In the Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2016-0271
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
JOSHUA D. POLK,	:	
	:	Court of Appeals
Defendant-Appellee.	:	Case No. 14AP-787
	:	

BRIEF OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL MICHAEL DEWINE IN SUPPORT OF JURISDICTION

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INTRODUCTION

The Fourth Amendment's exclusionary rule "exacts a heavy toll on both the judicial system and society" and "almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence." *Davis v. United States*, 131 S. Ct. 2419, 2427 (2011). Although "society must swallow this bitter pill when necessary," *id*., the questions here are both whether the pill should even be prescribed when the search is conducted by school officials (not police) and whether it should be administered when that official searches an unattended backpack in a school setting. The Tenth District broke new constitutional ground in Fourth Amendment law when it considered a school official's subjective motivation for a search and answered a question left open by the U.S. Supreme Court in concluding that the exclusionary rule applies to school officials. For the following reasons, this Court should exercise jurisdiction and reverse.

First, the decision creates tension among Ohio's appellate districts and between state and federal courts. It does so in three ways. The Tenth District's focus on the time gap in the search puts it on an island compared to other Ohio appellate decisions about school searches. The Tenth District's holding that the exclusionary rule applies here also takes sides in a debate that divides state supreme courts nationally. Finally, the Tenth District's judgment creates serious tension with federal precedent about the substance of the Fourth Amendment. That tension is significant because Ohio's citizens should not face differing Fourth Amendment rules based on whether their conviction proceeds through an Ohio state court versus a federal one.

Second, the topic of searches in schools cries out for guidance. There are few landmarks in the area. There is only one U.S. Supreme Court case on point, and it dates to 1985 (others have dealt with drug testing or strip searches). And when it comes to the exclusionary rule—as the Tenth District noted—there are "few published decisions" nationally in this area. *State v.*

Polk, No. 14AP-787, 2016-Ohio-28 ¶ 22 ("App. Op."). That does not mean that school searches are few and far between. Instead, they are an unfortunate staple of modern public schooling. The mismatch between a daily task for Ohio's school officials and a paucity of guidance makes this an issue the Court should address.

Third, the Tenth District's misinterpretation of the Fourth Amendment has consequences in collateral civil-rights litigation. Under existing precedent, a ruling that officers violated the Fourth Amendment may be the foundation for federal civil-rights liability (*see* 42 U.S.C. 1983). When an appeals court gets the Fourth Amendment wrong—as the Tenth District does here—the consequences reach beyond setting the guilty free.

All of these constitutional questions arise in an area of peak public and great general interest—the safety of school children. School attendance is (almost) mandatory. School populations include the full range of the blessings and burdens of close human interaction. In that environment, the rules for keeping everyone safe are of top of mind to students, teachers, officials, parents, and the broader public.

STATEMENT OF AMICUS INTEREST

The Attorney General is Ohio's chief law officer, and has a keen interest in decisions that limit the ability to prosecute crime. The Attorney General's interest is especially acute here because he has made school safety a priority.

As part of his mission to protect Ohio families, the Attorney General has devoted an entire task force to school safety. The Attorney General's School Safety Task Force includes "public safety officials, school personnel, mental health professionals, and others," and has produced a set of recommendations about safety. *See* http://goo.gl/zlj7rb (last accessed Feb. 3, 2016). Part of the Task Force's output has been the Attorney General's involvement in making

sure that every public school in Ohio has a safety plan in place. *See* http://goo.gl/BM7AaH (last accessed Feb. 3, 2016). The questions in this case intersect with those initiatives.

STATEMENT OF THE CASE AND FACTS

Robert Lindsey is the safety and security resource coordinator at Whetstone High School. He is not a police officer. He testified that, in February 2013, a school bus driver gave him a backpack that had been left on the bus that morning. After seeing defendant Polk's name on some papers inside the bag, Lindsey took the bag to the principal's office and emptied it, revealing multiple bullets. Lindsey explained that protocol requires searching any bag that is found unattended.

The discovery of the bullets led to a search of another backpack that Polk had with him at the time. That search found a gun. Polk moved to suppress, arguing, in part, that the search in the principal's office violated the Fourth Amendment. The common pleas court granted the motion on that basis.

The Tenth District affirmed. It held that the "second search," although it "could have been justified at the outset," was illegal because the school official may have performed it based on the owner's gang affiliation. App. Op. ¶ 16. The Tenth District then upheld the exclusion, reasoning that the Fourth Amendment "exists to be enforced." *Id*. ¶ 26. Judge Dorian dissented.

THIS CASE RAISES A SUBSTANTIAL CONTITUTIONAL QUESTION OF PUBLIC AND GREAT GENERAL INTEREST

The Tenth District misinterpreted the U.S. Constitution in a way that threatens school safety. That makes the case a matter of public and great general interest on a substantial constitutional question meriting review in this Court. More specifically, the decision below calls out for further review because it: (1) creates a split of authority in Ohio and nationally about school searches and about whether the exclusionary rule applies to them; (2) arises in an area

where there is little guidance about how to perform a daily task that confronts Ohio's school officials; (3) hinders school administration; and (4) triggers unwarranted liability for school officials.

A. The Court should review this case because the Tenth District's holding creates or deepens several conflicts over legal questions.

For one thing, the Tenth District's judgment creates tension about whether the two searches of Polk's book bag should be analyzed as two searches or one. That is not the rule in other Ohio districts. Consider the Fifth District's decision concluding that a search of a student's "pockets" and also his "bookbag" were justified by the same suspicion. *In re K.K.*, 192 Ohio App. 3d 650, 2011-Ohio-192 ¶ 25 (5th Dist). By contrast, the Tenth District here subdivided the initial and (slightly) later search of Polk's bag into two searches requiring different reasonableness inquiries. *See* App. Op. ¶ 15.

For another thing, the Tenth District's judgment excluding evidence takes sides on a question that divides state supreme courts: is exclusion the remedy if a school official violates the Fourth Amendment. *Compare, e.g.*, *State v. Young*, 216 S.E.2d 586, 591 (Ga. 1975) (No: "although school officials are governmental officers subject to some Fourth Amendment limitations in searching their students, should they violate those limitations the exclusionary rule would not be available to the students to exclude from evidence items illegally seized."), *and Ortiz v. State*, 703 S.E.2d 59, 62 (Ga. Ct. App. 2010) (same), *with In re William G.*, 709 P.2d 1287, 1298 n.17 (Cal. 1985) (Yes: "Having concluded that the evidence in the instant case was seized in violation of the Fourth Amendment . . . we further determine that the exclusionary rule is the only appropriate remedy for this violation . . . ."). The exclusionary-rule question is one that this Court should answer. *See, e.g.*, *State v. Mercier*, 117 Ohio St. 3d 1253, 2008-Ohio-1429

¶ 1 and ¶¶ 10-11 (Lanzinger, J., dissenting) (noting that the decision addressed a Fourth Amendment question that divided state supreme courts).

One last thing. The Tenth District's judgment rests uneasily in the shadow of several U.S. Supreme Court cases. The judgment contains at least three premises. One, the official's motivation is relevant. App. Op. ¶¶ 16-18. Two, the change of location from the initial to follow-up search changes the inquiry. *Id.* ¶ 15. Three, (implicitly) that the owner of an unattended backpack enjoys the same expectation of privacy as the owner who tightly clutches a bag to her side. *Id*. ¶ 13. Each premise butts up against a U.S. Supreme Court precedent pointing the other way. *See, e.g.*, *Whren v. United States*, 517 U.S. 806 (1996) (motive irrelevant for searches satisfying appropriate level of suspicion); *see also Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) (Court's cases "repeatedly reject[]" subjective approach; "An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed objectively, justify [the] action'") (citation omitted); *United States v. Edwards*, 415 U.S. 800, 803 (1974) ("[S]earches and seizures that could be made on the spot . . . may legally be conducted later"); *Abel v. United States*, 362 U.S. 217, 241 (1960) ("There can be nothing unlawful in the Government's appropriation of such abandoned property.").

When an Ohio appeals court takes a surprising view of the meaning of the U.S. Constitution, this Court should review the case. *See, e.g.*, *State v. Mole*, 2013-Ohio-3131, 994 N.E.2d 482 (8th Dist.) (concluding that criminal statute violated federal Equal Protection Clause), *appeal allowed*, 137 Ohio St. 3d 1473, 2014-Ohio-176; *State v. Klembus*, 2014-Ohio-3227, 17 N.E.3d 603 (8th Dist.) (criminal specification declared unconstitutional under federal Equal Protection Clause), *appeal allowed*, 141 Ohio St. 3d 1473, 2015-Ohio-554; *Pickaway*

Cnty. Skilled Gaming, L.L.C. v. Cordray, 127 Ohio St. 3d 104, 2010-Ohio-4908 (reversing decision holding gambling law violated federal Equal Protection Clause).

This tension is heightened because the Tenth District applied *only* the federal Fourth Amendment. *See* App. Opp. ¶¶ 18, 21, 26. The court did not suggest that it fashioned an Ohio rule that diverges from federal law to give greater protection under the Ohio Constitution. And even if the appellate court did interpret Ohio's Constitution, it should be for this Court, not the courts of appeals, to expand Ohio's Constitution. *See State v. Brown*, 143 Ohio St.3d 444, 2015-Ohio-2438 (majority and dissent disagreed about whether State Constitution is more expansive); *State v. Bode*, ___ Ohio St. 3d ___, 2015-Ohio-1519 ¶ 33 (French, J., dissenting) (when state courts "exercise the awesome power of creating new constitutional rights, that undertaking should be grounded in paragraphs, if not pages, of compelling legal analysis").

That tension alone is reason enough to review the decision. But it takes on special salience in the Fourth Amendment context because many crimes are punishable in state or federal court. A federal court, of course, need not follow the Tenth District's interpretation of the Fourth Amendment. *See, e.g.*, *U.S. v. Beals*, 698 F.3d 248, 263 (6th Cir. 2012) ("While the states are free to impose rules for searches and seizures that are more restrictive than the Fourth Amendment, those rules will not be enforced in a federal criminal proceeding."). Review thus avoids the unseemly scenario where an Ohio defendant's Fourth Amendment rights vary depending on which sovereign charges the crime.

B. The Court should grant review because there are few guideposts to answer the questions about school searches and the proper remedy.

This Court can be a powerful voice to guide the conduct of school officials. Since *TLO* in 1985, the U.S. Supreme Court has decided only three cases about school searches. None of those much elaborates on the relevant standard. Two cases dealt with drug testing of a subset of

the student population, so they examined either the "even less[er]" privacy expectations of athletes, *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 657 (1995), or students subject to rules that did "not apply to the student body as a whole," *Bd. of Educ. of Indep. School Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 832 (2002). The third case examined a strip search—involving the "quantum leap from [a search of] outer clothes and backpacks to exposure of intimate parts"—so it offered little guidance to this backpack search. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009). *TLO*, thirty-one years old, is still the leading precedent. The silence of that Court is all the more reason for this Court to give guidance.

The silence of the U.S. Supreme Court is even more notable on the exclusionary-rule question. *TLO*, of course, left it unanswered. *See* 469 U.S. at 333 n.3 (reserving the question). And, as the Tenth District recognized, there are "few published decisions," App. Op. ¶ 22, about the exclusionary rule for school searches. Just like this Court forged the way by taking up the question of cell-phone searches ahead of the U.S. Supreme Court, *see State v. Smith*, 124 Ohio St. 3d 163, 2009-Ohio-6426 (anticipating *Riley v. California*, 134 S. Ct. 2473 (2014)), it can "lead" the way on the remedy question in school searches. *See State v. Belew*, 140 Ohio St. 3d 221, 2014-Ohio-2964 ¶ 35 (O'Neill, J., dissenting from improv). (Of course, the answer here should be different. There is a major change in scope from searching a backpack or container to searching a cell phone. *See State v. A.J.C.*, 326 P.3d 1195, 1197 (Or. 2014) (search of backpack OK); *People v. Dilworth*, 661 N.E.2d 310, 321 (Ill. 1996) (search of flashlight OK); *G.C. v. Owensboro Pub. Schools*, 711 F.3d 623 (6th Cir. 2013) (search of cell phone not OK)).

C. The Court should grant review because the decision below hampers school administration.

"By reason of legal, social and economic pressures, very large numbers of students are brought into close proximity with one another. Because this coming together of many students is

not voluntary, it is especially important that students not be victimized by conditions prevailing at their educational institutions. Furthermore, the purpose of inducing the students to come together is to enable them to engage in academic activity, and this purpose might be frustrated by their exposure to certain dangers or distractions." William G. Buss, *The Fourth Amendment and Searches of Students in Public Schools*, 59 Iowa L. Rev. 739, 770 (1974). More bluntly, compulsory attendance increases the schools' responsibility because it compels all students to "associate with the criminal few—or perhaps merely the immature and unwise few—closely and daily," thereby triggering a duty to maintain "a safe and secure environment." *Young*, 216 S.E.2d at 592; *see also In re Adam*, 120 Ohio App. 3d 364, 373 (11th Dist. 1997) (O'Neill, J., op.) ("teachers and administrators have a substantial interest in maintaining discipline in the classroom, including the protection of students from the scourge of drugs and violent crimes that have afflicted our schools"). School officials' "custodial responsibility and authority," *Earls*, 536 U.S. at 831, is a heavy burden. If courts are going to say to these officials that the burden will be magnified by adding restrictions on that authority, the message should come from the State's highest court, not an intermediate one.

D. The Court should grant review to avoid potential collateral consequences.

A Fourth Amendment violation can be the basis for civil-rights liability. That liability is hardly negligible, especially for public servants. *See, e.g.*, *Kimbrew v. Evansville Police Dept.*, 867 F. Supp. 818, 832 (S.D. Ind. 1994) ($2,500 punitive damage award for Fourth Amendment violation); *Padilla v. Miller*, 143 F. Supp. 2d 479, 494 (M.D. Pa. 2001) ($3,000 and $2,000 award for couple detained one hour with "no physical injury"; $500 awarded to two children). It is for this Court, not an intermediate court, to open the door to damages against school officials.

All of this confirms that school searches raise "very difficult and complex Fourth Amendment issue[s]." Wayne R. LaFave, 5 Search & Seizure § 10.11(a) (5th ed. 2015). While

it may be "hypocritical for a teacher to lecture on the grandeur of the United States Constitution in the morning and violate its basic tenets in the afternoon," *In re Adam*, 120 Ohio App. 3d at 376 (O'Neill, J., op.), it is surely no comfort to law-abiding students when school officials (let alone, appellate courts) *misconstrue* that grandeur and let other students roam the halls with guns. *See K.P. v. State*, 129 So. 3d 1121, 1130 n.4 (Fla. App. 2013) (listing a dozen notorious school shootings). Complex issues with real-world consequences for all of Ohio's schools are the kinds of issues that should be aired in this Court.

To top it off, the pair of issues in this case—substantive Fourth Amendment standards and the exclusionary rule—enhance the case for review. The ability to review both issues reduces the chance the Court would later need to improv the case. *Cf. State v. Leak*, ___ Ohio St. 3d ___, 2016-Ohio-154 (O'Connor, C.J., Pfeifer and O'Donnell, JJ., voting to dismiss as improvidently allowed). This is one of those cases that should stand the test of time.

* * *

It is no obstacle to review that one judge below concurred in judgment only. It is the *judgment* that poses the need for review here, not merely the reasoning. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) ("[T]his Court reviews judgments, not opinions."). If there is any lesson for review in the votes of the three-judge panel, it should come from the dissent, not the concurrence. The dissent rightly focuses on the two key problems with the holding, nothing both that the majority (by affirming) placed too much emphasis on the sequence of the searches, App. Op. ¶¶ 33-34 (Dorian, J., dissenting) and that the majority too quickly applied the exclusionary rule, *id*. ¶¶ 36-37.

ARGUMENT

Amicus Curiae Ohio Attorney General's Proposition of Law No. I:

A school official's search of a student backpack, justified at its inception, remains justified regardless of the official's motivation or a brief interruption of the search.

"Fourth Amendment rights . . . are different in public schools than elsewhere"; "the nature of those rights is what is appropriate for children in school." *Acton*, 515 U.S. at 656. What is appropriate for schools must account for educators' "obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern." *T.L.O.*, 469 U.S. at 350 (Powell, J., concurring). Indeed, the "government has a heightened obligation to safeguard students whom it compels to attend school." *Id*. at 353 (Blackmun, J., concurring). Unlawful behavior in schools "is fundamentally inconsistent with the principal function of teaching institutions which is to educate young people and prepare them for citizenship. When such conduct occurs amidst a sizable group of impressionable young people, it creates an explosive atmosphere that requires a prompt and effective response." *Id*. at 376 (Stevens, J., concurring in part and dissenting in part).

Acknowledging these realities, the established Fourth Amendment test for a search in a school turns on "the reasonableness, under all the circumstances, of the search." *Id.* at 341. Reasonableness, in turns, asks first, whether the "'action was justified at its inception,'" and, second, "whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference,'" *Id*. (citation omitted). The search of an unattended backpack in a school setting is eminently reasonable. Cases applying the *higher* standard for non-school searches and founding-era statutes show why.

First, a long line of cases explains that people have no expectation of privacy in abandoned property, including bags. "There can be nothing unlawful in the Government's appropriation of . . . abandoned property." *Abel* 362 U.S. at 241 (Frankfurter, J.) (approving search of items left behind in hotel-room trash). Courts thus routinely reject Fourth Amendment claims that attack searches of abandoned bags. A person who leaves a bag "behind in a public place" usually retains "no reasonable expectation of privacy in it." *United States v. Thomas,* 864 F.2d 843, 846 (D.C. Cir. 1989) (approving search of duffel bag). This Court has applied the abandonment principle to turn away Fourth Amendment challenges. In *State v. Freeman*, the Court reasoned that a person who "dropped his luggage" and then left the airport, could not "challenge the subsequent search" of that luggage. 64 Ohio St. 2d 291, 297-98 (1980); *see also State v. Jones*, 124 Ohio St. 3d 1203, 2009-Ohio-6188 ¶ 39 (O'Connor, J., dissenting from improv) ("by leaving the grocery bag in a location in which he maintained no legitimate expectation of privacy, [defendant] abandoned any expectation of privacy that he had in the bag").

Next, other cases recognize that "blanket suspicionless searches calibrated to the risk may rank as 'reasonable.'" *Chandler v. Miller*, 520 U.S. 305, 323 (1997) (citing "searches now routine at airports and at entrances to courts and other official buildings"). Recognizing that reality, "numerous courts have found random, suspicionless, and warrantless searches of passengers and baggage intended to be on mass transit carriers to be constitutional under the Fourth Amendment." *VanBrocklen v. United States*, No. 1:08-CV-312, 2009 WL 819382, at *6 (N.D.N.Y. Mar. 26, 2009) (collecting cases) *aff'd*, 410 Fed. App'x 378 (2d Cir. 2011). To be sure, courts disagree whether random searches of students' bags *on their person* are constitutional. *Compare, e.g., In re Daniel A.*, No. B232404, 2012 WL 2126539 (Cal. App. June

13, 2012) (unpublished) (yes), *with Doe v. Little Rock Sch. Dist.*, 380 F.3d 349 (8th Cir. 2004) (no). But that disagreement merely proves the point that an unattended bag in a school setting may be searched.

Finally, evidence from the time of the framing shows that searches in public spaces, especially those to maintain safety, are reasonable. Consider these two. A 1779 Massachusetts law empowered town officials to stop horse teams suspected of carrying contraband. Laws of Massachusetts 253, 253 Chapter I (Sept. 23, 1779). A Delaware law required a physician to board ships to "search[] all parts" of them for evidence of diseased passengers or crew. Laws of the State of Delaware 1319, 1355, Chapter 134 (Jan. 24, 1797). If these searches to discover contraband and to protect public safety were consistent with the values embodied in the Fourth Amendment, searches of unattended property in public schools is well.

In light of this precedent and history, it is no surprise that backpack searches have been approved from coast to coast. For example, a Florida court recently upheld a backpack search in a school because the search was "no more intrusive than the search that occurs when a traveler brings a suitcase into the passenger compartment of an airliner, an attorney carries her brief case into a courtroom, a commuter totes a shopping bag on the New York City subway, or a citizen carts a box of petitions to his Senator at the State Capital." *K.P.*, 129 So. 3d at 1131. And the Oregon Supreme Court, even applying the more rigorous standards of the Oregon Constitution, *see State v. Backstrand*, 313 P.3d 1084, 1106 (2013) (Brewer, J., concurring), approved a backpack search in a school, *State v. A.J.C.*, 326 P.3d 1195, 1196 (Or. 2014). An unattended backpack in a school setting places that bag "into the zone of inquiry" for a search, *In re Adam*, 120 Ohio App. 3d at 370 (O'Neill, J., op.), and therefore outside the Fourth Amendment.

The Tenth District's judgment agrees to this point. The lead opinion acknowledges that the challenged search "could have been justified at the outset." App. Op. ¶ 16. That is, if the official had conducted the search he performed in the principal's office when he first searched the bag, it would have been legal. The Tenth District found it significant that the search was not continuous—starting with a preliminary look into the bag and finishing in the principal's office (and in front of the principal) with a more thorough inspection of its contents. App. Op. ¶¶ 15-16. The difference between a full inspection at place and time one versus a segmented inspection in two places and at two times is not constitutionally significant here.

A "reasonable delay in effectuating [a search] does not change the fact that [the defendant] was no more imposed upon than he could have been at the time and place of the [first search]." "The police did no more on" day two than they were "entitled" to do on day one. *Edwards*, 415 U.S. at 805. Similarly, a "warrantless search" of a package is "not unreasonable" merely because officials "took them to another location rather than immediately opening them." *United States v. Johns*, 469 U.S. 478, 486 (1985). Courts thus routinely reject challenges to searches that are spread over time or distance. *See, e.g.*, *United States v. Buenrostro*, 454 Fed. App'x 523, 525 (8th Cir. 2011) (search of vehicle started at roadside, but continued at shop); *United States v. Espinal*, No. 89 CR 224, 1989 WL 54112, at *2 (S.D.N.Y. May 17, 1989) (second, "more thorough search" or car discovered gun). The Tenth District's contrary holding is out of step and out of touch.

Amicus Curiae Ohio Attorney General's Proposition of Law No. II:

The exclusionary rule does not apply to searches by school officials of students in school.

Whether a search is constitutional is a "discrete" question, separate from what remedy should attend any violation. *T.L.O.*, 469 U.S. at 333 n.3. School officials, although agents of the State broadly, are not comparable to law enforcement specifically. Thus, "'the extreme

sanction,'" *Herring v. United States*, 555 U.S. 135, 140 (2009) (citation omitted), of the exclusionary rule is not appropriate when school officials cross Fourth Amendment lines. Exclusion is neither a "'personal constitutional right'" nor a remedy for any "'injury' occasioned by an unconstitutional search." *Davis v. United States*, 131 S. Ct. 2419, 2426 (2011) (citations omitted). It is instead a tool "'to deter police conduct.'" *id.* at 2432 (citation omitted), which is used only as a "last resort." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006).

No feature of the exclusionary rule makes it appropriate as the remedy when a school official crosses a Fourth Amendment threshold in trying to keep the school safe for other students. In these circumstances, a damage remedy is appropriate, not a remedy that asks other students and the public to pay the "'substantial social costs'" of exclusion. *Pa. Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 363 (1998) (citation omitted). Suits under 42 U.S.C. § 1983 may redress Fourth Amendment violations. That remedy is no small matter. It includes attorney's fees, 42 U.S.C. 1988(b), and may include punitive damages, *Smith v. Wade*, 461 U.S. 30, 56 (1983). Indeed, *refusing* to award attorney's fees, even for small damage awards, or declining nominal damages in the absence of *actual* damages may be reversible error. *See, e.g.*, *respectively*, *Hyde v. Small*, 123 F.3d 583, 585 (7th Cir. 1997) (Posner, J.) (reversing no-fee award for $500 recovery); *G.C.*, 711 F.3d at 634 (reversing to consider nominal damages).

The available fees and damages leave no surprise that reported cases reflect damage awards for Fourth Amendment violations. *See, e.g.*, *Kimbrew*, 867 F. Supp. 818 ($2,500 punitive award); *Padilla*, 143 F. Supp. 2d 479 ($3,000 damage award). Those amounts are not trivial for the public servants charged with the safety of Ohio's school children. Exclusion, by contrast, simply puts the price of error too high. Do we want school officials to worry about spoiling a prosecution for serious crime when they act on their professional judgment and on-the-

ground information to keep the school safe? Must they hesitate even more than money penalties alone would cause and abstain from taking steps to protect the children, the staff, and the public? Should judges say to school officials that the price of their errors in judgment means letting the guilty roam the schools and streets?

The Tenth District's answer is that official immunity eliminates the damage deterrent. App. Op. ¶ 24. The reported damage cases show the error of that thinking. If the Tenth District is right about the Fourth Amendment, civil remedies set the right price for compliance. After all, the officials responsible pay those penalties, not—as with the exclusionary rule—law-abiding students and citizens.

CONCLUSION

The Court should accept jurisdiction and reverse the judgment of the Tenth District.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of *Amicus Curiae* Ohio Attorney General Michael DeWine in Support of Jurisdiction was served on February 22, 2016, by U.S. mail on the following:

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