a "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." This exemption, by its terms, applies only to remove the concealed carry ban in schools under specified circumstances; it says nothing about any separately applicable requirements, like the training mandate imposed by R.C. 109.78(D). The

Board's discretion in authorizing persons to carry guns in school is, in other words, still cabined by other applicable statutes.

Were it otherwise, the Board's expansive reading of R.C. 2923.122(D)(1)(a) would free it from every other applicable law. Nothing in the statute says that. And the fact that the statute "makes no mention whatsoever of training" does not help the Board's argument, Opp. at 8; it undermines it. With no mention of training, R.C. 2923.122(D)(1)(a) does nothing to displace otherwise applicable training requirements.

The Board concedes as much by admitting that persons "authorized by the Board to carry a concealed weapon must do so in accordance with Ohio law governing the concealed carry of a weapon: R.C. 2923.12[,]" including the eight-hour training required by R.C. 2923.125. Opp. at 8; *see also id.* at 7, 9. But if so, then persons authorized to carry firearms at school under R.C. 2923.122(D)(1)(a) are still subject to other statutory requirements, including the training requirement of R.C. 109.78(D); the Board does not have unfettered discretion. Because Revised Code 2923.122(D)(1)(a) does not hand the Board the power to pick and choose which other statutes it wants to comply with, it must also comply with R.C. 109.78(D).

II. The Board's interpretation of R.C. 109.78(D) must be rejected.

Turning to R.C. 109.78(D), the defendants claim that this statute exempts "school teachers, support staff, and administrators" from its training requirement. Opp. at 9. But that reading of the statute would require rewriting 109.78(D). The text contains no such exemption. No canon of statutory construction authorizes the judicial redrafting the Board demands here.

A. The defendants' interpretation of R.C. 109.78(D) requires rewriting the plain language of the statute.

The defendants' brief does not even attempt to grapple with the plain meaning of R.C. 109.78(D) or rebut the clear dictionary definitions of the terms used in the statute. *See* Pls' Opening

Br. at 6. The Board also does not dispute that the plaintiffs' reading follows the common usage of the phrase "*other position in which such person goes armed while on duty*." Instead, they argue, without textual support, that R.C. 109.78(D) "requires. . . others *employed to provide security* with a firearm" to meet the statute's training requirement. Opp. at 10 (emphasis added). But that requires adding words to the statute (since "employed to provide security" does not appear in 109.78(D)). And neither the defendants nor this Court have that power. *Wilson v. Lawrence*, 150 Ohio St.3d 368, 2017-Ohio-1410, 81 N.E.3d 1242, ¶11; *Bd. of Edn. of Pike-Delta-York Local School Dist. v. Fulton Cty. Budget Comm.*, 41 Ohio St.2d 147, 156, 324 N.E.2d 566 (1975) ("[T]his court does not sit as a superlegislature to amend Acts of the General Assembly."); *see Wachendorf v. Shaver,* 149 Ohio St. 231, 236–237, 78 N.E.2d 370 (1948) (holding that "[t]he Legislature will be presumed to have intended to make no limitations to a statute in which it has included by general language many subjects, persons or entities, without limitation").

Indeed, limiting the training requirement to those "employed to provide security" is not even enough for the defendants; they also want this Court to insert even more words to limit the statute to "security personnel" whose "primary function" is to provide security. Opp. at 11. That reading must be rejected because, quite simply, that is not what the statute says. By its plain language, R.C. 109.78(D) applies, without limitation, to "other position[s]," besides security guards and police, in which the "person goes armed while on duty."

The defendants further argue that R.C. 109.78(D)'s failure to specifically mention teachers or administrators somehow alters the interpretation of the provision. *See* Opp. at 10. But the Legislature is not required to mention every single group that its training requirement would apply to. Such a narrow construction would be particularly inappropriate here given the drafting history demonstrating that the General Assembly specifically considered, and rejected, limiting the training requirement only to special policeman, security guards, or persons "in any *similar*

position." *See* Pls' Opening Br. at 7 (describing amendment to initial draft of R.C. 109.78(D) (emphasis added)). The broader language the Legislature ultimately settled on appears carefully calibrated to foreclose the precise contention the Board raises here: the relevant dispute is not whether the armed school staff serve in a "similar" position to security guards or special police officers (as the rejected language would have required), but whether the person goes "armed while on duty" (as the amended language provides). Armed teachers and other school staff undoubtedly do. And it makes sense that the Legislature would be particularly concerned that any person—irrespective of their position—who carries firearms around Ohio's children all day, every day at school is well-trained. The Court should follow the statute's plain language as written and declare that the Resolution violates R.C. 109.78(D).[2]

B. The Board misconstrues the relevant canons of statutory construction.

Putting the plain meaning aside, the defendants point to several canons of statutory construction that, they say, can be used to limit the meaning of R.C. 109.78(D). But canons are relevant only if the plain text is unclear. *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203, ¶8. Here, it is not. "Courts do not have the authority to ignore, in the guise of statutory interpretation, the plain and unambiguous language in a statute." *Bd. of Edn. of Pike-Delta-York Local School Dist.*, 41 Ohio St.2d at 156, 324 N.E.2d 566. Even so, the canons offer no aid to the defendants.

First, the defendants rely on the rule of construction (often referred to as *ejusdem generis*) that a "catch-all term used to conclude a list, such as the term 'other position' here, must be interpreted

[2] As stated in the opening brief (at 10–11), the plaintiffs argue in the alternative that armed teachers and administrators should be considered "security personnel" if the Court holds that R.C. 109.78(D) is so limited. The parties are in the process of conducting discovery on this matter and will present further argument on it in pre-trial briefing after this factual development.

in accordance with the previous items in the list," here "special police officer" and "security guard." Opp. at 10. Specifically, the "catch-all" term should be read to "embrace only things" with the "'definite features and characteristics'" of those items listed. *Id.* (quoting *State v. Aspell*, 10 Ohio St.2d 1, 4, 225 N.E.2d 226 (1967)).

Although the defendants properly describe the canon, it does not apply here, where there is no ambiguity about the scope of the "catch-all phrase." *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588–589, 100 S.Ct. 1889, 64 L.Ed.2d 525 (1980) (refusing to apply the canon because there is "no uncertainty in the meaning of the phrase"); *Brooks v. Ohio State Univ.*, 111 Ohio App.3d 342, 349–350, 676 N.E.2d 162 (10th Dist. 1996) (holding that "the doctrine of *ejusdem generis* need not be applied . . . as the words of the statute are clear"). The General Assembly has clearly defined the scope of persons who are required to have the training: those employed by a school in a "position in which such person goes armed while on duty." R.C .109.78(D).

The defendants argue that the Court should employ this canon to interpret the term "other position"—tellingly omitting that the Legislature has already qualified that term by specifying that it applies to those school employees who "go armed while on duty." Opp. at 10. Perhaps the defendants' argument would have traction if the statute stated only that the training applied to special police officers, security guards, or those in "other position[s]" without any other language specifying which "other position[s]" are subject to the training requirement. But the actual statutory language is not ambiguous in that way; it is clear. The Court need not speculate about how to confine the catch-all term "other position" using generalized canons of construction, because here the Legislature has already spelled it out—it applies to "other position[s] in which the person goes armed while on duty." R.C. 109.78(D).

The defendants' cases do not demonstrate otherwise. In *Fraley v. Estate of Oeding*, the Court had to interpret the scope of the catch-all phrase in Ohio's long-arm statute, which covers an

"executor, administrator, *or other personal representative*." 138 Ohio St.3d 250, 2014-Ohio-452, 6 N.E.3d 9, ¶21 (emphasis added). But unlike *Fraley,* here there is no ambiguous catch-all phrase with uncertain bounds. And in contrast to *Fraley*, where the court had to discern the integral feature of a "personal representative" based on the context of the statute, the Court here does not need to resort to *ejusdem generis* to understand the "definite features and characteristics" that limit the catch-all phrase in R.C. 109.78(D). The statute itself makes that clear by specifying that it applies to "other position[s] in which the person goes armed on duty." *Id.* So too for *State v. Aspell*, where the Court reached the unremarkable conclusion that the term "depository box" in a criminal statute does not include "cigarette vending machine[s]." 10 Ohio St.2d at 4, 225 N.E.2d 226 (1967). As the Court noted, vending machines were out of place in a list with "vault[s]" and "safe[s]." *Id.* By contrast, including armed teachers and staff in a list with special police officers and security guards makes perfect sense since they all "go armed while on duty."

Second, the defendants suggest that the title of R.C. 109.78(D) demonstrates that the statute should only be applied to personnel "employed in a police capacity." Opp. at 9. Not so. To begin with, the defendants ignore the Revised Code's first rule of statutory construction, namely that "Title, Chapter, and section headings . . . do not constitute any part of the law as contained in the 'Revised Code.'" R.C. 1.01; *see also Warner v. Zent*, 997 F.2d 116, 133 (6th Cir.1993) (citing R.C. 1.01and holding that "[r]esort to a title in construing a statute is unnecessary and improper"); *accord Cosgrove v. Williamsburg of Cincinnati Mgt. Co.*, 70 Ohio St.3d 281, 284, 1994-Ohio-295, 638 N.E.2d 991 (holding that "headings and numerical designations are irrelevant to the substance of a code provision."). And even if the title were properly considered, defendants misquote it—relying instead on what appears to be unofficial, editorially supplied language not reflected in the session laws. *Compare* Opp. at 9, *with* 1969–1970 Ohio Laws 2398, 2400 (session laws); *see also Cosgrove* at 286 n.1 (Resnick, J., concurring) (explaining that headings "are publisher's aids to the user of the

code. Neither is part of the code; neither is official.").[3] The session laws omit the critical phrase "persons...employed in a police capacity" on which the defendants rely. *See* 1969–1970 Ohio Laws at 2400 (reporting the title as "Certification as special policemen; payment of cost; special policeman for educational institution must have certificate"). The defendants' misquoted title is no basis to set aside Ohio's rules of statutory construction or ignore the plain text of R.C. 109.78(D).

Third, the overall context of R.C. 109.78(D) does not compel a different interpretation. The defendants note that subsections (A), (B), and (C) of R.C. 109.78 refer only to "persons engaged in law enforcement or security services." Opp. at 11. For defendants, it follows that R.C. 109.78(D) must be read to have the same constraints even though, unlike those subsections, there is no similar specific language in R.C. 109.78(D) limiting its scope. *Id.* The defendants again get the law wrong and misapply it. To begin with, the defendants ignore that the Legislature originally enacted R.C. 109.78 without the language that later became paragraphs (B) and (C), and thus, these paragraphs shed no light on how the Legislature originally understood the phrase "other position in which such person goes armed while on duty." *See* 1969–1970 Ohio Laws at 2400. And even after the Legislature amended 109.78(D) to add the paragraphs defendants cite as context, its decision to specifically limit the scope of these other subsections to security personnel means that its choice *not* to do so in subsection (D) must be given effect. *See Hulsmeyer v. Hospice of Sw. Ohio, Inc.*, 142 Ohio St.3d 236, 2014-Ohio-5511, 29 N.E.3d 903, ¶26 ("[T]he General Assembly's use of particular language to modify one part of a statute but not another part demonstrates that the General Assembly knows how to make that modification and has chosen not to make that modification in

[3] The defendants may have copied this title from a free online website called LawWriter (available at http://codes.ohio.gov/orc/109.78). Various reporters may ascribe different titles to statutory sections. For instance, Westlaw reports the title of R.C. 109.78 as: "Certification as special police officer or security guard; payment of cost; firearms training; peace officer private security fund." Lexis reports it as "Certification of special police, security guards, private police; firearms training; private security fund."

the latter part of the statute."); *Covert v. Ohio Aud. of State*, 4th Dist. Scioto No. 05CA3044, 2006-Ohio-2896, ¶19 (substantially similar). As the other subsections reflect, the Legislature knew how to limit these provisions to "special police, security guards, or persons otherwise privately employed in a police capacity," R.C. 109.78(A), or to those with particular licenses for security services, R.C. 109.78(B). *See also* R.C. 109.78(C) (substantially similar language to R.C. 109.78(A)). This Court cannot insert the exact limitation from other subsections—*e.g.*, to "persons otherwise employed in a police capacity"—into R.C. 109.78(D) even though the Legislature did not do so.

If anything, the context here supports the plaintiffs' argument that armed teachers and staff are covered by the statute. As the defendants' brief confirms, all other categories of persons who are allowed to carry guns inside a school building, such as federal agents, state law enforcement offices, and SROs, must have the peace officer or like training. *See* Opp. at 7–8 (citing R.C. 2923.122(D)(1)(a)). As such, R.C 109.78(D)'s basic mandate that all employees who "go armed while on duty" at school have the requisite training is consistent with the overall legislative scheme.

Lastly, the defendants contend that the Court must reject the plain language reading of the statute because it yields "absurd results," because most teachers "do not have the time or money" to complete the peace officer training required by R.C. 109.78(D). *Id.* at 1, 11. That gets it exactly backwards. As the defendants concede (at 3, 9), their interpretation would mean school employees could go armed in school with almost no training at all—just the *de minimis* eight-hour training required to obtain a concealed carry license (only two hours of which must be in person). Adopting the defendants' view, the Legislature allows persons to carry guns at school with less training than a manicurist. *See* Compl. ¶39. *That* is an absurd result because, as the defendant's own expert explains, "the environment that armed teachers find themselves in—schools—can't afford an errant shot." Benner Aff., Opp. Ex. E ¶25. Requiring extensive training before teachers and school

staff can carry guns with schoolchildren on the playground and in the classroom is sound safety policy. If the Board disagrees, it has a solution: convince the Legislature to change the law.

C. The Board improperly relies upon a budgetary appropriation that does not even address arming school teachers or staff.

In a final effort to avoid the plain meaning of R.C. 109.78(D), the defendants point to three sentences in budgetary allocation to FASTER buried on page 3,050 of last year's budget bill. *See* Opp. Ex. G. They argue that the appropriation reflects the current Legislature's judgment that the FASTER training is sufficient for training armed teachers in school. Opp. at 13. But references to vague appropriations—that neither amend the statute nor mention armed teachers—cannot overcome the text of a statute. Indeed, it is an ironclad rule that an appropriation, unless it explicitly amends an underlying statute, cannot be read to modify the meaning of a law. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978); *United States v. Langston*, 118 U.S. 389, 393, 6 S.Ct. 1185, 30 L.Ed. 164 (1886); *Sinclair Wyoming Ref. Co. v. U.S. Envtl. Prot. Agency*, 887 F.3d 986, 1002 (10th Cir.2017) (reasoning that because the appropriations bill "did not amend the statute, it should have little bearing on our analysis of the statutory text").

So it is here. Nothing about the General Assembly's appropriation to FASTER is inconsistent with R.C. 109.78(D). The defendants note that the appropriation was "for the purpose of stopping active shooters and treating casualties" and, from that alone, assume that the "General Assembly would not have provided this funding if it believed that R.C. 109.78(D) prohibited the use of firearms by [FASTER-trained] school staff." Opp. at 13. But that assumption is contradicted by its own expert affidavit, which explains that FASTER trains "non-armed school staff to teach them various non-firearm responses and also valuable [tactical casualty care]." Benner Aff., Opp. Ex. E, ¶27. Nothing in the allocation directs training for armed teachers, states that such training alone is sufficient for concealed carry in school, or even mentions armed teachers at all. Rather,

the second allocation for medical supplies for persons who have completed FASTER training suggests, if anything, that the General Assembly was focused on emergency medical treatment. *See* Opp. Ex. G; *see also TVA* at 190 ("When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful.").

The defendants' budget argument is also premised on faulty logic. If a legislature allocates some limited funds to a non-profit organization's programs, that does not mean that attending such programs fulfills statutory compliance standards for any particular occupation. For example, a nonprofit that receives funding to conduct trainings to improve teacher classroom preparedness does not replace the need to obtain official teacher certification. And it would make no sense to rest the fixed meaning of a law on appropriations that change based on political winds and revenue constraints. The reality is that, as here, not much can be discerned from appropriations. That's why courts generally reject reliance upon them, and this Court should as well.

* * *

Because the Court, with the parties' consent, has converted the plaintiffs' motion for a preliminary injunction into a trial on the merits of their declaratory judgment action, the plaintiffs do not respond to the defendants' arguments regarding the balance of the equities. The plaintiffs reiterate, however, that the Resolution causes them irreparable harm.[4] Thus, not only should the

[4] The defendants' laches argument (at 14) is no longer relevant because the preliminary injunction motion has been converted into a trial on the merits. The plaintiffs, however, did not "unreasonabl[y] delay" bringing their motion for a preliminary injunction. *State ex rel. Meyers v. Columbus*, 71 Ohio St.3d 603, 605 (1995). From the outset, the plaintiffs have been diligently pursuing their rights and seeking avenues short of litigation. *See* Compl. ¶¶56–85 (describing affirmative actions to change the Resolution starting days after the Resolution was passed). And they have done so without even knowing whether the school was in fact authorizing any teachers or staff to go armed at school—a fact that the Board will still not disclose. *Id.* ¶82; *see State ex rel. Meyers* at 605 (knowledge of injury a key element of laches). The plaintiffs sought a preliminary injunction as soon as it was clear that the defendants' strategy—by moving to dismiss only the public records claim and not answering the declaratory judgment action—would unnecessarily delay resolution of the issue at bar here. Furthermore, the defendants have not identified any

Court declare the Resolution in violation of R.C. 109.78(D), but it should also issue an injunction blocking implementation of the Resolution. An injunction is the only way to remedy the irreparable harm caused by unlawful Board policy, particularly given that the Resolution places the plaintiffs' children at increased risk of physical danger. *Dunning v. Varnau*, 2017-Ohio-7207, 95 N.E.3d 587, ¶26 (12th Dist.) (explaining that an injunction is appropriate when "there is no plain, adequate, and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete").

CONCLUSION

The Court should declare the Resolution in violation of R.C. 109.78(D) and enjoin the defendants from allowing school employees to go armed while on duty pursuant to that Resolution.

Respectfully submitted,

/s/ Rachel Bloomekatz

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prejudice from the timing of the preliminary injunction motion. *See State ex rel. Meyers* at 605. The point is moot at any rate, but the plaintiffs' initial efforts to resolve the case short of seeking extraordinary legal relief should be lauded, not held against them.

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2018, a copy of the foregoing was served via email on the following:

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