IN THE SUPREME COURT OF OHIO

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

BRIEF OF AMICI CURIAE JUVENILE LAW CENTER, CENTER FOR JUVENILE LAW AND POLICY, CENTER ON WRONGFUL CONVICTIONS OF YOUTH, CHILDREN'S LAW CENTER, INC., RUTGERS SCHOOL OF LAW CHILDREN'S JUSTICE CLINIC, RUTGERS CRIMINAL AND YOUTH JUSTICE CLINIC, EDUCATION LAW CENTER-PA, PROFESSOR BARRY C. FELD, JUVENILE DEFENDERS ASSOCIATION OF PENNSYLVANIA, JUVENILE JUSTICE INITIATIVE, NATIONAL CENTER FOR YOUTH LAW, NATIONAL JUVENILE JUSTICE NETWORK, NORTHEAST JUVENILE DEFENDER CENTER, RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER, AND YOUTH LAW CENTER ON BEHALF OF APPELLEE JOSHUA POLK

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Amici Curiae Juvenile Law Center, Center for Juvenile Law and Policy, Center on Wrongful Convictions of Youth, Children's Law Center, Inc., Rutgers School of Law Children's Justice Clinic, Rutgers Criminal and Youth Justice Clinic, Education Law Center-PA, Professor Barry C. Feld, Juvenile Defenders Association of Pennsylvania, Juvenile Justice Initiative, National Center for Youth Law, National Juvenile Justice Network, Northeast Juvenile Defender Center, Roderick and Solange MacArthur Justice Center, and Youth Law Center, work to advance and enforce the rights of vulnerable young people. *Amici* have particular expertise in the area of children's constitutional rights, especially with regard to children's interaction with the juvenile justice and education systems, and the promotion of their well-being through those systems. *Amici* join to urge this Court to affirm the decision of the Tenth District Court of Appeals in this case. Affirming the decision below will ensure continued robust protection of children's Fourth Amendment rights in Ohio schools without endangering student safety.

Juvenile Law Center, founded in 1975, is the oldest public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Recognizing the critical developmental differences between youth and adults, Juvenile Law Center works to ensure that the child welfare, juvenile justice, and other public systems provide vulnerable children with the protection and services they need to become healthy and productive adults. Juvenile Law Center advocates for the protection of children's due process rights at all stages of juvenile court proceedings, from arrest through disposition and from post-disposition through appeal. Juvenile Law Center works to align juvenile justice policy and practice. Juvenile Law Center urges courts to recognize the important constitutional

guarantees that protect children's liberty interests. Accordingly, Juvenile Law Center participates as *amicus curiae* in state and federal courts throughout the country, including the United States Supreme Court, in cases addressing the rights and interests of children.

The **Center for Juvenile Law and Policy ("CJLP")** is a non-profit advocacy organization at Loyola Law School and houses three live-client in-house clinics providing direct representation. The CJLP brings public service, education, and advocacy together to improve the quality of legal services provided to indigent children in the juvenile delinquency system. For over eleven years, the CJLP has facilitated access to justice for Los Angeles youth and promoted fairness, opportunity, and compassion for children in courts and in public schools. The Juvenile Justice Clinic ("JJC") provides free trial-level legal services to children in the Los Angeles delinquency courts while providing law students with a vital skill set and the opportunity to practice in the public interest. The JJC works collaboratively with the Youth Justice Education Clinic and a staff social worker to holistically represent youth and ensure that each and every client has the opportunity to succeed in life. The Youth Justice Education Clinic trains students who advocate on behalf of child clients for appropriate educational services and against school exclusion. The Juvenile Innocence and Fair Sentencing Clinic is a post-conviction clinic dedicating to reducing the draconian sentences, such as LWOP, that children received after their adult criminal court waivers and convictions.

The **Center on Wrongful Convictions of Youth ("CWCY")** operates under the auspices of the Bluhm Legal Clinic at Northwestern University School of Law. A joint project of the Clinic's Center on Wrongful Convictions and Children and Family Justice Center, the CWCY was founded in 2009 with a unique mission: to uncover and remedy wrongful convictions of youth and promote public awareness and support for nationwide initiatives aimed

at preventing wrongful convictions in the juvenile justice system. In recognition of the reality that juvenile's interactions with the criminal justice system increasingly begin with events at school, the CWCY urges courts to safeguard juvenile's constitutional rights within the schoolhouse. Since its founding, the CWCY has filed amicus briefs in jurisdictions across the country, ranging from state trial courts to the U.S. Supreme Court.

The **Children's Law Center, Inc. ("CLC")** is a non-profit organization committed to the protection and enhancement of the legal rights of children. CLC strives to accomplish this mission through various means, including providing legal representation for youth and advocating for systemic and societal change. For over 25 years, CLC has worked in many settings, including the fields of special education, custody, and juvenile justice, to ensure that youth are treated humanely, can access services, and are represented by counsel. For the past four years, CLC has worked on issues facing Ohio youth prosecuted in juvenile and adult court, including ensuring that youth receive constitutionally required protections and due process in delinquency and criminal court proceedings. To this end, CLC advocates for the constitutional rights of children in Ohio schools.

Based in one of our nation's poorest cities, the **Rutgers School of Law Children's Justice Clinic** is a holistic lawyering program using multiple strategies and interdisciplinary approaches to resolve problems for indigent facing juvenile delinquency charges, primarily providing legal representation in juvenile court hearings. While receiving representation in juvenile court and administrative hearings, clients are exposed to new conflict resolution strategies and be educated about their rights and the implications of their involvement in the juvenile justice system. This exposure assists young clients in extricating themselves from destructive behavior patterns, widens their horizons and builds more hopeful futures for

themselves, their families and their communities. Additionally, the Clinic works with both local and state leaders on improving the representation and treatment of at risk children in Camden and throughout the state.

The **Rutgers Criminal and Youth Justice Clinic ("CYJC")** provides legal representation to youth incarcerated in New Jersey's long-term juvenile facilities; young adults charged with minor criminal offenses; and clients convicted of serious offenses during adolescence who are seeking exoneration or other forms of post-conviction relief. Since 2009, CYJC faculty and students have worked with over 300 incarcerated young people in matters involving conditions of confinement, access to treatment, re-entry, and parole, among other issues. The clinic also regularly raises constitutional challenges to searches and seizures on behalf of its clients and spearheads juvenile justice policy reform initiatives. The CYJC has participated in or as appeared as counsel for amicus curiae in numerous matters before federal and state appellate courts, including, most recently, *State in the Interest of N.H.*, 226 N.J. 242, 141 A.3d 1178 (2016).

The **Education Law Center-PA** is a non-profit legal advocacy organization dedicated to ensuring access to quality public education for all children in PA. For over 40 years, ELC has advocated on behalf of the most at-risk students—children living in poverty, children of color, children in the foster care and juvenile justice systems, children with disabilities, English language learners, LGBTQ students, and children experiencing homelessness. One of our priority areas is dismantling the School-to-Prison Pipeline, which includes promoting evidence-based prevention practices to improve school climate while advocating against exclusionary discipline policies that push at-risk children out of school and often into the juvenile or adult

criminal justice systems. We seek to participate as amicus to explain why, in our view, the exclusionary rule should apply in schools.

Professor Barry C. Feld is Centennial Professor of Law Emeritus at the University of Minnesota Law School. He has taught juvenile justice for four decades, the author of the leading casebook in the field, author of ten books and more than 100 articles on juvenile justice administration including school searches, and his work has been cited by more than 100 state and federal courts including the US Supreme Court.

The **Juvenile Defenders Association of Pennsylvania ("JDAP")** wishes to join in the Amicus Brief on behalf of Joshua Polk. Part of JDAP's mission is to enhance the ethical representation of children charged with delinquent conduct, and to that end, we support the robust defense of children's constitutional protections. We join with the Juvenile Law Center in recognizing that the exclusionary rule is necessary to preserve the rights of children at school.

The **Juvenile Justice Initiative ("JJI")** of Illinois is a non-profit, non-partisan, inclusive statewide coalition of state and local organizations, community advocates, legal educators, practitioners, community service providers, and child advocates, supported entirely by private funding. JJI establishes broad collaborations around specific initiatives to achieve concrete and sustainable reforms to ensure full human rights for all children in conflict with the law. Our mission is to reduce reliance on confinement, enhance fairness, and develop a comprehensive continuum of community based resources throughout the state. Our collaborations work in concert with other organizations, concerned individuals and state and local government entities throughout Illinois to ensure that fairness and competency development are public and private priorities for all children in conflict with the law, and that incarceration is a last resort for as short a time as possible.

The **National Center for Youth Law ("NCYL")** is a private, non-profit organization that uses the law to help children in need nationwide. For more than 40 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support, and opportunities they need to become self-sufficient adults. One of NCYL's priorities is to reduce the number of youth subjected to harmful and unnecessary incarceration through access to appropriate education services. NCYL has litigated to end the "school-to-prison pipeline" in numerous states, and advocated at the federal, state, and local levels to reduce reliance on the justice systems to address the needs of youth, including decriminalizing normal adolescent behavior and improving children's access to adequate education and developmentally appropriate treatment.

The **National Juvenile Justice Network ("NJJN")** leads and supports a movement of state and local juvenile justice coalitions and organizations to secure local, state and federal laws, policies and practices that are fair, equitable and developmentally appropriate for all children, youth and families involved in, or at risk of becoming involved in, the justice system. NJJN currently comprises fifty-three member organizations in forty-three states and the District of Columbia, all of which seek to establish effective and appropriate juvenile justice systems. NJJN recognizes that youth are still developing, are fundamentally different from adults and should be held accountable in a developmentally appropriate manner that gives them the tools to make better choices in the future and become productive citizens. NJJN supports a growing body of research that indicates the most effective means for addressing youth crime are age-appropriate, rehabilitative, community-based programs that take a holistic approach, engage youth's family members and other key supports, and provide opportunities for positive youth development.

The **Northeast Juvenile Defender Center ("NRJDC")** is dedicated to increasing access to justice for and the quality of representation afforded to children caught up in the juvenile and criminal justice systems. Housed jointly at Rutgers Law School - Newark and the Defender Association of Philadelphia, the NRJDC provides training, support, and technical assistance to juvenile defenders in Pennsylvania, New Jersey, New York, and Delaware. The NRJDC also works to promote effective and rational public policy in the areas of juvenile detention and incarceration reform, disproportionate confinement of minority children, juvenile competency and mental health, and the special needs of girls in the juvenile justice system.

The **Roderick and Solange MacArthur Justice Center ("MJC")** is a non-profit, public interest law firm that advocates positive reform within the criminal justice system. MJC has offices in Chicago (at the Northwestern Pritzker School of Law), New Orleans, St. Louis, and at the University of Mississippi Law School. MJC was founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. It has led battles against myriad civil rights injustices, including police misconduct, racial bias in the criminal justice system, denial of counsel for the indigent accused, and improper treatment of court-involved youth.

The **Youth Law Center** is a public interest law firm that works to protect children in the nation's foster care and justice systems from abuse and neglect, and to ensure that they receive the support and services they need to become healthy and productive adults. Since 1978 our lawyers have worked across the United States to reduce the use of out-of-home care and incarceration; ensure safe and humane conditions in out-of-home placements; keep children out of adult jails; and secure equitable treatment for children in the child welfare and juvenile justice systems. Our advocacy goals include reducing youth involvement in the juvenile justice and

adult criminal systems and increasing educational opportunities for youth who are in or have recently left juvenile justice facilities.

STATEMENT OF FACTS

Amici adopt the Statement of Facts as articulated in the brief of Appellee Joshua Polk.

INTRODUCTION

Amici curiae write to ensure the Supreme Court's decree that "students do not 'shed their Constitutional rights . . . at the schoolhouse gate,'" *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969), continues to have meaning in Ohio. It is through the educational system that our children learn the moral, social and civic values that drive the interaction between citizens and government. While the United States Supreme Court has recognized that children's constitutional rights may in some instances be articulated differently from adult rights in comparable circumstances, no decision from the Supreme Court or this Court suggests that school children forfeit their rights to our most fundamental constitutional guarantees merely by crossing the school threshold.

Yet, the State and its *Amici* seek through this case to drastically circumscribe children's Fourth Amendment rights by barring application of the only remedy the Supreme Court has crafted to prevent Fourth Amendment violations—the exclusionary rule—for any illegal search conducted by school officials. Such a bold and effectively unprecedented decision would render the Fourth Amendment meaningless for Ohio's school children. No such sweeping erosion of children's Fourth Amendment rights is justified.

Amici reject all three propositions of law proposed by the State. For the first proposition, *Amici* support and incorporate the argument of Appellee Joshua Polk.

On the second proposition of law, *Amici* write to underscore the importance of the exclusionary rule, and to stress that it applies to illegal searches conducted by school officials. The State's argument that school officials are not deterred by the threat of the exclusionary rule because they are completely divorced from law enforcement does not comport with contemporary school culture, in which police and "school resource officers" are increasingly present on school campuses and schools refer hundreds of thousands of students to law enforcement each year.

With respect to the third proposition of law, *Amici* argue that the State overstates the cost-benefit analysis courts must apply in determining whether to apply the exclusionary rule. In cases like this one, in which a state official's actions are sufficiently culpable, the deterrent effect is strong and there is no need to conduct a deeper balancing test. Moreover, eliminating the exclusionary rule in school search cases would undermine those students' respect for the Constitution and the civic responsibilities schools are supposed to engender, while contributing to the "school-to-prison-pipeline" epidemic plaguing our country—all this without any demonstrable improvement in student safety.

The trial court and Court of Appeals correctly rejected the State's dangerous call to bar the exclusionary rule in school search cases. We urge this Court to do the same.

ARGUMENT

AMICI'S RESPONSE TO THE FIRST PROPOSITION OF LAW

The second and third searches of Mr. Polk violated the Fourth Amendment.

Amici adopt the response to the First Proposition of Law as articulated in the brief of Appellee Joshua Polk.

AMICI'S RESPONSE TO THE SECOND PROPOSITION OF LAW

This Court should affirm the Court of Appeals' holding that the exclusionary rule bars admission of evidence illegally obtained by school officials. The exclusionary rule would deter school officials from violating students' Fourth Amendment Rights and should apply to public-school employees.

I. THE EXCLUSIONARY RULE IS A NECESSARY SAFEGUARD TO PREVENT FOURTH AMENDMENT VIOLATIONS.

The exclusionary rule serves the critical function of deterring future Fourth Amendment violations, "thereby effectuat[ing] the guarantee of the Fourth Amendment against unreasonable searches and seizures." *United States v. Calandra*, 414 U.S. 338, 347 (1974). Specifically, because the Fourth Amendment is silent on how it is to be enforced, the Supreme Court created the exclusionary rule to prevent the prosecution from introducing evidence obtained in violation of the Fourth Amendment. *Davis v. United States*, 564 U.S. 229, 231-32 (2011). The exclusionary rule also bars admission of the fruits of illegally-obtained evidence. *Calandra*, 414 U.S. at 347.

The exclusionary rule is intended to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances reoccurring or systemic negligence. *Herring v. United States*, 555 U.S. 135, 144 (2009). The exclusionary rule is not itself a constitutional right. *Id.* at 141. Nor can it restore the privacy of the victim wrongfully searched. *Calandra*, 414 U.S. at 347.

Nevertheless, the rule is designed "to compel respect for the constitutional guaranty [sic] in the ***only effectively available way***—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960) (emphasis added). The Court of Appeals correctly concluded that, in this case and in general, "without the remedy of exclusion, no practical remedy would exist for Fourth Amendment violations, and 'the protection of the Fourth Amendment declaring [one's] right to be secure against such searches and seizures [would be] of no value, and . . . might as well be stricken from the Constitution.'" *State v. Polk*, 10th Dist. Franklin No. 14AP-787, 2016-Ohio-28, 26 (quoting *Weeks v. United States*, 232 U.S. 383, 393 (1914)).

The State and its *Amici* ask this Court to hold that the exclusionary rule never applies to searches conducted by school officials. Not only does this extreme conclusion not follow from the case law, as discussed below, but it would rob Ohio's school children of the one remedy the Supreme Court crafted to "safeguard" their Fourth Amendment rights.[1]

II. SCHOOL OFFICIALS ARE STATE ACTORS SUBJECT TO THE FOURTH AMENDMENT AND THE EXCLUSIONARY RULE.

In *New Jersey v. T.L.O.*, the Supreme Court confirmed that the Fourth Amendment's prohibition on unreasonable searches and seizure is not limited to searches carried out by law enforcement, and specifically applies to searches conducted by public school officials. *New*

[1] The Court of Appeals appropriately rejected the State's argument that students can enforce their Fourth Amendment rights through civil lawsuits. The Supreme Court created the exclusionary rule to curtail Fourth Amendment violations, and the existence of civil remedies—and especially civil remedies that are so rarely fruitful "in light of wide-ranging immunity and lack of practical damages"—is an ineffective substitute. *See Polk*, 2016-Ohio-28, ¶¶ 24-26 (quoting *Elkins*, 364 U.S. at 220 (quoting *People v. Cahan*, 44 Cal.2d 434, 282 P.2d 905, 911-13 (1955) (applying the exclusionary rule "because other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers . . . [N]either administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures."))).

Jersey v. T.L.O., 469 U.S. 325 (1985). The Court of Appeals in this case correctly recognized that in applying the Fourth Amendment to school officials, the Supreme Court necessarily implied that the exclusionary rule applies to school officials as well. *See Polk*, 2016-Ohio-28, ¶¶ 20-21. The Court of Appeals also reasoned that not applying the exclusionary rule to school offices would "revive what was known as the silver platter doctrine for use against Ohio's school children." *Id.* at ¶ 21. The Silver Platter doctrine allowed law enforcement agents to receive evidence that would otherwise be unconstitutional, but for the fact that it was obtained by agents outside of the reach of the Fourth Amendment and delivered (on a proverbial silver platter) to law enforcement. *Elkins*, 364 U.S. at 208 n.2 (prohibiting the silver platter doctrine).[2]

Multiple states have also held that the exclusionary rule applies to schools. *See People v. Scott D.*, 315 N.E.2d 466 (N.Y. 1974); *Louisiana v. Mora*, 307 So.2d 317, 320 (La. 1975); *Interest of L.L.*, 280 N.W.2d 343, 347-48 (Wis. Ct. App. 1979); *In re William G.*, 709 P.2d 1287, 1298 n.17 (Cal. 1985); *In re T.L.O.*, 463 A.2d 934, 943-44 (N.J. 1983) [hereinafter "*N.J. T.L.O.*"], *rev'd on other grounds*, 469 U.S. 325 (1985); *D.I.R. v. State*, 683 N.E.2d 251, 253 (Ind. Ct. App. 1997); *State v. Jones*, 666 N.W.2d 142, 146 (Iowa 2003); *G.M. v. State*, 142 So.3d 823, 829 (Ala. 2013).[3] Conversely, no U.S. Supreme Court or Ohio Supreme Court decision has ever held that the exclusionary rule does not apply to searches conducted by school officials.

[2] The Supreme Court has applied the exclusionary rule in non-law enforcement cases. *Michigan v. Tyler*, 436 U.S. 499, 500 (1978) (applying the exclusionary rule to firefighters in non-exigent circumstances). This Court has also applied the exclusionary rule outside of law enforcement context. *State v. Pi Kappa Alpha Fraternity*, 23 Ohio St.3d 141, 145, 491 N.E.2d 1129, (1986) (applying exclusionary rule to suppress evidence found by liquor control agents).

[3] The State criticizes these cases on the grounds that they improperly treated the exclusionary rule as an automatic consequence of a Fourth Amendment violation. Appellant Br. at 34-35 (citing *Davis*, 564 U.S. at 244, which states "exclusion of evidence does not automatically follow from the fact that a Fourth Amendment violation occurred"). While the U.S. Supreme Court has indeed held that the exclusionary rule does not always automatically follow a Fourth

The State fails to undercut this case law on which Mr. Polk and the Court of Appeals have relied. First, the State misconstrues the New Jersey Supreme Court's reason for holding the exclusionary rule applied in *T.L.O.* (an issue which the Supreme Court did not reach in its own opinion in *T.L.O.*). *See* Appellant Br. at 32 (citing *N.J. T.L.O.*, 463 A.2d at 341). The State over-emphasizes the New Jersey Supreme Court's sentence that "the exclusionary rule applies to Fourth Amendment violations by public-school employees because it is of 'little comfort' to someone charged with a crime whether the person who illegally obtained the evidence was a law-enforcement official or some other government actor." *See Id.* at 32 (citing *N.J. T.L.O.*, 463 A.2d at 341). The New Jersey Supreme Court held that the exclusionary rule applied in *T.L.O.* because it determined that school officials are state agents and state agents are subject to the Fourth Amendment. *N.J. T.L.O.*, 463 A.2d at 341. The decision rested on the bedrock principle that the Fourth Amendment applies to all state agents—not TLO's lack of comfort. *See id.*

Additionally, the State attempts to rebut the relevance of *In re William G.*, 709 P.2d 1287 (Ca. 1985) by pointing to the California Supreme Court's conclusion that the exclusionary rule is necessary in school cases to preserve judicial integrity, a justification which now plays only a "limited role" in deciding whether to apply exclusionary rule. *See* Appellant Br. at 33 (quoting *Stone v. Powell*, 428 U.S. 465, 485 (1976)). However, the State again misunderstands the reasoning behind the holding. The California Supreme Court held that the exclusionary rule applied because it "conclude[d] that public school officials were government agents within the purview of the Fourth Amendment, and must therefore respect the constitutional rights of

(continued…)

Amendment violation, these cases still demonstrate courts' decisions to apply the exclusionary rule to school searches, underscoring the critical value that the exclusionary rule provides in the school setting. *See G.M*, 142 So.3d at 829; *Jones*, 666 N.W.2d at 146; *D.I.R.*, 683 N.E.2d at 253; *Mora*, 307 So. 2d at 320; *Scott D.*, 34 N.E.2d at 471.

students in their charge against unreasonable searches and seizures." *In re William G.*, 709 P.2d at 1293. The court then held that the search of William G. was not based on reasonable suspicion, thus violating William G.'s Fourth Amendment rights and triggering the exclusionary rule. *Id*. at 1296-98. *William G's* holding was based not on the goal of preserving "judicial integrity," but, instead, on the necessity of applying the exclusionary rule to remedy violations of the Fourth Amendment. *See id.*

Similarly, the State contests the Wisconsin case, *Interest of L.L*, by criticizing its one statement, in a footnote, that the exclusionary rule serves to "deter prosecutions." Appellant Br. at 34 (quoting 280 N.W.2d at 347 n.1.) However, again, the court's opinion rested on other criteria: the teacher's reasonable suspicion before searching the student's pockets, not prosecutorial deterrence. *See* 280 N.W.2d at 351-52 (concluding that the exclusionary rule applies to school searches but holding that the search was not illegal).

This Court should affirm the Court of Appeals and follow the similar cases from around the country to hold that the exclusionary rule applies in schools.

III. AS SCHOOL OFFICIALS INCREASINGLY REFER STUDENTS TO LAW ENFORCEMENT AND THE COURTS, THEIR INTERESTS ARE SUFFICIENTLY ALIGNED WITH THOSE OF LAW ENFORCEMENT THAT THREAT OF THE EXCLUSIONARY RULE WOULD DETER THEM FROM VIOLATING STUDENTS' FOURTH AMENDMENT RIGHTS.

Relying on an outdated vision of schools, the State incorrectly asserts that the exclusionary rule does not apply to school officials because they are only focused on pedagogical concerns and therefore cannot be deterred by the exclusionary rule. This argument fails to confront the unfortunate reality that school officials regularly interact with law enforcement, and refer hundreds of thousands of students to police and our courts each year. Specifically, in 2012,

the most recent year for which comprehensive national data is available via the U.S. Civil Rights Data Collection, schools "referred" 260,000 students to law enforcement and over 64,000 students were subject to school-related arrests. U.S. Dep't of Educ., Office for Civil Rights, *2011-12 Civil Rights Data Collection State and Nat'l Estimations*, available at ocrdata.ed.gov/StateNationalEstimations (accessed September 12, 2016)*; see also* Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 862 (2012) (school officials now "refer a growing number of youth to the juvenile and criminal justice systems for school-based misconduct"). Police presence and influence in schools is pervasive: 43,000 "School Resource Officers" ("SROs") and other police officers, plus 39,000 security guards, are today working in 84,000 public schools. Emma Brown, *Police in Schools: Keeping Them Safe or Arresting Them for No Good Reason?*, WASHINGTON POST, Nov. 8, 2015, https://www.washingtonpost.com/local/education/police-in-schools-keeping-kids-safe-or-arresting-them-for-no-good-reason/2015/11/08/937ddfd0-816c-11e5-9afb-0c971f713d0c_story.html (citing the Nat'l Ctr. for Educ. Statistics). In 2014, thirty percent of schools had SROs, as compared to only ten percent in 1997. Kyle Spencer and Adam Hooper, *Bullied by the Badge*, HUFFINGTON POST, Aug. 10, 2016, available at http://data.huffingtonpost.com/2016/school-police/mississippi (accessed Sept. 12, 2016).

Use of police in schools and increasingly draconian school discipline practices have led over the last few decades to what many refer to as the "school-to-prison-pipeline," or the practice of criminalizing student misconduct, which sets off a chain of events that increases the chances that low-income students of color will end up involved in the criminal justice system. *See generally* Catherine Y. Kim, Daniel J. Losen, and Damon T. Hewitt, *The School-to-Prison Pipeline: Structuring Legal Reform*, New York University Press (2010), 34 [hereinafter "Kim,

The School To Prison Pipeline"] (citing Daniel J. Losen, *The Color of Inadequate School Resources: Challenging Racial Inequities that Contribute to Low Graduation Rates and High Risk for Incarceration*, 38 Clearinghouse re. J. of Poverty Law & Policy 616, 625 (2005)). "Zero tolerance" policies, which remove educators' discretion in school discipline and typically seek to keep out students who engage in certain conduct, contribute to this pipeline. In a powerful published Tenth Circuit concurrence, Justice Lucero calls for a more "enlightened," jurisprudence to reflect the reality in today's schools, noting that "[r]eferral of students to law enforcement—so that even minor offenses are often dealt with and punished by police rather than school officials—is a key and growing feature of modern school discipline policies." *Hawker v. Sandy City Corp.*, 774 F.3d 1243, 1245 (10th Cir.2014) (Lucero, J., concurring) (citing *N.C. v. Commonwealth*, 396 S.W.3d 852, 863 (Ky. 2013)). Scholars refer to the "criminalization of the classroom," to describe this "national pattern of schools relying on exclusionary discipline, police tactics, and criminal punishments to address even the slightest kind of misbehavior by students." Josie Foehrenbach Brown, *Developing Due Process: Waging a Constitutional Campaign to Align School Discipline with Developmental Knowledge*, 82 TEMP. L. REV. 929, 962 (2009) (citations omitted); Udi Ofer, *Criminalizing the Classroom: The Rise of Aggressive Policing and Zero Tolerance Discipline in New York City Public Schools*, 56 N.Y.L. SCH. L. REV. 1373, 1374 (2011/12). Even the United States' Secretary of Education, John King, was recently driven to write to school administrators "I know that many of you, like me, have become increasingly concerned about school-based law-enforcement officers' involvement in the administration of school discipline in many of our Nation's schools. . . . I am concerned about the potential for violations of students' civil rights and unnecessary citations or arrests of students in schools, all of which can lead to the unnecessary and harmful introduction of children

and young adults into a school-to-prison pipeline." U.S. Sec. of Educ. John B. King, Dear Colleague Letter (Sept. 8, 2016), available at http://www2.ed.gov/documents/press-releases/secretary-sro-letter.pdf (accessed Sept. 12, 2016). Schools have effectively criminalized student misconduct to the point where "one can no longer assume a nonadversarial benevolent relationship between school disciplinarian and student." Kim, *supra*, at 883.

While the State is correct that presence of SROs is not evidence of close collaboration between all educators and police, *see* Appellant Br. at 32, it is naïve to assume school officials are clueless about potential law enforcement consequences for school searches that unearth contraband.[4] Here, although Officer Lindsey was a "safety and security resource coordinator," not a police officer, Whetstone High School's resident SRO did eventually become involved. Appellant Br. at 1 (citing Tr., 4-6, 9-10, 28). School officials today are sufficiently aware of or directly involved in law enforcement to the extent that the exclusionary rule should act as a deterrent from conducting illegal searches.

[4] The State's brief cites directly to several U.S. Supreme Court cases for the proposition that educators and law enforcement are distinct, but none of these cases are in fact in the school context. *See* Appellant Br. at 25-27 (citing, for example, *United States v. Leon*, 468 U.S. 897, 916 (1984) (law enforcement case) for proposition that there is no evidence public school employees are inclined to ignore the Fourth Amendment; *Arizona v. Evans*, 514 U.S. 1, 15 (1995) (court clerk case) for the proposition that teachers are not "adjuncts to the law enforcement team"; and *Pennsylvania Bd. of Prob. and Parole v. Scott*, 524 U.S. 357, 368 (1998) (parole officer case) for the proposition that it is unfair to assume an educator "bears hostility" against a student). The one recent school-based Supreme Court case on which the State relies, *Ohio v. Clark*, is not an exclusionary rule case (which the State concedes), but rather dealt with whether a three-year-old's statements about abuse to his preschool teachers was testimonial for Confrontation Clause purposes. *Ohio v. Clark*, 135 S.Ct. 2173, 2181-83 (2015) (noting that "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause.") Therefore, the Supreme Court's statement that "the relationship between a student and his teacher is very different from that between a citizen and the police," must be read in the preschool context. *Id.* at 2182. What is more, *Amici* do not contest that students and teachers do and should have a different relationship than that of citizen and police—we merely point out that school officials do their work in the broader context of increasing police presence and would be aware of, and deterred by, the exclusionary rule's effect.

AMICI'S RESPONSE TO THE THIRD PROPOSITION OF LAW

The Court need not conduct a traditional cost-benefit analysis to conclude that the exclusionary rule should apply; however, not applying the exclusionary rule would have severe costs.

I. THE "COST-BENEFIT" TEST DOES NOT SUPPORT REVERSAL HERE; OFFICER LINDSEY'S ILLEGAL SEARCH IS PRECISELY THE TYPE OF CONDUCT THE EXCLUSIONARY RULE PROPERLY AIMS TO DETER.

As explained above, the general rule is that evidence obtained unconstitutionally, including its illegal fruits, will be excluded. *Davis*, 564 U.S. at 232. The Supreme Court has carved out distinct exceptions to this rule in cases where the deterrent effect is so marginal that it cannot outweigh the substantial cost. *See id.* at 238 (The Court "recalibrated [its] cost-benefit analysis in exclusion cases to focus the inquiry on the "flagrancy of the police misconduct at issue."). The Supreme Court has repeatedly held, for example, that when an officer relies in good faith on a warrant, existing statute, or biding appellate precedent, the court need not exclude the evidence. *See id.* (exception applied for good-faith reliance upon a "bright-line rule" of appellate decision that authorized the search and then later changed to prohibit it); *Herring*, 555 U.S. 135 (the arresting officer objectively reasonably relied on a warrant clerk's word that the suspect had an open warrant—the warrant clerk, not the officer, made the mistake that led to the illegal search); *United States v. Leon*, 468 U.S. 897 (1984) (officer objectively reasonably relied on a search warrant that was later determined to be invalid); *Illinois v. Krull*, 480 U.S. 340 (1987) (exception applied for good-faith reliance upon a statute later found to be unconstitutional). In such cases, there is "nothing to deter" in the police conduct. *See Leon,* 468 U.S. at 920-21. Similarly, the Court has recognized other exceptions to the exclusionary rule when the evidence would otherwise have been obtained by officers under the doctrines of independent source, inevitable discovery, or attenuation. *See, e.g.*, *Murray v. United States*, 487 U.S. 533, 537 (1988)

(independent source); *Nix v. Williams*, 467 U.S. 431, 443-44 (1984) (inevitable discovery); *Segura v. United Sates*, 468 U.S. 796, 805 (1984) (inevitable discovery); *Utah v. Strieff*, 136 S.Ct. 2056, 2061 (2016) (attenuation).

None of these exceptions apply here. Specifically, in this case, Officer Lindsey was not relying on law, error of another, or objective reasoning in deciding to search Polk's property. Instead, Officer Lindsey was motivated by a rumor concerning Mr. Polk's alleged gang affiliation in deciding to search Mr. Polk's property. *Polk*, 2016-Ohio-28, ¶ 16. The Court of Appeals determined, "[t]he trial court was well within its fact-finding discretion to conclude, based on the circumstances, the testimony and its ability to evaluate the officer's credibility, that the second search [in which Officer Lindsey dumped out Mr. Polk's bag after he had already determined to whom it belonged and that it was not a bomb] was based 'solely' on rumors of Polk's gang affiliation." *Id.* at ¶¶ 14-16. There was no intervening agent or objectively reasonable reliance on binding precedent here on which Lindsey can blame this mistake. The Court of Appeals properly determined that the "good faith" exception to the exclusionary rule does not apply here, noting that "if subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects, 'only in the discretion of the police.'" *Id.* at ¶ 28 (citing *Beck v. Ohio*, 379 U.S. 89, 97 (1964). Lower courts in Ohio have also previously held that "the good faith exception to the exclusionary rule does not apply where the official conducting the search is alone responsible for assuming it is reasonable and conforms with governing law when in fact it is neither." *State v. Thomas*, 10th Dist. Franklin No. 14AP-185, 2015-Ohio-1778, ¶ 46 (citing *State v. Forrest*, 10th Dist. Franklin No. 11AP-291, 2011-Ohio-6234, ¶¶ 17-18; *State v. Simon*, 119 Ohio App.3d 484, 488-89, 695 N.E.2d 814 (9th Dist.1997)). This case is not analogous to

the objectively reasonable behavior the Supreme Court has found cannot be deterred by the exclusionary rule due to low or non-existent culpability of the actor. Rather, Officer Lindsey's conduct is deliberate, reckless, or at best grossly negligent, and thus the ability of the exclusionary rule to deter is high.

The so-called "cost benefit analysis" is not a broad, context-based balancing test as the State portrays it. The weighing of costs against benefits arose in the context of these narrow cases in which where there was low police culpability and therefore limited benefit from exclusion. This Court should not expand the analysis beyond its narrow focus on the conduct of the officer and the existence of specific facts and circumstances warranting the good faith exception.

II. FAILING TO APPLY THE EXCLUSIONARY RULE IN SCHOOLS HAS GRAVE CONSEQUENCES: FOSTERING DISRESPECT FOR THE CONSTITUTION AND PUSHING STUDENTS INTO THE SCHOOL-TO-PRISON PIPELINE.[5]

A. Failing to Apply an Appropriate Remedy for Fourth Amendment Violations in Schools Would Diminish Students' Appreciation for The Constitution and Other Civic Values.

Allowing school officials and law enforcement officers to violate students' Fourth Amendment rights without consequence would teach students that the Constitution is

[5] As discussed above, *Amici* contend that it is not necessary to conduct a broad cost-benefit analysis before deciding to apply the exclusionary rule in this case. If this Court nevertheless determines it must conduct a cost-benefit analysis that looks beyond Officer Lindsey's culpability, the Court should find that the costs of providing no remedy for violations of students' Fourth Amendment rights at school—namely, eroding their appreciation for civic values and contributing to a police-state atmosphere at schools in which students are more likely to fall victim to the "school-to-prison pipeline"—are grave enough to justify the Court's applying the exclusionary rule in this and other illegal school search cases.

meaningless. Most children in the United States learn about their civil rights and responsibilities at school. Since *Brown v. Board of Education*, the Supreme Court has recognized that "education is the foundation of good citizenship." Sarah Jane Forman, *Countering Criminalization: Toward a Youth Development Approach to School Searches*, 14 SCHOLAR 301, 303 (2011) (citing *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)); *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) ("public schools [are] a most vital civic institution for the preservation of a democratic system of government"); *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) ("education is necessary to prepare citizens to participate effectively and intelligently in our open political system"); *see also T.L.O.*, 469 U.S. at 373 (Stevens, J., dissenting) ("Schools are places where we inculcate the values essential to the meaningful exercise of rights and responsibilities by a self-governing citizenry."). Failing to remedy illegal school searches "sends conflicting, potentially dysfunctional signals about the Constitution to young citizens who are to be entrusted with ensuring the Constitution's continuing vitality." Brian J. Fahey, *J.P. ex rel. A.P. v. Millard Public Schools: A Limit on School Authority and What It Means for Students' Fourth Amendment Rights in Nebraska*, 93 NEB. L. REV. 1012, 1032 (2015). Failing to redress Constitutional harms "teach[es] youth to discount important principles of our government as mere platitudes." *Joseph T. v. State*, 336 S.E.2d 728, 740 (W. Va. 1985) (McGraw J., dissenting) (quoting *Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)). In contrast, applying the exclusionary rule to the fruits of illegal school searches, "makes an important statement to young people that 'our society attaches serious consequences to a violation of constitutional rights.'" *T.L.O.*, 469 U.S. at 374 (Stevens, J., dissenting).

The need to foster respect for rather than skepticism about the Constitution is particularly important in adolescence—a transitional phase in which teens' identities are formed. *See*

Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime,* 18 THE FUTURE OF CHILDREN 2, 23 (2008). As the Supreme Court has explained, a youth's age "is far more than a chronological fact"; "[i]t is a fact that generates commonsense conclusions about behavior and perception" that are "self-evident to anyone who was a child once himself." *J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 674 (2004)). These distinctions are also supported by a significant body of developmental research and neuroscience demonstrating significant psychological and physiological differences between youth and adults. *See, e.g.*, *Graham v. Florida*, 560 U.S. 48, 68 (2010) ("developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"). "[A] child's character is not as 'well formed' as an adult's; his traits are 'less fixed.'" *Miller v. Alabama*, 132 S.Ct. 2455, 2458 (2012) (quoting *Roper v. Simmons*, 545 U.S. 551, 570 (2005)). Indeed, "finding yourself" is a hallmark of adolescence:

> [P]sychologists have explained that a key development task of adolescence is the formation of personal identity—a process linked to psychological development, which for most teens extends over several years until a coherent 'self' emerges in late adolescence or early adulthood. During adolescence, identity is fluid—values, plans, attitudes, and beliefs are likely to be tentative as teens struggle to figure out who they are.

Scott & Steinberg, *supra*, at 23. Particularly relevant in the Fourth Amendment context, teenagers also have a heightened need for personal privacy. Gary B. Melton, *Minors and Privacy: Are Legal Concepts Compatible?,* 62 NEB. L. REV. 455, 488 (1983); Ellen Marrus, *Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality and Juvenile Delinquency*, 11 GEO. J. LEGAL ETHICS 509, 534 (1998). For an adolescent, privacy is a "marker of independence and self-differentiation." Melton, *supra,* at 488. It is imperative that schools capitalize on this critical period of identity development to instill respect for the foundations of

our government and the importance of civic responsibility. Students who observe their own and their peers' Fourth Amendment rights violated without remedy will have little reason to form a core belief of respect for the law.

B. Failing to Apply the Exclusionary Rule in School Would Fuel the School-to-Prison Pipeline and Not Make Students Safer.

As advocates for children, *Amici* share the goal of the State and its *Amici* to keep students safe at school. Stripping students of their Constitutional rights and attendant remedies does not make students safer, however. It serves only to further alienate them from the educational process and push them into the school-to-prison pipeline.

While the "criminalization of the classroom," described in Section III above, was brought about through a series of strategies to maintain order and safety in school, research has shown that school policies that increasingly rely on exclusionary discipline and police tactics "appear counterproductive, igniting student hostility toward school officials and eroding the sense of school connectedness critical to a student's academic success and behavioral improvement." Brown, *supra, at* 963. Ronald L. Davis, Director of the Office of Community Oriented Policing Services within the United States Department of Justice, recently noted:

> We have seen that there is the potential for SROs to have a negative impact on students through unnecessary arrests and improper involvement in routine school discipline matters. If SROs are not properly hired, trained, evaluated, and integrated into the school community—or if they are given responsibilities more appropriately carried out by educators—negative outcomes, including violations of students' civil rights, can and have occurred.

Ronald L. Davis, Dir., U.S. Dep't of Justice, Office of Cmty. Oriented Policing Services, Dear Colleague Letter (Sept. 8, 2016), available at http://www2.ed.gov/documents/press-releases/cops-sro-letter.pdf (accessed Sept. 12, 2016). After studying twenty-five years of "zero

tolerance" policies, the Vera Institute concluded that such strict discipline did not make schools more orderly or safe: No studies show that an increase in out-of-school suspension and expulsion reduces disruption in the classroom and some evidence suggests the opposite effect. Jacob Kang Brown et al., Vera Inst., *A Generation Later: What We've Learned About Zero Tolerance in Schools*, CENTER ON YOUTH JUSTICE, 4 (Dec. 2013), available at https://storage.googleapis.com/vera-web-assets/downloads/Publications/a-generation-later-what-weve-learned-about-zero-tolerance-in-schools/legacy_downloads/zero-tolerance-in-schools-policy-brief.pdf (accessed Sept. 12, 2016). [T]here is no research demonstrating that the threat of harsh punishment actually discourages students from bringing a weapon to school. *Id.* There is similarly no reliable evidence that SROs make schools safer. Barbara Fedders & Jason Langberg, *School Discipline Reform: Incorporating the Supreme Court's 'Age Matters' Jurisprudence*, 46 LOY. L.A. L. REV. 933, 962 (2013).

In fact, instead of making schools safer, strict discipline and police state policies on school campuses produce myriad detrimental effects:

Draconian discipline and an atmosphere of police oversight undermine learning objectives and leave students feeling unwelcome and unsafe. *See, e.g.*, Jessica Feierman, *The Decriminalization of the Classroom: The Supreme Court's Evolving Jurisprudence on the Rights of Students*, 13 J.L. SOC'Y 301, 302 (2011) ("The presence of police and metal detectors and the use of intrusive searches may undermine students' own sense of safety within the school building." (citations omitted)); Ofer, *supra*, at 1400 ("[z]ero tolerance policies create an unwelcoming school environment for all students, leading to feelings of detachment from school and a greater willingness to leave the school environment"); Kim, *The School To Prison Pipeline, supra*, at 113 ("Classmates who witness a child being arrested for a minor infraction

may develop negative views or distrust of law enforcement."); Jason P. Nance, *School Surveillance and the Fourth Amendment*, 2014 WISCONSIN L. REV. 79, 103-04 (2014) ("[M]any scholars argue that strict security measures undermine trust and send a negative signal to students—that they are dangerous and prone to commit illegal, violent acts. This message, scholars fear, may sour students' attitudes towards school and school officials." (citations omitted)); Kim, *supra*, at 888-91 (describing various studies that concluded that police-like interventions in schools increase rather than stifle school disorder); Fedders & Langberg, *supra*, at 960 ("[S]uspension and expulsion make schools and communities less safe by exacerbating behavior problems, antisocial behavior, and developmental problems, and creating a self-fulfilling belief that the student is incapable of abiding by the school's social and behavioral codes. These policies cause some students to view confrontational discipline as a challenge to escalate their behavior." Fedders & Langberg, *supra*, at 960 (internal citations omitted)). After analyzing all available data, Professor Catherine Kim concluded that "[w]hatever might be said about the pedagogical value of suspensions or other more traditional forms of school discipline, the available social science shows that referring a student to law enforcement has negative educational consequences not only on the youth referred, but also likely on the larger student body." Kim, *supra*, at 891. "To the extent school discipline increasingly takes the form of law enforcement referrals," Kim explains, "it can no longer be justified by the educational benefits it confers on the child or its purportedly nonadversarial nature." *Id.* at 892. Real student experiences confirm the research: a Huffington Post article recently reported that "[s]tudents say being arrested has made them fearful of school, distrustful of authority figures and, in some cases, deeply angry." Spencer and Hooper, *supra.*

Harsh school discipline policies and police presence also increase racial and ethnic disparities as well as discrimination against students with disabilities. Ofer, *supra*, at 1400 ("zero tolerance tends to be implemented in a discriminatory manner: it is enforced more often against male students, students of color, students with disabilities, and students from low-income households"). The latest U.S. Department of Education data shows black students are more than twice as likely to be referred to law enforcement or arrested at school as white students are. U.S. Dep't of Educ., Office for Civil Rights, *2013-2014 Civil Rights Data Collection: A First Look* (Jun. 7. 2016), http://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf. Similarly, black students and students with disabilities are more likely than their peers to be disciplined under zero tolerance regimes. Ofer, *supra*, at 1401.

Finally, there are also devastating life-long consequences for the individuals subject to school-based arrests, and for the taxpayers who ultimately may have to support them. Students who are arrested are nearly twice as likely to drop out of school, while going to court "nearly quadruples the odds of dropout; lowers standardized test scores; reduces future employment prospects; and increases the likelihood of future interaction with the criminal justice system." Kim, *The School To Prison Pipeline*, *supra*, at 113.

The exclusionary rule represents a critical restraint on this growing police power of school officials. It is one way that courts can curb school officials' otherwise-unfettered power to patrol and criminalize typical adolescent behavior. Without such procedural checks and balances in place, these detrimental policies will affect an even larger number of young people, expanding the school-to-prison pipeline even further.

CONCLUSION

For the foregoing reasons, *Amici Curiae*, Juvenile Law Center, et al., respectfully urge this Court to affirm the decision of the Court of Appeals.

Respectfully submitted this 14h day of September, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of September, 2016, I caused copies of the foregoing Brief of Amici Curiae Juvenile Law Center et al. on Behalf of Appellee and Motion of Attorney Marsha L. Levick for Permission to Appear Pro Hac Vice to be served via electronic mail on:

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