No. 09-11121

IN THE

Supreme Court of the United States

J.D.B.,

Petitioner,

—v.—

STATE OF NORTH CAROLINA,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 550,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In support of those principles, the ACLU has appeared in numerous students' rights cases before this Court from *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969) to *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633 (2009).

The ACLU and its affiliates throughout the country work daily in the courts and in legislatures to safeguard the rights of children in school. As a result of that work, the ACLU has identified the "school to prison pipeline," a set of policies and practices that render at-risk youth more likely to become incarcerated than to receive a high school diploma, as a major civil rights challenge of our time. Because the ACLU is committed to ensuring that youth in public schools obtain the constitutional protections to which they are entitled, the proper resolution of this case is a matter of significant concern to the ACLU and its members.

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[1] No counsel for party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made any monetary contribution towards the preparation and submission of this brief. Blanket letters of consent to the filing of *amicus* briefs have been lodged by both parties with the Clerk of the Court.

STATEMENT OF THE CASE

Thirteen year-old Petitioner J.D.B. was accused of breaking and entering into two homes and stealing various items. On the day of the break-ins, police officers questioned him, presumably at his home, regarding the crime. *In re J.D.B.*, 686 S.E.2d 135, 136 (N.C. 2009); Pet. Cert. at 3. Unsatisfied with the results of this interview, the police decided to question petitioner for a second time at school. Pet. Cert. at 3. An investigator from the Chapel Hill Police Department went to the school, had another uniformed officer remove petitioner from his special education classroom and escort him into a closed conference room on school grounds, and again questioned petitioner about the alleged crimes. *Id*. Petitioner was not given *Miranda* warnings at any point during this interrogation. 686 S.E.2d at 136. After the assistant principal told petitioner to "do the right thing because the truth always comes out in the end," petitioner confessed to the crimes. Pet. Cert. at 4-5. After he confessed, the investigator told petitioner that he was free to leave. *Id.* at 5. The police then obtained a warrant based on the information they received during the school interrogation and searched petitioner's home. *Id.* at 5-6. He was later arrested and adjudicated delinquent.

At trial, petitioner moved to suppress the statements made to the police and the evidence seized from his home, arguing that his statements and the evidence were obtained as a result of a custodial interrogation conducted in violation of N.C. Gen. Stat. § 7B-2101 (2005), and without having been advised of his rights under *Miranda*

v. Arizona, 384 U.S. 436 (1966). *In re J.D.B.*, 674 S.E.2d 795, 798 (N.C. App. Ct. 2009). The trial court denied the motion to suppress and petitioner appealed the denial of his motion. *Id.* at 797. In May 2007, the North Carolina Court of Appeals remanded to the trial court for findings of fact supporting its determination that J.D.B. was not in custody at the time he was questioned. *Id.* On remand, the trial court entered an order making findings of fact and conclusions of law in support of its denial of J.D.B.'s motion to suppress the statement and evidence. *Id.* at 797-98. Specifically, the trial court found that petitioner was thirteen years old when questioned by the police, that he was questioned in a conference room that was closed but not locked, that he did not receive the *Miranda* warnings, and that he was not offered the opportunity to speak to a parent or guardian before being questioned by the police. *Id.* Nevertheless, the trial court judge concluded that petitioner was not in custody at the time of this interrogation ostensibly because the petitioner's "responses to the investigator's questions were appropriately responsive, indicating that he was capable of understanding the fact that he did not have to answer questions . . . [and] his responses to counsel during the suppression hearing were appropriately responsive." *Id.* at 798. That decision was affirmed by the North Carolina Court of Appeals. *In re J.D.B.*, 674 S.E.2d 795, 800 (N.C. App. Ct. 2009).

Petitioner then appealed to the North Carolina Supreme Court. In a 4-3 opinion, the North Carolina Supreme Court affirmed the

decision of the Court of Appeals, finding that petitioner was not in custody when he was interrogated by the police at his school. *In re J.D.B.,* 686 S.E.2d. 135 (N.C. 2009). In reaching this conclusion, the state supreme court expressly declined to consider petitioner's age among the totality of circumstances relevant to determining custody. In the majority's view, "the custody inquiry states an objective rule designed to give clear guidance to the police, while consideration of a suspect's individual characteristics–including his age–could be viewed as creating a subjective inquiry." *In re J.D.B.*, 686 S.E.2d at 140, quoting *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004).

This Court granted certiorari to decide whether a court may consider a juvenile's age in a *Miranda* custody determination.

SUMMARY OF ARGUMENT

This case is not about whether school principals may question students about school misconduct. Nor is it about precautionary measures taken to maintain order and safety in our public schools. Rather, this case is limited to examining the role of police officers in public schools enforcing criminal laws; an interaction that now occurs on a regular basis in public schools across the nation.

Recognizing that custodial interrogation is inherently coercive, this Court held in *Miranda v. Arizona* that the Fifth Amendment privilege against self-incrimination requires police to inform suspects of their rights before engaging in custodial interrogation. This Court has also held in *Miranda* and subsequent cases that the

question of whether a suspect is in custody, and thus entitled to *Miranda* warnings, turns on an objective evaluation of the totality of the circumstances.

Amici agree with petitioner that the age of a juvenile suspect is an appropriate factor to consider under *Miranda* in deciding whether a reasonable person in similar circumstances would feel free to leave the room and end the interrogation. However, we do not repeat that argument at length here. Instead, this brief focuses on a related point. The school setting itself is an additional factor that should be considered in determining custody and applying *Miranda*. Students are not free agents in school. They are not free to leave their classrooms, they are not free to leave the principal's office, and there is no reason for a child to believe that he or she is free to leave a police interrogation conducted in school as part of a law enforcement investigation.

Having litigated and conducted extensive research on issues relating to law enforcement in public schools, we respectfully submit this brief to draw the Court's attention to the increasing prevalence of police in schools, the criminalization of student behavior that was previously treated as a school discipline problem, and the importance of safeguarding the *Miranda* rights of children who are subject to police interrogations in school that can and often do lead to criminal arrests.

ARGUMENT

Miranda v. Arizona requires a court to analyze two questions in determining whether a suspect is in custody and must therefore be given the familiar *Miranda* warnings before being interrogated. "First, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). If, given the totality of the circumstances, a reasonable person would not have known that he or she was free to leave and terminate the interrogation, the interrogation may proceed only if the suspect is informed of his or her *Miranda* rights. Absent *Miranda* warnings, any subsequent statements by a suspect in custody are inadmissible. *Berkemer v. McCarty*, 468 U.S. 420, 429 (1984) ("[I]f the police take a suspect into custody and then ask him questions without informing him of the rights enumerated [in *Miranda*], his responses cannot be introduced into evidence to establish his guilt.").

At the outset, therefore, *Miranda* custody analysis demands a review of the "circumstances surrounding the interrogation" to determine whether or not there was a "restraint on freedom of movement." *Keohane*, 516 U.S. at 112. Because school children are not free to come and go as they please, their interrogation in a school building at the hands of the police necessarily involves a "restraint on freedom of movement."

Furthermore, when determining custody, courts are required to consider all the circumstances that would weigh on a reasonable person's belief that he or she is not free to leave. Beginning from this starting point, the juvenile status of a suspect, particularly when the interrogation is conducted in a middle school after pulling the youth out of a classroom, is necessarily part of the totality of circumstances to be considered in determining whether a reasonable person in the suspect's circumstances would have felt free to terminate the interrogation.

Prior to this Court's ruling in *Yarborough v. Alvarado* every jurisdiction to address the question of whether juvenile status may be considered in the *Miranda* custody determination held that it could be. Pet. Cert. at 9. Contrary to the view of the North Carolina Supreme Court, *Alvarado* does not compel the decision below. First, *Alvarado* was a habeas proceeding that gave heightened deference to the state court conviction. Thus, the Court did not reach the merits of the issue of whether a court should consider the juvenile status of a youth when conducting the custody inquiry for *Miranda*. This case, by contrast, arises on direct appeal and does not trigger the deferential standard of review involved in *Alvarado*. Accordingly, it squarely presents for the first time the question of age as a factor in the totality of circumstance *Miranda* custody analysis. Second, the factual record that informed the Court's judgment in *Alvarado* was very different than the factual record in this case. The defendant in *Alvarado* was just shy of his

eighteenth birthday when questioned by the police; the petitioner here was only thirteen years old. In addition, the defendant in *Alvarado* went to the police station voluntarily and was accompanied by his parents; the petitioner here was away from his parents when he was removed from his classroom by an armed school resource officer.

I. AGE IS AN APPROPRIATE FACTOR TO CONSIDER IN DETERMINING CUSTODY UNDER *MIRANDA V. ARIZONA*.

The question presented by this case is not a new one. In applying *Miranda*, numerous lower courts have held that the age of a juvenile is an appropriate factor to consider in determining whether police interrogation is custodial or not. *See A.M. v. Butler*, 360 F.3d 787, 799 (7th Cir. 2004) (age of a juvenile is an important factor in the totality of circumstances evaluation); *State v. Doe*, 948 P.2d 166, 173 (Idaho App. Ct. 1997) ("[T]he objective test for determining whether an adult was in custody for purposes of *Miranda* . . . applies also to juvenile interrogations, but with additional elements that bear upon a child's perceptions and vulnerability, including the child's age, maturity and experience with law enforcement and the presence of a parent or other supportive adult."); *In re Andre M.*, 88 P.3d 552, 555 (Ariz. 2004) ("To determine whether a [juvenile] confession is voluntary, we consider the totality of the circumstances. . . . [A] number of factors are relevant to the totality of the circumstances analysis, including age, education, and intelligence . . . .").

The concern expressed in *Alvarado* that the police should not be left to guess at a suspect's age "before deciding how they may interrogate [a] suspect," 541 U.S. at 667, has little relevance to the facts of this case or school interrogations in general. When police officers investigate young children for criminal violations by interrogating them at a school, they know that the suspect is most likely a minor. Any uncertainty they may have can quickly be removed by asking the student or checking with school officials.

The relationship of children to adults in general, and authority figures in particular, is not the same as the relationship of one adult to another. Even in circumstances where an adult may understand that he is free to terminate a police interrogation, it defies common sense to suggest that the reactions of a child, no matter how young, are likely to be the same. A child's youth may not be sufficient to turn every police questioning into a custodial interrogation, but it should not be deemed legally irrelevant either. What if the child is only five years old and subject to arrest for a throwing a tantrum? *See* discussion *infra* p. 20 (five year-old forcibly pinned down and arrested by police in St. Petersburg, Florida after throwing a tantrum in school).

II. COURTS SHOULD ALSO CONSIDER WHETHER OR NOT AN INTERROGATION TOOK PLACE AT A SCHOOL IN THE *MIRANDA* CUSTODY ANALYSIS.

In addition to age, courts can and should consider the unique nature of the school setting in

determining whether or not a law enforcement interrogation is custodial for *Miranda* purposes. As the dissent noted below, "[u]nlike a university campus, where people may freely come and go, middle school students are not free to leave the campus without permission." *In re J.D.B.*, 686 S.E.2d 135, 143 (N.C. 2009) (Brady, J. dissenting). To the contrary, "[s]tudents at middle schools are instructed to obey the requests and directives of adults. The Student Handbook at Smith Middle School, which J.D.B. attended, instructs students to '[f]ollow directions of all teachers/adults the first time they are given.'" *Id.* Here, petitioner was told by the assistant principal to "do the right thing" when questioned by the police "because the truth always comes out." *See supra* p.2. Had he refused to answer the police officer's question after receiving this instruction from the assistant principal, petitioner would arguably have been subject to arrest on a separate charge under N.C.G.S. § 14-288.4 (which makes disturbing the peace or order of a school a misdemeanor offense).[2]

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[2] N.C.G.S. § 14-288.4(a)(6) provides that a person who willfully engages in disorderly conduct by "[d]isrupt[ing], disturbing[ing] or interfere[ing] with the teaching of students . . . or disturb[ing] the peace, order or discipline at any . . . educational institution" is "guilty of a Class 2 misdemeanor." N.C.G.S. § 14-288.4 (a) (6) (2007). At least 14 other states have equivalent statutes that criminalize offenses similar to "disrupting public school." ARIZ. REV. STAT. ANN. § 13-2911 (2002); AL. EDUC. CODE § 32210 (West 2002); GA. CODE ANN. § 20-2-1181 (2004); IOWA CODE § 718.3 (2003); MASS. GEN. LAWS ch.272, § 40 (2009); MD. CODE ANN., EDUC. § 26-101 (2002); MONT. CODE ANN. § 20-1-206 (1971); NEV. REV. STAT. § 392.910 (2003); N.D. CENT. CODE § 15.1-06-16 (1999); R.I. GEN.

A youth's fear of arrest for refusing to obey the directives of an authority figure at school would not be unreasonable given the frequency with which school-based arrests for such refusals and other minor misconduct are documented in the mainstream media. *See, e.g.*, Maureen Downey, Op-Ed, *Back Away From Balloon*, ATLANTA J. & CONST., June 1, 2009, at A9 (describing arrest and jailing of two students for throwing water balloons during a senior prank); Sharif Durhams, *Tosa East Student Arrested, Fined After Repeated Texting*, MILWAUKEE J. SENTINEL, Feb. 18, 2009, at B8 (documenting arrest of 14-year old girl for text-messaging); Denise Buffa, *Public Enemy No. 1 --- City Sued for Cuffing 4-Yr.-Old Napnixers*, N.Y. POST, Mar. 10, 2008, at 15 (reporting on two four-year olds who were handcuffed by school safety officer for refusing to take a nap at school); *see also* Luanne Austin, *'Zero Tolerance' An Excuse for Lack of Judgment,* DAILY NEWS RECORD, Apr. 28, 2009 (reporting arrest of high school student for destruction of government property after jumping up to tap a hallway clock); Colin Gustafson, *Board May Review Cop at GHS*, GREENWICH TIME, Jul. 27, 2008, at A1 (describing police officer's use of a Taser to shock a student for refusing to report to the assistant principal's office); Ann N. Simmons, *Scuffle Exposes a Racial Rift*, L.A. TIMES, Oct. 11, 2007, at B1 (documenting arrest of a 16-year old girl after dropping a piece of birthday cake and

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LAWS § 11-11-1 (2007); S.C. CODE ANN. § 16-17-420 (1972); S.D. CODIFIED LAWS § 13-32-6 (1982); TEX. EDUC. CODE ANN. § 37.123 (2006); UTAH CODE ANN. § 76-9-103 (1973).

failing to clean it up to the satisfaction of a police officer stationed at school).

In contrast to the ruling below, many lower courts have therefore held that police interrogations at school are custodial for *Miranda* purposes and suppressed incriminating statements made without *Miranda* warnings. *See, e.g.*, *In re Interest of C.H.*, 763 N.W.2d 708, 713 (Neb. 2009) (suppressing juvenile's statement and holding juvenile's interrogation in school by police was custodial even though he had unrestrained freedom of movement during the questioning); *In re G.S.P.*, 610 N.W.2d 651, 658 (Minn. Ct. App. 2000) (suppressing juvenile's statement and finding twelve-year-old "in custody" where a uniformed police officer summoned a juvenile from the classroom to the principal's office and actively participated in the questioning; the circumstances suggested the coercive influence associated with a formal arrest); *In re M.H.*, 851 So. 2d 233, 234 (Fla. Ct. App. 2003) (suppressing a student's response to school police officer's single question where the officer failed to give *Miranda* warnings).

In a case with nearly identical facts to this one, the Oregon Court of Appeals decided that a junior high school student was in custody for *Miranda* purposes when he made incriminating statements to an armed police officer after being summoned to the principal's office and questioned about an off-campus burglary. *Matter of Killitz*, 651 P.2d 1382 (Or. Ct. App. 1982). The Oregon court emphasized that the defendant "was in school during regular hours, where his movements were controlled to a great extent by

school personnel." *Id*. The court further noted that the "defendant cannot be said to have come voluntarily to the place of questioning," because he would likely have been subjected to disciplinary actions had he refused the principal's command to come to his office. *Id*. Based upon all these factors, the court found that the juvenile had been subjected to a custodial interrogation, precluding the admission of his incriminating statements in subsequent criminal proceedings because he had not been given *Miranda* warnings. *Id*.

The Oregon decision in *Killitz* is representative of the approach followed by many courts when they assess whether an interview is custodial for *Miranda* purposes. The controlling factors typically are that the student was compelled by school authorities, acting at the behest of the police, to leave his or her classroom during school hours to speak with the police in a restrictive, private location at the school without the benefit of the student's parents or an attorney. For example, in a recent decision directly addressing the issue of school as a factor in custody analysis under *Miranda*, the Alaska Court of Appeals decided that the school environment operates as an independent restraint on children subject to police questioning. *Kalmakoff v. State*, 199 P.3d 1188 (Ala. Ct. App. 2009). Quoting from *State v. Doe,* 948 P.2d 166, 173-74 (Idaho Ct. App. 1997), the Alaska court observed: "[I]t is unlikely that the environment of a principal's office or a faculty room is considered by most children to be a familiar or comfortable setting, for students normally report to these

locations for disciplinary reasons . . . . It is also unlikely that any ten-year-old would feel free to simply leave the administrative area of the school after having been summoned there by school authorities for a police interview." *Kalmakoff v. State*, 199 P.3d at 1198-99. For these reasons, the court held, a child "would have reasonably believed that his appearance at the designated room and his submission to the questioning was compulsory and that he was subject to restraint which, from such a child's perspective, was the effective equivalent of arrest." *Id.*

State v. Doe, the Idaho case relied on by the Alaska court, involved a ten-year-old boy who was directed to leave his fifth-grade classroom and report to a room where he had been disciplined previously. While there, he was interrogated by a school police officer. Although the boy was ultimately informed that he was free to go, this did not occur until after the boy confessed, just as petitioner in this case was not informed that he was free to go until after he confessed to police officers. The Idaho court concluded that, under these circumstances, the boy was in custody and was entitled to *Miranda* warnings. *See also In re Welfare of R.J.E.*, 642 N.W.2d 708, 709-10 (Minn. 2002) (court affirmed the suppression of a confession made by a high school student who was interrogated in the school office by a uniformed police officer acting as a school "liaison" officer); *In re G.S.P.*, 610 N.W.2d 651, 657-58 (Minn. Ct. App. 2000) (court suppressed confession of a twelve-year-old who was removed from class by the assistant principal and the uniformed school liaison officer, taken to the

principal's office and told he "had no choice but to answer the questions," of the police officer).

To be clear, *amici* do not suggest that school officials, as distinct from law enforcement officers, should be required to provide *Miranda* warnings every time a student is questioned about school misconduct in the principal's office. *Cf. New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (searches conducted by school officials must be reasonable but they do not require a warrant and probable cause). But where, as here, outside police officers come to the school to question a youth about an off-campus crime, those officers should not be permitted to take advantage of the school environment to coerce statements that they would not be able to (and indeed in this case were not able to) obtain through questioning away from school grounds.

A. POLICE OFFICERS ARE NOW A REGULAR PRESENCE IN PUBLIC SCHOOLS.

In the last fifteen years, the number of law enforcement officers in schools has increased dramatically. In 1998, immediately following the Columbine disaster, President Bill Clinton ordered the release of $70 million in federal funding for school-based police officers. Am. Civil Liberties Union et al., HARD LESSONS: SCHOOL RESOURCE OFFICER PROGRAMS AND SCHOOL-BASED ARRESTS IN THREE CONNECTICUT TOWNS 14 (2008) [hereinafter ACLU HARD LESSONS], available at http://www.aclu.org/files/pdfs/racialjustice/hardlessons_november2008.pdf. The U.S. Justice Department's COPS in Schools (CIS) grant program was created the same year to help local

communities pay for new school police officers. *Id*. In 2006, there were over 20,000 sworn police officers assigned to schools. Ben Brown, *Understanding and Assessing School Police Officers: A Conceptual and Methodological Comment*, J. OF CRIM. JUST., Vol. 34, 591-604 (2006). And according to one study, sixty percent of high school teachers reported armed police officers stationed on school grounds. Paul Hirschfield, *The Uneven Spread of School Criminalisation in the United States*, 74 CRIM. JUST. MATTERS 28, 28 (2008). As recently as 2006, the National Association of School Resource Officers stated "that school-based policing is 'the fastest growing area of law enforcement." Paul Holland, *Schooling Miranda: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 LOY. L. REV. 39, 74 (2006). Although these officers are present in an educational environment, their primary duty is criminal law enforcement. See *In re R.H.*, 791 A.2d 331, 334 (Penn. 2002) (deciding that school police are "law enforcement"). Not surprisingly, therefore, the deployment of law enforcement in schools has led to a dramatic rise in youth arrests. *See e.g.*, Children's Def. Fund, AMERICA'S CRADLE TO PRISON PIPELINE 125 (2007) (noting tripling in number of school-based arrests in Miami-Dade County from 1999-2001); The Advancement Project, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 15 (Mar. 2005) [hereinafter EDUCATION ON LOCKDOWN] (documenting the growth in the number of school-based arrests in select jurisdictions[3]); Clayton

[3] For example, between 2000 and 2004, Denver Public

County Pub. Sch. [GA], EXECUTIVE REPORT OF THE BLUE RIBBON COMMISSION ON SCHOOL DISCIPLINE 47 (Jan. 2007) (noting increase in the number of school-based referrals to the juvenile court from 90 in 1996 to 1,200 in 2004, mostly for "minor offenses" that "have traditionally been handled by the school and are not deemed the type of matters appropriate for juvenile court").

B. DISCIPLINE PROBLEMS THAT WERE PREVIOUSLY HANDLED BY SCHOOL OFFICIALS ARE NOW INCREASINGLY TREATED AS LAW ENFORCEMENT ISSUES THAT SUBJECT STUDENTS TO ARREST.

Furthermore, a relatively high proportion of youth who are arrested are arrested in school. *See* Florida Dep't of Juvenile Justice, DELINQUENCY IN FLORIDA'S SCHOOLS: A FIVE YEAR STUDY 1, 4 (2009) (noting that in the 2004-05 school year, almost one in five youth sent to the juvenile justice system were from school referrals; in one county, in 2008-09, the rate was 38 percent); *see also* PENNSYLVANIA STATE SCHOOL SAFETY ANNUAL REPORT 2008-09 (documenting 11,703 arrests on primary and secondary school grounds during that year statewide). During the 2007-2008 fiscal year, the crime of "disturbing schools" was the single most frequent offense resulting in a referral to the juvenile justice system in South Carolina, representing twelve

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Schools experienced a seventy-one percent increase in the number of student referrals to law enforcement. Most of these referrals were for non-violent behavior. EDUCATION ON LOCKDOWN at 8.

percent of all cases referred to the state prosecutor. S.C. Dep't of Juvenile Justice, ANNUAL STATISTICAL REPORT 2007-2008 13 (2008), *available at* http://www.state.sc.us/djj/pdfs/2008-Statistical-Report.pdf.

The instant case involves the police arriving at the school to question a student for an outside crime. However, many schools have policies that mandate that school officials call the police to the school to deal with common misbehavior. These so-called "zero tolerance" policies create an environment where children may be sent to jail for a number school rule violations.[4] See *Antoine v. Winner Sch. Dist.*, No. 06-3007 (D.S.D. Compl. filed Mar. 28, 2006) (describing allegations of policy in which middle

[4] Zero tolerance stands for the proposition that certain behaviors trigger severe, mandatory responses, almost always beginning with the removal of the child from the classroom and sometime extending to referral to outside law enforcement for on-campus misconduct. Zero tolerance schools impose suspensions, expulsions and arrest for infractions across the spectrum – from tardiness to weapons possession. Between 79 and 94 percent of American public schools now have zero tolerance policies. N.Y. Civil Liberties Union et al., SAFETY WITH DIGNITY: ALTERNATIVES TO THE OVER POLICING OF SCHOOLS 9 (2009), *available at* http://www.nyclu.org/files/Safety_with_Dignity.pdf. Zero tolerance policies are ineffective as a corrective measure, implemented in discriminatory manner. *Id.*; *see also* Heath Urie, *Boulder DA: Police Should Step Back From School Discipline*, BOULDER DAILY CAMERA (Dec. 13, 2010), http://www.dailycamera.com/privateschoolsa-m/ci_16851028 (describing position of County District Attorney—who also served as School Board President during the 1999 Columbine murders—that zero tolerance policies are bogging down courts and disrupting the education of young people).

school and high school principals referred students accused of pushing or hitting to police for arrest). The result is yet more interaction between young students and police officers in the school environment and additional evidence for children that they have no option but to comply with adult directives while at school or risk arrest.

Whether the police are already in the school as resource officers, or brought into the school as a result of zero tolerance policies, or arrive at the school independently to conduct an investigation, their increased contact with students can lead to a student's arrest for harmless, non-criminal behavior. For example, police arrested a thirteen-year-old Florida student for repeatedly passing gas and turning off classmates' computers. Zach Smith, *Report: Martin County Student Arrested for Passing Gas, Turning Off Classmate's Computer*, TCPALM (Florida), Nov. 21, 2008, http://www.tcpalm.com/news/2008/nov/21/report-martin-county-student-arrested-passing-gas-/. Police arrested a fourteen-year-old student in Milwaukee for texting. Sharif Durhams, *Tosa East Student Arrested, Fined After Repeated Texting,* MILWAUKEE J. SENTINEL, Feb. 18, 2009, at B8. And Shaquanda Cotton, a 14-year-old high school freshman in Paris, Texas, was arrested for shoving a hall monitor. She was convicted in March 2006 of "assault on a public servant" and sentenced to a prison term of up to seven years. Bob Herbert, Op-Ed, *6-Year-Olds Under Arrest*, N.Y. TIMES, Apr. 9, 2007, at A17.

Even very young children are not immune from contact with the police in their schools. Children are being diverted from schools to the criminal justice system at an earlier and earlier age because of minor misconduct. Perhaps the most widely-reported example of the criminalization of routine school misconduct is the story of five-year-old Ja'eisha Scott. In 2005, video of Ja'eisha being forcibly pinned down and arrested by police in St. Petersburg, Florida for throwing a temper tantrum aired on the evening news nationwide. Fla. State Conference NAACP et al., ARRESTING DEVELOPMENT: ADDRESSING THE SCHOOL DISCIPLINE CRISIS IN FLORIDA 15 (2006), *available at* http://www.advancementproject.org/sites/default/files/full%20report.pdf. Prior to her arrest by the police, Ja'eisha was counting jellybeans in her math class as part of an exercise. When the teacher ended the game, she threw a tantrum. *Id.* at 14. Though she eventually calmed down in a school administrator's office, St. Petersburg police arrived at the school and handcuffed and arrested her. *Id.* Police attempted, but were unable to charge her for assault and battery. Next they tried to have her institutionalized without success. Finally, police tried to have the child removed from her mother's home by Child Protective Services. *Id.*

While the arrest of an elementary school student is extreme, it does not appear that Ja'eisha's experience was unique. Statistics reported by the Advancement Project reveal that that Ja'eisha was not the only elementary school student arrested in the county that year. During

the 2004-05 school year, there were 17 arrests of Pinellas County elementary school students. *Id.* at 21. Newspapers around the country have covered the arrest of very young students for non-criminal behavior by local police or school safety agents. For instance, two four-year-olds were handcuffed by school safety officers for refusing to take a nap. Denise Buffa, *Public Enemy No. 1 --- City Sued for Cuffing 4-Yr.-Old Napnixers*, N.Y. POST, Mar. 10, 2008, at 15.

The increased number of children arrested at school has not gone unnoticed. Thomas Perez, the Assistant Attorney General for Civil Rights in the United States Department of Justice, recently remarked that "in schools across the country, we are seeing more and more students disrupted on their way to a diploma by increasingly harsh discipline practices for increasingly minor infractions."[5] Juvenile and family courts are also expressing concern about the increased criminalization of student misconduct.

The National Council of Family and Juvenile Court Judges highlighted the problem of schools improperly pushing students out into the court system in a 2005 report outlining the essential elements of effective practice in juvenile delinquency cases. David E. Grossmann &

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[5] Thomas E. Perez, Ass't Att'y Gen. for Civ. Rights, U.S. Dep't of Justice, Remarks as Prepared for Delivery by Assistant Attorney General for Civil Rights Thomas E. Perez at the Civil Rights and School Discipline: Addressing Disparities to Ensure Equal Educational Opportunities Conference (Sept. 27, 2010), at http://www.justice.gov/crt/speeches/perez_eosconf_speech.php.

Maurice Portley, NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, JUVENILE DELINQUENCY GUIDELINES: IMPROVING COURT PRACTICE IN DELINQUENCY CASES 150-51 (2005). Their response has been a call for judges to "commit to keeping school misbehavior and truancy out of the formal juvenile delinquency court." *Id*. at 151.

C. POLICE INTERACTIONS WITH STUDENTS IN SCHOOL REQUIRE A DIFFERENT CONSTITUTIONAL BALANCE THAN THE ENFORCEMENT OF SCHOOL DISCIPLINARY RULES BY SCHOOL OFFICIALS.

With police-student encounters increasing, and the role of the police in schools undefined, the rights of students are at risk. For example, the New York City Police Department (NYPD) maintains a controversial program of unannounced pre-dawn installations of mobile security checkpoints at schools. Am. Civil Liberties Union et al., CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY SCHOOLS 6, 9 (2007) *available at* http://www.aclu.org/files/pdfs/racialjustice/overpolicingschools_20070318.pdf. Pursuant to this program, on the morning of November 17, 2006, the NYPD arrived at Wadleigh Public High School in Manhattan with metal detectors. *Id*. at 6. Police detained and arrested a number of students for non-criminal violations of school rules, such as having a cell phone. *Id*. Without alerting school administrators or his parents, officers arrested the student government association vice president while he stood in front

of the school waiting for his mother to take his cell phone from him. The student was transported to the police station but the charges ultimately dropped. *Id.*

In addition to questionable arrests, police have used force on students causing injury. For example, in 2007, a student running late to class was stopped by school officials. *Id.* at 14. When he protested receiving a detention, a school safety officer slammed his face into a brick doorframe, sprayed mace in his eyes and put the student in handcuffs. *Id.* The student ultimately spent 28 hours in police custody and two hours handcuffed to a hospital chair while receiving treatment for a laceration. The student was suspended and was criminally charged. *Id.*

Students of color are at an even greater risk of arrest at school than their white peers. A study of Denver Public Schools between 2000 and 2004 found that black and Latino students are 70 percent more likely to be disciplined (suspended, expelled, or ticketed) than their white peers. EDUCATION ON LOCKDOWN at 8. In Florida, black youth only represent twenty-two percent of the overall juvenile population but make up forty-seven percent of school-based delinquency referrals. Mark A. Greenwald, FLORIDA DEP'T OF JUVENILE JUSTICE, DELINQUENCY IN FLORIDA'S SCHOOLS: A FOUR YEAR STUDY 5 (2009). And a review of school police practices in Hartford, Connecticut revealed that black and Latino students account for twenty-four percent of student body but make up sixty-three percent of school based arrests. ACLU HARD LESSONS at 35-43. The report also found that students of color

were more likely to be arrested at school than white students committing the same infractions. *Id.*

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Police officers have a proper role to play in preserving public safety in our schools and elsewhere. But as more and more police are stationed in schools, and as more and more disciplinary offenses now lead to criminal prosecution, it is also important for this Court to reaffirm that "students do not shed their constitutional rights at the schoolhouse gate." *Tinker v. Des Moines*, 393 U.S. 503, 506. In this context, that simple but fundamental principle means that the age of the child and the reality of the school setting should both be considered in deciding whether *Miranda* warnings are required. By failing to do so, the decision below deprived the petitioner of his *Miranda* rights.

CONCLUSION

For the reasons stated herein, the judgment should be reversed.

Respectfully submitted,

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