IN THE SUPREME COURT OF OHIO

State of Ohio,	:	
	:	Case No. 2016-0271
Plaintiff-Appellant,	:	
	:	
v.	:	On appeal from the Franklin County
	:	Court of Appeals, Tenth Appellate District
Joshua D. Polk,	:	
	:	
Defendant-Appellee.	:	Court of Appeals Case No. 14AP-787
	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICI CURIAE, OHIO SCHOOL BOARDS ASSOCIATION, BUCKEYE ASSOCIATION OF SCHOOL ADMINISTRATORS AND OHIO ASSOCIATION OF SCHOOL BUSINESS OFFICIALS

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STATEMENT OF AMICI INTEREST AND INTRODUCTION

The Ohio School Boards Association (OSBA) is a nonprofit 501(c)(4) corporation dedicated to assisting its members to more effectively serve the needs of students and the larger society they are preparing to enter. Nearly 100% of the 714 district boards in all of the city, local, exempted village, career technical school districts and educational service center governing boards throughout the state of Ohio are members of OSBA, whose activities include extensive informational support, advocacy and consulting activities, such as board development and training, legal information, labor relations representation, and policy service and analysis.

The Buckeye Association of School Administrators (BASA) is a statewide organization representing over 95% of school district superintendents in Ohio. BASA is a nonprofit 501(c)(6) corporation dedicated to assisting its members to more effectively serve the needs of school administrators and their districts. BASA provides extensive informational support, advocacy, and professional development in an effort to support their professional practice.

The Ohio Association of School Business Officials (OASBO) is a statewide organization representing over 1,200 school business officials. OASBO is a nonprofit 501(c)(6) corporation dedicated to assisting its members to more effectively serve the needs of their boards of education and school administration, including providing extensive informational support, advocacy, professional development, business services and search services.

These three statewide school associations enhance Ohio's public school districts by helping shape a legislative and regulatory environment conducive to student learning. It is vital to the governing bodies of public school districts and their administrators that legal regulations impacting the daily operations of school districts be as clear as possible. When courts stray from established law or apply established rules incorrectly, it creates uncertainty for school boards and their employees. This is not good for Ohio schools, and it is not good for public school children.

The Tenth District's decision does just that in the noteworthy area of school searches. It inhibits the day-to-day decision making of school administrators and employees by creating a level of uncertainty—with potentially dangerous consequences. For its practical and legal implications, this case is tremendously important to Ohio's public school boards, their employees, their students and the public at large.

THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

This case is of public and great general interest because it undermines the ability of Ohio public school districts to protect students and ensure the safety and security of their school communities. An activity playing out on a daily basis in Ohio's public schools is student searches. The law is relatively well-settled in this area. *See New Jersey v. T.L.O.*, 469 U.S. 325 (1985). But the Tenth District's decision disturbs the well-established standards applicable to student searches conducted by school employees and, in turn, places into question the reasonable safety and security protocols utilized by school districts.

The decision misapplies Fourth Amendment precedent, requiring a higher standard for school employees searching unattended bags than school searches in other contexts. It ignores the unique nature of the school setting, applying standards that are intended for law enforcement officials in the criminal context—not for school employees in the context of advancing school safety. If the Tenth District's faulty analysis goes unaddressed, school districts' and their employees' efforts to ensure safety and security will be significantly hindered.

It is undisputed that the Fourth Amendment applies to searches conducted by school employees in the school setting. But the United States Supreme Court has been clear that the school setting requires some modification of the level of suspicion needed to justify a search. *See Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 370 (2009), quoting *T.L.O.*. The unique context of the school setting "necessitates a degree of constitutional leeway[,]" and

accordingly, the Fourth Amendment is "more lenient with respect to school searches." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 680 (1995) (O'Connor, J., concurring).

As a result, the United States Supreme Court has applied a less stringent standard to searches conducted by school employees than what is applicable to law enforcement officials. Specifically, searches conducted by school employees are held to a "standard of reasonableness that stops short of probable cause[.]" *T.L.O.*, 469 U.S. at 341. Public school districts have continually relied on this precedent in crafting their student search protocols. The reasonableness standard governed the search protocol utilized here—under the specific situation where a student bag was found unattended.

The Tenth District concluded that the protocol of emptying the contents of an unattended bag is justified at the outset for the purposes of safety and identifying the owner. *State v. Polk*, 2016-Ohio-28, 10th Dist. No. 14AP-787, 2016 Ohio App. LEXIS 23, ¶16 (hereafter "Decision"). In other words, the protocol itself was reasonable under the Fourth Amendment. But according to the majority opinion, the school employee's "thought process" during the search alone turned the otherwise reasonable protocol into an unreasonable search. *Id.* In doing so, the majority ignored or greatly misapplied the well-established principle that the legality of a search in the school setting depends "simply on the reasonableness, under all the circumstances, of the search." *T.L.O.* at 341.

The majority decision disregards the unique nature of the school setting, including the relationships formed between school employees and students. The United States Supreme Court has specifically acknowledged such particularities in analyzing school searches and investigations. *See T.L.O.* at 340 (recognizing the "value of preserving the informality of the student-teacher relationship); *see also State v. Clark*, 576 U.S. ___, 135 S.Ct. 2173, 2182 (2015)

("It is common sense that the relationship between a student and his teacher is very different from that between a citizen and the police.").

It is likely that school employees will have information or specific knowledge about particular students, just as the school employee did here. School employees must be able to conduct sufficient safety searches, regardless of any incidental knowledge they may happen to possess. In addition, it is essential that an objective standard apply to all school searches, so that school employees are able to fully understand and properly fulfill their duties. The Tenth District has interfered with that ability, creating a significant question for school employees as to the standard governing searches of unattended bags. It permits the conclusion that a search might be unreasonable simply because the employee knows certain information about the student. To create—and apply—such a limitation will significantly thwart the ability of school employees to appropriately respond to legitimate safety concerns.

The decision is even more disturbing given the lower court concluded that the protocol of emptying unattended bags is reasonable. If a school district's protocol for addressing unattended bags is reasonable—and that very protocol was utilized by the employee—the inquiry into the reasonableness of the search ends. To parse out the search based on the employee's "thought process" was a misapplication of established principles. It is important to Ohio's public schools that the faulty logic used by lower court not stand as precedent.

In addition, the Tenth District's extension of the exclusionary rule to searches conducted by school employees is erroneous. In essence, the Tenth District has analogized school employees to law enforcement officials, erroneously relying on *Elkins v. United States*, 364 U.S. 206 (1960). *Elkins* applied only to state and federal *law enforcement officers*, but the Tenth District has now applied it to school employees. In support, the court of appeals made the bold

assertion that school employees "would have little incentive to respect student's rights" when conducting searches and that "law enforcement would have an incentive to use school employees as Fourth Amendment immune agents to conduct illegal student searches in schools." (Decision, ¶ 21.) This commentary is speculative, and the court cited to no legal or practical authority in support of it.

Ohio public schools are well aware that they are obligated to conduct searches in accordance with the Fourth Amendment—regardless of whether the search results may implicate criminal behavior and the involvement of law enforcement. But searches conducted by school employees are done for school purposes only—not for law enforcement purposes, as the court of appeals suggested. Whether a particular search will result in subsequent criminal prosecution is irrelevant to a school employee's protocol when conducting a search. Instead, school employees have their own responsibilities and concerns in mind when conducting searches. *See generally Wolf v. Commissioner*, 13 F.3d 189, 193-194 (6th Cir. 1993), citing *Tirado v. C.I.R.*, 689 F.2d 307, 312 (2nd Cir.1982). The potential collusion alluded to by the Tenth District is unfounded.

The court of appeals seems to ignore the fact that school employees are *not* law enforcement officers and school searches are *not* criminal matters. The court specifically referenced "on-site police officers" at public school districts. (Decision, ¶ 21.) But the presence of on-site police officers in the school setting is irrelevant in analyzing searches conducted by *school employees.* School employees are *not police officers*, and on-site police officers are not school employees. The Tenth District has blurred the distinction between school employees and law enforcement officials that has been recognized by Fourth Amendment jurisprudence since *T.L.O.*

Finally, the majority opinion is based on the mistaken belief that the United States Supreme Court has decided the question of whether the exclusionary rule applies to school employees. The Tenth District cites to an extended passage from *T.L.O.* that speaks only to the application of the Fourth Amendment generally to school employees, and does nothing to bolster the argument that the exclusionary rule applies in the school setting. As correctly noted by Judge Dorrian in her dissent, the question of whether the exclusionary rule applies is a question *yet to be determined* by the United States Supreme Court or the Ohio Supreme Court. (Decision, ¶ 37.)

The Tenth District's decision attempts to turn public school employees into law enforcement officials and all school searches into criminal matters. That is not how the Fourth Amendment has been interpreted in the school context. The decision strips school employees of the flexibility deliberately afforded by *T.L.O.* and ignores the well-recognized differences between the school setting and the rest of the world. *T.L.O.*, 469 U.S. at 339-340 ("[W]e have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures"). By applying a higher standard to searches conducted by school employees, there is a substantial likelihood that their ability to maintain security and order will be undermined, affecting the safety of students and staff.

The impact of the court of appeals' decision goes well beyond the parties in this case and will have an impact on all Ohio public schools. School boards and their administrators and employees desire predictability and stability in the interpretation of long-established legal precedent, particularly when it comes to ensuring the safety and security of their schools. A standard that impacts the ability of Districts to protect their students is of public and great general interest. The Amici Curiae urge the Court to accept this appeal and address: (1) the

standard governing searches of unattended student bags conducted by public school employees; and (2) whether the exclusionary rule applies to school searches.

STATEMENT OF THE CASE AND FACTS

The Amici Curiae adopt the Statement of the Case and Facts set forth in the State's Memorandum.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: When a public school employee conducts an objectively reasonable search of a student's unattended bag pursuant to reasonable protocol, the search does not violate the Fourth Amendment, regardless of the subjective thoughts of the school employee conducting the search.

In the public school setting, a search is reasonable if it was justified at its inception and reasonably related in scope to the circumstances which justified the interference in the first place. *See T.L.O.*, 469 U.S. at 342. The legality of a school search depends "simply on the reasonableness" of the search. *Id*. Thus, if a school employee has conducted an objectively reasonable search under the circumstances, the search does not violate the Fourth Amendment—regardless of additional factors, including the subjective thoughts of the school employee conducting the search.

The school employee here conducted a search of an unattended student bag. Under established protocol, school employees search all unattended bags for identification and safety purposes. Pursuant to this protocol, the school employee made an initial "cursory examination" immediately followed by a more thorough inspection by emptying the contents of the bag. The court of appeals conceded that the practice of emptying the entire unattended bag is "an acceptable way to meet the two initial justifications for the search: safety and identification." (Decision, ¶16.). In essence, the court of appeals concluded that such a search protocol is

objectively reasonable. That should have ended the inquiry into whether the Fourth Amendment was violated.

The Tenth District, however, determined that the school employee emptied the bag *only* after recalling rumors that Defendant was involved in gang activity, treating the emptying of the bag as a "second" (and unreasonable) search. The court concluded that the employee's "cursory examination" of the bag's contents was sufficient to determine the bag did not pose a hazard to the school community, and thus the decision to empty the bag was unreasonable. Here is where the court lost its way.

While the bag did not contain a bomb, as noted by the court, it could have contained a number of other dangerous items not readily apparent during a "cursory examination." As such, upon completion of the "cursory examination," one of the original, reasonable justifications for the search (safety) had not yet been fulfilled. Only after conducting a thorough examination of the bag, which could entail emptying the contents of the bag, was the safety search completed. Contrary to the court of appeals' theory, there was only one search here.

The employee's thought process during the search does not come into play under the Fourth Amendment analysis. The test of reasonableness under the Fourth Amendment is an objective one, and subjective motive should not be considered. *See L.A. County v. Rettele*, 550 U.S. 609, 614 (2007). The Tenth District ignored this standard. The majority opinion's reliance on a case from Alabama is unfounded The facts in *G.M. v. State*, 142 So.3d 823 (2013) are different and are easily distinguished. In G.*M.*, a student was called to the principal's office and searched simply because he had been seen talking to a student who was caught with cocaine earlier in the school day. Here, it was not Defendant's "mere association with a gang" that resulted in the search of his bag. It was because he left the bag on a bus. School protocol called

for the search of such bags—a protocol the court of appeals found entirely reasonable. The student in *G.M.* was searched solely because he had ties to a gang member. Not the case here. If Defendant's bag had not been left unattended, it would not have been searched.

The Fourth Amendment requires that a search conducted by a school employee be reasonable. If a school employee complies with an objectively reasonable search protocol, such as the one governing unattended bags, the search is reasonable and, therefore, does not violate the Fourth Amendment. The Court should accept this issue for review and conclude accordingly.

Proposition of Law II: The Exclusionary Rule does not apply to searches conducted by public school employees.

Amici Curiae adopt the arguments set forth in the State's Memorandum as to why the exclusionary rule does not apply to searches conducted by public school employees.

Proposition of Law III: Suppression is proper only if the deterrence benefits of suppression outweigh its substantial social costs.

Amici Curiae adopt the arguments set forth in the State's Memorandum in relation to the Third Proposition of Law.

CONCLUSION

For all the reasons set forth above, Amici Curiae respectfully urge this Court to accept this case for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum in Support of Jurisdiction of Amici Curiae was served on the following by electronic mail, this 22nd day of February, 2016:

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