IN THE SUPREME COURT OF OHIO
Case Number 16-0271

STATE OF OHIO,	**On Appeal from the Franklin County Court of Appeals, Tenth Appellate District**
Appellant	
v.	**C.A. No. 14AP-787**
JOSHUA POLK	
Appellee	

MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION

SHERRI BEVAN WALSH #0030038
Summit County Prosecuting Attorney
HEAVEN DIMARTINO #0073423
Assistant Prosecuting Attorney
Appellate Division
Summit County Safety Building
53 University Avenue
Akron, Ohio 44308
(330) 643-7459
Fax (330) 643 2137
Email: dimartino@prosecutor.summitoh.net

Attorney as Amicus Curiae For The
Ohio Prosecuting Attorneys Association

RON O'BRIEN #0017245
Franklin County Prosecuting Attorney
SETH L. GILBERT #0072929
Assistant Prosecuting Attorney
Counsel of Record
Office of the Franklin County Prosecutor
373 South High Street, 13th Floor
Columbus, Ohio 43215
(614) 525-3555
Fax (614) 525-6103
Email: sgilbert@franklincountyohio.gov

Attorney for Appellant
State of Ohio

YEURA VENTERS #0014879
Franklin County Public Defender
TIMOTHY E. PIERCE #0041245
Assistant Public Defender
Counsel of Record
373 South High Street, 12th Floor
Columbus, Ohio 43215
(614) 525-8783

Attorney for Appellee
Joshua Polk

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STATEMENT OF AMICUS INTEREST

The Ohio Prosecuting Attorneys Association ("OPAA") offers this Memorandum in Support of Jurisdiction in support of the State of Ohio's Memorandum in Support of Jurisdiction.

The OPAA is a private non-profit membership organization that was founded in 1937 for the benefit of the eighty-eight elected county prosecutors. Its mission is to increase the efficiency of its members in the pursuit of their profession; to broaden their interest in government; to provide cooperation and concerted action on policies that affect the office of the Prosecuting Attorney; and to aid in the furtherance of justice.

This felony case presents the issues of whether a search that is reasonably related in scope to the initial search and is not excessively intrusive, is a constitutionally sufficient basis for a search by school personnel and whether the federal exclusionary rule, designed to deter future police misconduct, is applicable to search conducted by public-school employees.

"A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety." *Bd. of Educ. of Ind. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 830 (2002). Thus, when a public-school employee conducts a search it need not be supported by a warrant or probable cause, but rather "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985).

Here, a school bus driver gave a book bag that had been left on the bus to Mr. Lindsey, a school safety and security officer employed by Columbus Public Schools. *Polk*, at ¶3. Mr. Lindsey opened the bag and discerned that it belonged to Joshua Polk, a student at Whetstone High School. *Polk*, at ¶3.

Then, following the school protocol of searching all unattended bags, Mr. Lindsey emptied the book bag and found several small caliber bullets. Later, Lindsey found Mr. Polk and searched Polk's additional bag where he found a gun inside. *Polk*, at ¶5. The court of appeals found that the public school employee's second search of the bag was improper and therefore suppressed the gun that was found in the other bag as fruit of the improper search of the book bag.

The appellate court found that the initial search was justifiable as it was made to establish ownership and for safety purposes. *Polk*, at ¶12. The court further noted that "in a school setting, emptying the entire bag would have been an acceptable way to meet the two initial justifications for the search: safety and identification." *Polk* at ¶ 16. Thus, the school's protocol to search unattended bags was reasonable and that emptying a bag was a valid means of complying with this protocol. However, because the school safety and security officer emptied the bag, after making a cursory search inside the bag and determining that the bag belonged to Polk and was not an immediate safety hazard, the Court found that the second search was unjustified and further found that Mr. Lindsey "emptied the bag based 'solely' on rumors of Polk's gang affiliation."

The appellate court erred in basing its decision on the perceived mindset of the public school employee rather than the objective circumstances surrounding the search. "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.' " *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006, quoting *Scott v. United States*, 436 U.S. 128, 138 (1978 (emphasis in *Stuart*). Likewise, the court erred when it disregarded the acceptable school protocol and instead focused on its perception of the school employee's mindset.

The appellate court's opinion creates confusion and uncertainty as to whether a school employee can follow established protocols without fear that a court will find that they acted unreasonably, even though they followed the law and established protocols, simply based on a court's impression of what the public school employee's mindset was when conducting the search. School employees must be able to act quickly in order to protect the safety of the children in the schools.

In addition, the decision in this case improperly extends that the exclusionary rule, which was designed to deter misconduct by law enforcement, to searches conducted by public school employees. This extension is improper and is not consistent with the purpose of the exclusionary rule.

STATEMENT OF THE CASE AND FACTS

Joshua Polk, who was indicted on one count of illegal conveyance or possession of a deadly weapon in a school safety zone under R.C. 2923.122, filed a motion to suppress. The trial court suppressed the firearm.

The Amicus hereby incorporates by reference the statement of the case and facts asserted by the Appellant, the State of Ohio.

PROPOSITION OF LAW I

A SEARCH IS CONSTITUTIONAL IF IT COMPLIES WITH A PUBLIC SCHOOL'S REASONABLE SEARCH PROTOCOL. THE SUBJECTIVE MOTIVE OF THE PUBLIC-SCHOOL EMPLOYEE PERFORMING THE SEARCH IS IRRELEVANT.

LAW AND ARGUMENT

When determining whether a search conducted by a public school employee, in compliance with appropriate protocol, is reasonable, the inquiry is whether the action was justified at its inception and whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place. Thus, the subjective motive of the employee should not be examined in this analysis, nor should it be determinative.

The Supreme Court of the United States has held that the Fourth Amendment's prohibition of unreasonable searches and seizures applies to searches conducted by public school officials. *New Jersey v. T.L.O.*, 469 U.S. 325, 333 (1985). However, the Court determined that that the warrant requirement is not for the school environment because it would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools. *Id.* at 340. Therefore, " * * * school officials need not obtain a warrant before searching a student who is under their authority." *Id.* "The school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search." *Id.*

"Where a careful balancing of governmental and private interest suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard." *Id.* Thus, the Court concluded that in a school setting, the legality of a student search depends on the 'reasonableness,' under all the circumstances, of the search, not on probable cause. *Id.* at 342. Determining reasonableness involves a two-part analysis. First, ' * * * one must consider "whether the * * * action was

justified at its inception," * * *; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place" * * *." *Id.*

" * * * [A] search of a student by a teacher * * * will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id.* at 341–342. "Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* at 342."

In this case, the school employee acted pursuant to school policy regarding unattended bags and emptied the bag. Mr. Lindsey first made a cursory examination of the contents and then made a more thorough search of the bag once inside the building. Mr. Lindsey's first and second searches of the bag were reasonable for safety purposes and/or to obtain the owner. Moreover, examining the entire inventory of the bag arguably does not violate Fourth Amendment since such a procedures serves to protect owner's property while it is in the school's custody, the school from claims or disputes over lost or stolen property, and the school from potential danger from what may be in the bag. The searches were valid. Whether Mr. Lindsey's knowledge of rumors that Polk was associated with a gang went through his mind as he conducted the search is of no consequence. In light of this, the trial court erred in relying on its perception of Mr. Lindsey's mindset rather than his compliance with the law and school protocol.

PROPOSITION OF LAW II

THE SOLE PURPOSE OF THE FEDERAL EXCLUSIONARY RULE IS TO DETER POLICE MISCONDUCT. AS A RESULT, THE EXCLUSIONARY RULE DOES NOT APPLY TO SEARCHES BY PUBLIC-SCHOOL EMPLOYEES.

LAW AND ARGUMENT

The exclusionary rule is inapplicable to searches made by school employees in accordance with valid school protocol. School employees are not police officers. The exclusionary rule was designed to deter misconduct by law enforcement officers, not public school employees acting in accordance with protocol.

Public school employees, like other government actors to whom the exclusionary rule does not apply, are not "engaged in the often competitive enterprise of ferreting out crime" and "they have no stake in the outcome of particular criminal prosecutions." *Arizona v. Evans*, 514 U.S. 1, 14, 15 (1995, citing *Johnson v. United States*, 333 U.S. 10, 14 (1948, and *United States v. Leon*, 468 U.S. 897, 917 (1984). Law enforcement officers "function as adversaries of criminal suspects," in contrast, "[t]he attitude of the typical teacher is one of personal responsibility for the student's welfare as well as for his education." *New Jersey v. T.L.O.*, 469 U.S. 325, 350 (1985). As such, the exclusionary rule does not apply to searches by public-school employees. *State v. Young*, 234 Ga. 488, 493 (1975); *D.R.C. v. State*, 646 P.2d 252, 258 (Alaska App.1982).

Furthermore, applying the exclusionary rule to searches made by school employees in accordance with valid school protocol and without the involvement of law enforcement officers, would have a chilling effect on the ability of public schools to provide for the health and safety of those students whom they are obligated to protect and in no way furthers the purpose for which the exclusionary rule was created.

PROPOSITION OF LAW III

SUPPRESSION IS PROPER ONLY IF THE DETERRENCE BENEFITS OF SUPPRESSION OUTWEIGH ITS SUBSTANTIAL SOCIAL COSTS.

LAW AND ARGUMENT

Even assuming arguendo that the exclusionary rule applies to searches made by school employees, in this case the trial court improperly determined that the gun should be suppressed and further erred by finding that the good faith exception did not apply.

Suppression of evidence is only proper when the benefits of deterrence outweigh the costs. *Herring v. United States*, 555 U.S. 135, 141 (2009), citing *Leon* at 910. "The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that 'offends basic concepts of the criminal justice system." *Herring* at 141, quoting *Leon* at 908. The deterrent benefits depend on "culpability of the law enforcement conduct" at issue. *Herring* at 143. Thus, in order "to trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Id.* at 144.

In this case, the school employee was not deliberate, reckless, or grossly negligent. Instead, he relied on reasonable school protocol. Thus, suppression of the evidence in this case would not deter future misconduct as the employee did not engage in misconduct. Furthermore, the court did not determine whether the deterrence benefits outweighed the costs of withholding evidence of the gun.

In light of the foregoing, the Court improperly applied the exclusionary rule.

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction of *Amicus Curiae* was forwarded by regular U.S. First Class Mail to Counsel for Appellee, Timothy E. Pierce, Assistant Public Defender, 373 South High Street, 12th Floor, Columbus, Ohio 43215 and to Counsel for Appellant, Seth L. Gilbert, Assistant Prosecuting Attorney, Office of the Franklin County Prosecutor, 373 South High Street, 12th Floor, Columbus, Ohio 43215 on this 22nd day of February, 2016.

HEAVEN DIMARTINO
Assistant Prosecuting Attorney

Attorney as Amicus Curiae For The
Ohio Prosecuting Attorneys Association

CONCLUSION

The Ohio Prosecuting Attorneys Association respectfully submits, pursuant to the argument offered, that the trial court erred in granting the motion to suppress.

Respectfully submitted,

SHERRI BEVAN WALSH
Prosecuting Attorney

HEAVEN DIMARTINO
Assistant Prosecuting Attorney
Appellate Division
Summit County Safety Building
53 University Avenue, 6th Floor
Akron, Ohio 44308
(330) 643-7459
Reg. No. 0073423

Attorney as Amicus Curiae For The
Ohio Prosecuting Attorneys Association