12-22-2011

Amicus Curiae Brief on Behalf of the Fred T. Korematsu Center for Law and Equality, in Support of Neither Party

Robert S. Chang
Seattle University School of Law

Lorraine K. Bannai
Seattle University School of Law

Robert C. Boruchowitz
Seattle University School of Law

David A. Perez

No. 86203-9

In the Washington State Supreme Court

STATE OF WASHINGTON

Respondent,

v.

JAMAR MENEESE,

Petitioner.

Amicus Curiae Brief on Behalf of the Fred T. Korematsu Center for Law and Equality, in Support of Neither Party.

Robert C. Chang
WSBA No. 44083

Lorraine K. Bannai,
WSBA No. 20449

Robert C. Boruchowitz
WSBA No. 4563

David A. Perez
WSBA No. 43959

901 12th Avenue
Seattle, WA 98122
Tel: (206) 398-4133
Fax: (206) 398-4261
perezd@seattleu.edu

Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

FEDERAL CASES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

IDENTITY AND INTEREST OF AMICUS CURIAE

The Fred T. Korematsu Center for Law and Equality ("Korematsu Center") is a non-profit organization based at Seattle University School of Law that works to advance justice through research, advocacy, and education. The Korematsu Center is dedicated to advancing the legacy of Fred Korematsu, who defied the military orders during World War II that ultimately led to the incarceration of 110,000 Japanese Americans. He took his challenge to the United States Supreme Court, which upheld his conviction in 1944 on the ground that the removal of Japanese Americans was justified by "military necessity." Fred Korematsu went on to successfully vacate his conviction and to champion the cause of civil liberties and civil rights for all people. The Korematsu Center, inspired by his example, works to advance his legacy by promoting social justice for all. Accordingly, the Korematsu Center has a special interest in defending constitutional values for people of all ages, including students and youth. The Korematsu Center does not, in this brief or otherwise, represent the official views of Seattle University.

ARGUMENT

I. Both Parties and the Court Below Misconstrue the "School Official" Exception by Conflating Police Officers with School Officials. Police Officers Can *Never* Be Considered School Officials Under the Fourth Amendment.

In their respective briefs, both parties rely on the faulty premise that police officers stationed at schools may qualify as "school officials" for Fourth Amendment purposes.[1] Working from this assumption, but never questioning it, the parties simply dispute whether the police officer in this case qualified as a school official *at the time of the search*. The parties' flawed assumption, however, misstates the threshold issue that the Court should consider first: that a police officer can *never* qualify as a school official under any circumstance.

A. The "School Official" Exception Is Based on a Sharp Distinction Between Law Enforcement and School Officials. The Exception Was Intended to Apply Only to Teachers and Principals, Not Police Officers.

The search in this case was conducted by a police officer, not a school official, and therefore cannot fall within the "school official" exception, even if the search took place at a school. The ability of police officers to search an individual is subject to constitutional requirements.

[1] The Fourth Amendment states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. const., amend. IV.

The Fourth Amendment "generally requires a law enforcement officer to have probable cause for conducting a search." Safford Unified Sch. Dist. #1 v. Redding, __ U.S. __, 129 S. Ct. 2633, 2640, 174 L. Ed. 2d 354 (2009). Similarly, the "authority of law" requirement in article I, section 7, of the State constitution requires officers to have a valid warrant, "subject to a few jealously guarded exceptions." State v. Afana, 169 Wn.2d 169, 177-78, 233 P.3d 879 (2010). "It is always the State's burden to establish that such an exception applies." Id.

In New Jersey v. T.L.O., the Supreme Court recognized that the school setting "requires some modification of the level of suspicion . . . needed to justify a search." 469 U.S. 325, 340, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985). The Court reasoned that "requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules . . . would unduly interfere with the . . . informal disciplinary procedures needed in the schools." Id. The Court held that for searches by school officials "a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops shorts of probable cause. Id. at 341. The key issue in this case is the scope of the school official exception.

In crafting the exception, the Court made clear that the phrase "school official" did not include law enforcement:

> We here consider only searches carried out by school authorities acting alone and on their own authority. This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement.

Id. at 342 n.7. This clarification demonstrates that the Court never intended for the term "school official" to apply to law enforcement.[2] Justice Powell's concurrence reiterated that the Court's decision was based on the significant differences between teachers and police officers:

> The special relationship between teacher and student also distinguishes the setting within which schoolchildren operate. Law enforcement officers function as adversaries of criminal suspects. These officers have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial. Rarely does this type of adversarial relationship exist between [teachers] and [their] pupils. Instead, there is a commonality of interests between teachers and their pupils. . . . Unlike police officers, school authorities have no law enforcement responsibility or indeed any obligation to be familiar with the criminal laws.

Id. at 349-50 (Powell, J., concurring). In the present case, a police officer stationed at a school, but nevertheless charged with the adversarial responsibility to investigate criminal activity and arrest those who violate our laws, conducted the search. The "special relationship" between teacher and student, which the Court found crucial in crafting its exception, does

[2] In fact, New Jersey argued in its brief in T.L.O. that "the history of the Fourth Amendment indicates that the Amendment was intended to regulate only searches and seizures carried out by law enforcement officers." Id. at 334.

not exist between police officer and student. Listing the officer as a member of the school staff, giving him office space in the building, and letting him participate in staff meetings, does not alter his status as law enforcement.[3] Concluding otherwise would elevate form over substance.

Washington State's own school exception rule, which pre-dates T.L.O., also relied upon a clear distinction between officers and school officials. In State v. McKinnon, this Court considered whether evidence seized by a high school principal was properly admitted at trial. 88 Wn. 2d 75, 558 P.2d 781 (1977). Foreshadowing the logic that the U.S. Supreme Court would employ eight years later in T.L.O., this Court wrote:

> The high school principal is not a law enforcement officer. His job does not concern the discovery and prevention of crime. His duty as the chief administrator of the high school includes a primary duty of maintaining order and discipline in the school. . . . [H]e should not be held to the same probable cause standard as law enforcement officers. . . . [F]or us to hold school officials to the standard of probable cause required of law enforcement officials would create an unreasonable burden upon these school officials.

Id. at 81. Like the reasoning ultimately adopted in T.L.O., this Court's

[3] Justice Blackmun's concurrence strongly echoed the Court's distinction between officers and school officials: "A teacher has neither the training nor the day-to-day experience in the complexities of probable cause that a law enforcement officer possesses, and is ill-equipped to make a quick judgment about the existence of probable cause. The time required for a teacher to ask the questions or make the observations that are necessary to turn reasonable grounds into probable cause is time during which the teacher, and other students, are diverted from the essential task of education. A teacher's focus is, and should be, on teaching and helping students, rather than on developing evidence against a particular troublemaker." T.L.O., 469 U.S. at 353 (Blackmun, J., concurring).

reasoning in McKinnon is incoherent if police officers may be considered school officials. This Court's holding in McKinnon was premised on a sharp distinction that the parties effectively erase.[4] Post-T.L.O. cases in Washington have universally applied the exception to searches conducted by teachers and principals. See State v. B.A.S., 103 Wn. App. 549, 13 P.3d 244 (2000) (teacher);[5] State v. Slattery, 56 Wn. App. 820, 787 P.2d 932 (1990) (principal); State v. Sweeney, 56 Wn. App. 42, 782 P.2d 562 (1989); State v. Brooks, 43 Wn. App. 560, 718 P.2d 837 (1986) (vice principal). Notably neither party cites to a *single* Washington case that has applied the exception to police officers.

Maintaining the distinction between school officials and law enforcement also makes practical sense. Constitutional protections against unlawful searches by police officers have developed because the consequences are high: arrest, detention, and the exposure to criminal

---

[4] In fact, the Court's subsequent discussion about whether there existed "joint action" demonstrates how unworkable the school official exception would be if it included police officers. See McKinnon, 88 Wn. at 82 ("Although joint action by a law enforcement officer and a private person may constitute police action, joint action was not present in these cases."). The joint action inquiry is endlessly circular if a police officer can qualify as a school official: any action by a school resource officer would constitute "joint action" because SROs would be considered both police and school officials. Surely, if the reasonable suspicion standard does not apply when an officer is directing a teacher or principal to conduct a search, it is not applicable where that same police officer conducts the search himself.

[5] Although the Court in B.A.S. states that the "school attendance officer," David Halford, conducted the search, 103 Wn.App. at 552, Mr. Halford is not a police officer. Mr. Halford began working at the school as a teacher, and is currently the school's principal. See "Staff Page for David Halford," *available at* http://swift.auburn.wednet.edu/arhs/dhalfordjr/index.php (last visited Dec. 20, 2011).

sanctions. But in contrast, school administrators can search students based on a lower standard (reasonable suspicion) because students have diminished civil liberties while in the school setting and because the consequences for violating school rules are lower. For instance, students have no right to counsel or right to remain silent when summoned to the principal's office. Invoking either of these rights when questioned by a principal or teacher can lead to suspension. And, more specific to this case, students have diminished search and seizure protections when teachers or principals search their property. See T.L.O., 469 U.S. at 340. But courts have accepted diminished student liberties vis-à-vis school officials because the sanctions available to teachers and principals – detention and suspension – are not as severe as criminal sanctions. The protections are low because the stakes are low: teachers cannot detain students overnight, principals cannot handcuff students, and neither can arrest students – only police officers can do those things.

The school official exception, as originally conceived by this Court and the U.S. Supreme Court, never contemplated a scenario in which a uniformed officer could invoke it to circumvent the Fourth Amendment. It was an exception narrowly tailored to the unique roles that teachers and principals play in our public education system. This Court should make clear that police officers are not school officials, even when they are

stationed at a school.

B. Applying the School Official Exception to Police Would Concentrate Too Much Power into the Hands of Law Enforcement and Allow the Exception to Swallow the Rule.

Just as students do not shed their constitutional rights at the schoolhouse gates, Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503, 506, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969), police officers do not shed their badges at the schoolhouse gates. Nevertheless, the State urges this Court to expand the school official exception to include law enforcement officers who are stationed at schools. State's Br. at 9-16. This shift is deceptively profound: in one fell-swoop the State eliminates the core distinction that separates the exception from the rule.

The school official exception, as originally conceived, constituted a small concession of students' Fourth Amendment rights in return for a greater guarantee of safety within schools. T.L.O., 469 U.S. at 340. But the State's broad reading warps this once narrow concession into a wholesale waiver, amputating the search and seizure clause from a student's Bill of Rights. Under the State's new rule, police officers can skirt the probable cause requirement of the Fourth Amendment so long as they are stationed at a school. In effect, the State's argument converts the narrow exception into a glaring loophole.

Worse still, the State's tortured logic would create a constitutional

chimera: one part law enforcement, one part school official. This new hybrid would retain the authority granted to all uniformed police officers, along with the ability to conduct searches like school teachers, unencumbered by traditional procedural requirements (such as probable cause). Too much power would be concentrated into the hands of police officers stationed at schools. Consider, for instance, an analogous scenario whereby school teachers, employing the reasonable suspicion standard, were given the authority to handcuff, arrest, and detain students overnight – effectively transforming them into "law enforcement teachers." The latter scenario is essentially the same legal construct that the State advances in its brief: a state official with police powers who has the authority to search students under a lower constitutional standard.

Additionally, the State's new legal construct would violate the text and structure of the Fourth Amendment. The Fourth Amendment's underlying command is that searches be reasonable. See T.L.O., 469 U.S. at 337. The first clause states the amendment's purpose ("The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated"), while the second clause defines the word "unreasonable" ("and no Warrants shall issue but upon probable cause"). U.S. const., amend. IV. After T.L.O., whether a particular search is reasonable depends on who conducts the search. For a law enforcement

search, the text and structure of the Fourth Amendment clearly states that a warrant or probable cause is required. A somewhat lower standard ("reasonable suspicion") applies to teachers. Conflating the two would effectively rewrite the Fourth Amendment.

C. Limiting the School Official Exception to Teachers and Principals, Rather than Police Officers, Promotes School Safety While Safeguarding Constitutional Values.

The public interest in protecting schools is important, and cannot be overlooked. But this interest, however compelling, is adequately protected by the original exception crafted by the Supreme Court to allow *teachers and school administrators* to search students based only on reasonable suspicion. See T.L.O., 469 U.S. at 342-43 ("This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren.").

The frightful scenario the State presents, where school discipline would grind to a halt, and where students would remain in limbo and miss class while awaiting a search warrant, is a classic straw man. State Br. at 10-11. First, it rests on the unfounded premise that police officers are schools officials. Second, limiting the school official exception to teachers and principals would not do away with the exception altogether. Requiring officers to obtain a warrant or show probable cause before conducting a

search would not burden teachers and principals, who would still be allowed to conduct searches under the lower standard of "reasonable suspicion." The specter of teachers and administrators standing powerless to discipline any student who invokes the Fourth Amendment is a cynical attempt to scare this Court into abandoning its cardinal principles.[6]

Notably, the State has cited no evidence – and there is none in the record – that shows how school safety would suffer if police officers abided by constitutional limitations. There is no reason to conclude that the exception ought to be expanded to include police officers.[7]

One challenging aspect of this Court's duty is to be continuously aware and alert to the ways in which expediency and convenience tend to crowd out our constitutional values in ways that are gradual and often imperceptible. While it may seem convenient to sacrifice student liberty to simplify and streamline police searches within schools, that convenience comes at too great a cost. It diminishes students' respect for the education

---

[6] The State argues that because students are compelled to attend school their safety interests should override their constitutional interests. The State is incorrect. Precisely because school attendance is compulsory is it even more urgent to ensure that procedural protections are firmly in place to guard against whimsical violations of students' rights. Otherwise, students who cannot attend private schools effectively would be compelled to waive their Fourth Amendment rights in order to go to school – a rather Faustian Bargain.

[7] As discussed above, other constitutional exceptions apply only to teachers and principals, rather than officers, and with good reason. For instance, students cannot invoke their right against self-incrimination when principals or teachers interrogate them. If they do not answer, they face detention or suspension. But the same logic that the State employs to water down the search and seizure clause can just as easily apply to the Fifth Amendment. In this sense, the State's troubling expansion of what constitutes a school official is not so much a slippery slope as it is a dangerous cliff.

system, facilitates alienation and mistrust between students and school officials, and disrupts the learning environment.[8] "That [public schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 637, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943). In short, the State's well-intentioned attempt to promote school safety would instead sacrifice student liberty and foster student cynicism.

Amicus strongly supports efforts to make our schools safe and secure for all our students. We believe that officers can play a vital role in fostering a safe school environment. That role must conform, however, to our constitutional principles. The State's rule would undermine our constitution without appreciably increasing school safety. Adhering to the school official exception, as it was originally crafted – narrow, and based on a distinction between cops and teachers – would promote safety *and* constitutional values.

[8] Randall R. Beger, *The "Worst of Both Worlds": School Security and the Disappearing Fourth Amendment Rights of Students*, 28 CRIM. JUST. REV. 336, 340-41 (2003).

II. Allowing Police Officers to Search Students Under the School Official Exception Would Expose Students – Particularly Students of Color – To Increased and Earlier Contact with the Criminal Justice System.

Allowing police officers to search students on a lesser showing of reasonable cause will bring more students into contact with the criminal justice system, with dangerous consequences for students, especially students of color. Over the past decade the number of students referred to court for school discipline has grown dramatically as student misbehavior has become increasingly criminalized.[9] Allowing police officers to search students based on a lower standard, such as reasonable suspicion, would only contribute to this phenomenon. In recent years, misbehavior that was traditionally settled by teachers and principals – such as a playground scrap or temper tantrum – is now handled by police officers stationed at schools.[10] It is now clear that placing police in schools has raised the stakes for student misconduct.[11] The increased prevalence of school arrests has had a devastating impact on students: those arrested are two to four times more likely to drop out of school, more likely to test poorly, and

---

[9] Paul J. Hirschfield, *Preparing for Prison? The Criminalization of School Discipline in the USA*, 12 THEORETICAL CRIMINOLOGY 79, 80 (2008).

[10] Lisa H. Thurau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y. L. REV. 977, 978 (2009/2010) ("Not surprisingly, behaviors such as schoolyard scuffles, shoving matches, and verbal altercations – once considered exclusively the domain of school disciplinarians – took on potentially sinister tones and came to be seen as requiring law enforcement intervention.").

[11] Augustina Reyes, *The Criminalization of Student Discipline Programs and Adolescent Behavior*, 21 ST. JOHN'S J. OF L. COMM. 73, 90 (2006) ("We as a society have extended a criminal incarceration approach to K-12 education.").

more likely to enter the criminal justice system later in life.[12]

Unfortunately, "these lessons have come mostly at the expense of minority children."[13] Indeed, extensive studies over the past thirty-five years have found that minority students tend be disciplined at a disproportionate rate.[14] One major study found that Black and Latino students tend to be disciplined at a higher rate and for more severe violations than white students.[15] For instance, Black students nationwide are two to five times more likely to be suspended.[16] While Black students constitute only 17% of the K-12 population in the United States, they comprise 35% of all suspensions.[17] Latinos fare no better.[18] Although minority students are disciplined more often than white students, there is no evidence to suggest that Black and Latino students act out more often.[19] Worse still, the disproportionality increases as the severity of the sanctions

---

[12] Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 JUST. Q. 462, 473, 478-79 (2006).
[13] Reyes, *supra* note 11, at 79.
[14] Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, Policy Research Report #SRS1, at *1-2 (June 2000), *available at* www.iub.edu/~safeschl/cod.pdf (last visited: Dec. 21, 2011).
[15] Reyes, *supra* note 11, at 96.
[16] JACQUELINE IRVINE, BLACK STUDENTS AND SCHOOL FAILURE: POLICIES, PRACTICES, AND PRESCRIPTIONS 16-17 (1990).
[17] Id. at 17.
[18] Justice Police Institute, Policy Brief, "Schools and Suspensions: Self-Reported Crime and the Growing Use of Suspensions,"(2001) *available at* http://www.justicepolicy.org/research/2058 (last visited Dec. 21, 2011).
[19] Skiba, *supra* note 14, at *6 ("Despite the ubiquity of findings concerning the relationship between race and behavior-related consequences, investigation of behavior, race, and discipline have yet to provide evidence that African American students misbehave at a significantly higher rate.").

increase.[20] Therefore, with the proliferation of police officers in schools, studies have found that students of color, low-income students,[21] and students with disabilities are more likely to be arrested in school.[22] In short, Black and Latino boys have borne the brunt of this criminalization of school discipline, worsening an already intractable achievement gap.[23]

The disproportionalities in Washington schools are just as sobering. For instance, during the 2009-2010 school year, there were 864 total short-term suspensions in the Seattle School District.[24] Although Black students comprise only 20% of the Seattle School District, they received 48.7% (421) of the suspensions, while Latino students, who comprise only 11.8% of the student population, received 15.4% (133) of the suspensions.[25] Similar disproportionalities exist in elementary and middle schools.[26] These disproportionalities have persisted over the last 17 years.[27] Moreover, as the punishment becomes more severe, so does the disproportionality. For instance, there were 313 total long term

---

[20] Skiba, *supra* note 14, at *17.
[21] However, one study found that "socioeconomic status had virtually no effect when used as a covariate in a test of racial differences in office referrals and suspensions. Indeed disciplinary disproportionality by socioeconomic status appears to be a somewhat less robust finding than gender or racial disparity." Skiba, *supra* note 14, at *15.
[22] Thurau & Wald, *supra* note 10, at 980.
[23] Id. at 78-79.
[24] Seattle Public Schools, Student Information Services Office, "Full 2010 Data Profile, District Summary, December 2010," at *103, *available at* http://www.seattleschools.org/modules/groups/homepagefiles/cms/1583136/File/Departmental%20Content/siso/disprof/2010/disprof_2010.html (last visited Dec. 21, 2011).
[25] See id. at 11 and 103.
[26] Id. at 105-07.
[27] Id. at 104 (racial breakdown of short term suspensions between 1992 – 2010).

suspensions in the Seattle School District in 2009-2010, and Black students received 50.7% of them.[28] Overall, 4.5% of Black students and 4.6% of Latino students will receive a long-term suspension, compared to just 0.8% of White students.[29] Like the rest of the country, Washington State's public schools mete out school discipline in a racially disproportionate way.

Blurring the line between school sanctions and criminal sanctions by extending the school official exception to police officers would exacerbate this disproportionality and contribute to the criminalization of school discipline. Minority students already face a higher likelihood of suspension, expulsion, and arrest. Instead of promoting school safety and learning, expanding the school official exception would create criminals in schoolyards.

CONCLUSION

Both parties rely on the legal fiction that police officers may be considered school officials for Fourth Amendment purposes to search students' property without a warrant or a finding of probable cause. But the school official exception, as crafted by this Court and by the U.S. Supreme Court, depends on a sharp distinction between police and school authorities. Safety interests cannot override this distinction because

[28] Id. at 110.
[29] Id. at 112.

allowing officers to circumvent the Fourth Amendment would not promote student safety – it would promote student cynicism.

Ultimately, the constitutional protections associated with school discipline vis-à-vis teachers and principals are watered down because the consequences are watered down. School authorities cannot arrest or detain students, nor can they expose students to criminal sanctions. But if the State's hybrid legal construct is accepted, the stakes will increase drastically without a commensurate increase in constitutional protections. All students stand to suffer, but because school discipline is already meted out in a racially disproportionate way, minority students have the most to lose.

For the reasons stated above, this Court should REVERSE the lower court. RESPECTFULLY SUBMITTED this 22nd day of December 2011.

/s/ Robert C. Chang
WSBA No. 44083

/s/ Robert C. Boruchowitz
WSBA No. 4563

/s/ Lorraine K. Bannai,
WSBA No. 20449

/s/ David A. Perez
WSBA No. 43959

Amicus Curiae Fred T. Korematsu Center for Law and Equality

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that the foregoing *Amicus Curiae* Brief in Support of Neither Party was e-filed with the Washington State Supreme Court on December 22, 2011, and a true and correct copy also served on the following counsel:

[x]	Christopher H. Gibson Nielson, Broman & Koch, PLLC 1908 East Madison gibsonc@nwattorney.net	[x] E-Mail
[x]	William L. Doyle James M. Whisman Senior Deputy Prosecuting Attorneys King County Prosecutor's Office William.Doyle@kingcounty.gov Jim.Whisman@kingcounty.gov	[x] E-Mail

Signed in Seattle, Washington, this 22nd day of December 2011.

_____

/s/ David A. Perez
Amicus Curiae