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SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

J.M.,

Petitioner.

**MEMORANDUM OF *AMICUS CURIAE* AMERICAN CIVIL
LIBERTIES UNION OF WASHINGTON IN SUPPORT OF
PETITION FOR REVIEW**

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ORIGINAL

TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE*.....1

ISSUE TO BE ADDRESSED BY *AMICUS*1

STATEMENT OF THE CASE.....1

ARGUMENT2

 A. The Court of Appeals Decision Involves a Matter of
 Significant Public Interest on Which this Court’s Guidance
 Is Needed and Conflicts with *York v. Wahkiakum Sch. Dist.*
 No. 200..... 3

 B. A Decision of this Court Is Necessary to Stop the Growth
 of the “School to Prison Pipeline” 7

CONCLUSION.....10

TABLE OF AUTHORITIES

State Cases

<i>State v. Brooks</i> , 43 Wn. App. 560, 718 P.2d 837 (1986).....	4, 5
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	3
<i>State v. J.M.</i> , __ Wn. App. __, 2011 WL 1959571 (2011).....	2, 3
<i>State v. McKinnon</i> , 88 Wn.2d 75, 558 P.2d 781 (1977)	3, 4, 6, 7
<i>York v. Wahkiakum Sch. Dist. No. 200</i> , 163 Wn.2d 297, 178 P.3d 995 (2008).....	3, 4, 5, 6

Federal Cases

<i>Vernonia Sch. Dist. 47J v. Acton</i> , 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995).....	4
---	---

Rules

RAP 13.4(b)	10
-------------------	----

Constitutional Provisions

Fourth Amendment	3, 4
Wash. Const. art. 1, § 7.....	passim

Other Authorities

Ann N. Simmons, <i>Scuffle Exposes a Racial Rift</i> , L.A. Times, Oct. 11, 2007, at B1	9
Ben Brown, <i>Understanding and Assessing School Police Officers: A Conceptual and Methodological Comment</i> , 34 J. of Crim. Just. 591-604 (2006)	8
Clayton County Pub. Sch. [GA], <i>Executive Report of the Blue Ribbon Commission on School Discipline</i> (Jan. 2007).....	9

<i>COPS in Schools</i> (visited Aug. 8, 2011) < http://www.cops.usdoj.gov/default.asp?Item=54 >.....	8
Gary Sweeten, <i>Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement</i> , 23 <i>Just. Q.</i> 462 (2006).....	10
George R. Nock, <i>Seizing Opportunity, Searching for Theory: Article I, Section 7</i> , 8 <i>U. Puget Sound L. Rev.</i> 331 (1985).....	4
Luanne Austin, <i>'Zero Tolerance' An Excuse for Lack of Judgment</i> , <i>Daily News Record</i> , Apr. 17, 2009, at B4	9
Maureen Downey, <i>Back Away From Balloon</i> , <i>Atlanta J. & Const.</i> , June 1, 2009, at A9	9
Paul Hirschfield, <i>The Uneven Spread of School Criminalisation in the United States</i> , 74 <i>Crim. Just. Matters</i> 28 (2008).....	8
Paul Holland, <i>Schooling Miranda: Policing Interrogation in the Twenty-First Century Schoolhouse</i> , 52 <i>Loy. L. Rev.</i> 39 (2006).....	8
Sharif Durhams, <i>Tosa East Student Arrested, Fined After Repeated Texting</i> , <i>Milwaukee J. Sentinel</i> , Feb. 18, 2009, at B8	9
Texas Appleseed, <i>Texas' School-to-Prison Pipeline</i> (2010)	9
The Advancement Project, <i>Education on Lockdown: The Schoolhouse to Jailhouse Track</i> (Mar. 2005)	8

INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington (“ACLU”) is a statewide, nonpartisan, nonprofit organization of over 20,000 members, dedicated to the preservation of civil liberties, including privacy. The ACLU strongly supports adherence to the provisions of Article 1, Section 7 of the Washington State Constitution, prohibiting unreasonable interference in private affairs. It also has long advocated for the constitutional rights of public school students in Washington. It has participated in numerous privacy-related cases as *amicus curiae*, as counsel to parties, and as a party itself, including in cases specifically involving the privacy rights of students.

ISSUE TO BE ADDRESSED BY *AMICUS*

Whether a warrantless search by a police officer of an arrested student’s belongings violates Article 1, Section 7 and has such broad public impact that review by this Court is warranted.

STATEMENT OF THE CASE

The Bellevue Police Department stationed an officer in the local high school, designating him a “school resource officer” or “SRO.” On February 4, 2009, the SRO was patrolling a school restroom, and discovered J.M. with marijuana and a locked backpack. The SRO seized the marijuana and backpack, and told J.M. he was under arrest. The SRO

proceeded to search the backpack (opening it with a key seized from J.M.), without consent or a warrant. The Court of Appeals held that this search was allowed under the “school search” exception to the warrant requirement. *See State v. J.M.*, ___ Wn. App. ___, 2011 WL 1959571 (2011).

This case asks whether Article 1, Section 7 of the Washington State Constitution allows for such warrantless searches, conducted by a police officer for law enforcement purposes, simply because the search takes place within a school.

ARGUMENT

If J.M. had been arrested by a police officer in any location other than his school, there is no dispute that the search of his locked backpack would have been unconstitutional. Yet here the State argues that the same search is constitutionally allowed simply because the officer is normally stationed at the school and the arrest took place there. In affirming J.M.’s conviction, Division Two of the Court of Appeals sanctioned a practice that treats students as second-class citizens, with diminished privacy rights even for non-school purposes. This decision was made despite contrary precedent from this Court, and without consideration of the broad impact such a policy would create, given today’s routine police presence in our school system.

A. The Court of Appeals Decision Involves a Matter of Significant Public Interest on Which this Court’s Guidance Is Needed and Conflicts with *York v. Wahkiakum Sch. Dist. No. 200*

Analysis of this case must start with the oft-repeated maxim that “[s]tudents do not shed their constitutional rights at the schoolhouse door.” *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 303, 178 P.3d 995 (2008) (quotations omitted). One of those rights is the right to be free from warrantless searches, “unless it fits within one of the ‘jealously and carefully drawn exceptions’ ... rooted in the common law.” *Id.* at 310 (quoting *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996)).

The Court of Appeals recognized this, but nonetheless upheld the search, based on a broad understanding of a “school search” exception. *J.M.* at ¶ 7. The court relied primarily on Fourth Amendment precedent, and failed to take into account the greater protections afforded by Article 1, Section 7. In particular, it did not even cite to *York*, the *only* case wherein this Court has analyzed a search in the school context separately under Article 1, Section 7 and the Fourth Amendment.

This Court’s most complete analysis of a search in the school environment was in *State v. McKinnon*, 88 Wn.2d 75, 558 P.2d 781 (1977), the genesis of the “school search” exception applied by the Court of Appeals here. But *McKinnon* was decided over thirty years ago—prior to the development of an independent and robust Article 1, Section 7

jurisprudence—and considered only the Fourth Amendment. One should therefore not consider *McKinnon* without also considering subsequent Article 1, Section 7 developments. It is especially ill-advised to rely solely on subsequent Fourth Amendment developments, which have tended to restrict privacy rights while our Article 1, Section 7 jurisprudence has consistently reaffirmed the importance of privacy in our state constitutional scheme.

The State claims that Article 1, Section 7 affords no greater privacy protection to students than the Fourth Amendment. Brief of Respondent at 10 (citing *State v. Brooks*, 43 Wn. App. 560, 568, 718 P.2d 837 (1986)). This argument does not withstand scrutiny in light of *York*, which held that drug testing of student athletes violates Article 1, Section 7 even though it is allowed under the Fourth Amendment, *see Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995). It is even less viable when one examines the *Brooks* reasoning, which has not withstood the test of time. *Brooks* reached its conclusion based on a now-obsolete “*stare decisis*” view of Article 1, Section 7 jurisprudence, considering it to be essentially a correction of “irrational” decisions of the United States Supreme Court. *Brooks*, 43 Wn. App. at 566 (quoting George R. Nock, *Seizing Opportunity, Searching for Theory: Article I, Section 7*, 8 U. Puget Sound L. Rev. 331, 352 (1985)). The

subsequent twenty-five years have shown that to be an incorrect view, as Article 1, Section 7 jurisprudence has flourished, based on our own history and language, independent of decisions of the United States Supreme Court. And in any case, as this Court noted, it is not “bound to the Court of Appeals’ broad language.” *York*, 163 Wn.2d at 310. The truth is that this Court has simply never considered the question of a “school search” exception under Article 1, Section 7, and the lower courts have, at most, simply repeated the *Brooks* conclusion without examining its flawed basis.

To the extent that a “school search” exception to Article 1, Section 7 exists at all, *York* made it clear that it is a limited and narrow exception. The majority¹ and concurring opinions disagreed about whether a “special needs” exception is compatible with Article 1, Section 7. They agreed, however, that any “special needs” or “school search” exception must be divorced from law enforcement purposes.

The majority was clearest: “For there to be a special need, not only must there be some interest beyond normal law enforcement but also any evidence garnered from the search or seizure should not be expected to be used in any criminal prosecution against the target of the search or seizure.” *York*, 163 Wn.2d at 311. Justice Madsen’s concurrence described

¹ Although the opinion authored by Justice Sanders was subscribed to by only four justices, it was referred to as the “majority” in the concurring opinions, and this brief will use the same terminology.

a slightly broader exception, but still found two necessary conditions. First, “the purpose of the search is other than the detection or investigation of a crime.” *Id.* at 319 (Madsen, J., concurring). Second, “the traditional requirement of a warrant and probable cause must be inadequate to fulfill the purpose of the search.” *Id.*

McKinnon itself emphasized the difference between a school environment and law enforcement:

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. In carrying out this duty, he should not be held to the same probable cause standard as law enforcement officers. Although a student's right to be free from intrusion is not be lightly disregarded, for 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. Maintaining discipline in schools oftentimes requires immediate action and cannot await the procurement of a search warrant based on probable cause.

McKinnon, 88 Wn.2d at 81. Significantly, the search there was upheld only because the principal “acted independently” of law enforcement in deciding to search the students. *Id.* at 82.

Plainly, none of these views of a “school search” exception would extend to a situation such as in the present case. Here, the search was initiated and conducted by a law enforcement officer, as part of a criminal

investigation, after the suspect was already arrested and the backpack was secured. The officer was easily in a position to obtain a warrant, just as he would have done if J.M. had been arrested outside the school.

This Court should accept J.M.'s Petition for Review in order to rectify the lower court's flawed analysis. At a minimum, the Court should hold that warrantless searches by a police officer of a student's belongings subsequent to his arrest are incompatible with Article 1, Section 7. It may also be appropriate to decide more broadly whether a "school search" exception to the warrant requirement exists under Article 1, Section 7—and, if so, delineate its scope. As discussed below, the school environment has radically changed since this Court confronted suspicion-based school searches in *McKinnon*. Even if the *McKinnon* opinion has relevance under Article 1, Section 7, it simply doesn't address many situations present in today's schools. School administrators, teachers, law enforcement (including SROs), students, and the lower courts would all benefit from clarity in the rules regarding searches in the school environment.

B. A Decision of this Court Is Necessary to Stop the Growth of the "School to Prison Pipeline"

The situation presented by this case is unfortunately now commonplace, as the number of law enforcement officers in schools has increased dramatically in the past fifteen years. Since 1999, the United

States Justice Department has awarded more than \$750 million for schools to hire more than 6500 SROs. *COPS in Schools* (visited Aug. 8, 2011) <<http://www.cops.usdoj.gov/default.asp?Item=54>>. By 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*, 34 J. of Crim. Just. 591-604 (2006). One study showed sixty percent of high school teachers reporting 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). The National Association of School Resource Officers stated just a few years ago “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).

The deployment of law enforcement in schools has been accompanied by a dramatic rise in arrests in schools as well. Although there are no national statistics available, a variety of jurisdiction-specific studies have shown dramatic increases in school-based arrests. *See e.g.*, The Advancement Project, *Education on Lockdown: The Schoolhouse to Jailhouse Track 15* (Mar. 2005) (noting increase of 30% increase in Philadelphia County from 1999-2002, 300% in Houston from 2001-2002,

and 71% in Denver from 2000-2003). Increased arrests have little or nothing to do with the actual level of criminal activity in schools. In at least one school district, “the major cause of the increase in [school-related charges] was a result of law enforcement (SROs) within the schools.” Clayton County Pub. Sch. [GA], *Executive Report of the Blue Ribbon Commission on School Discipline* 47 (Jan. 2007) (noting increase in such charges from 90 in 1996 to 1,200 in 2004); *see also* Texas Applesed, *Texas’ School-to-Prison Pipeline* 101 (2010) (noting correlation between police presence and arrests). Most arrests are for “minor offenses” that “have traditionally been handled by the school and are not deemed the type of matters appropriate for juvenile court”. Clayton County Pub. Sch. at 47. The range of minor offenses that have led to arrests is eye-popping. *See, e.g.*, Maureen Downey, *Back Away From Balloon*, Atlanta J. & Const., June 1, 2009, at A9 (throwing water balloons); Sharif Durhams, *Tosa East Student Arrested, Fined After Repeated Texting*, Milwaukee J. Sentinel, Feb. 18, 2009, at B8 (text-messaging in class); Ann N. Simmons, *Scuffle Exposes a Racial Rift*, L.A. Times, Oct. 11, 2007, at B1 (failing to adequately clean up dropped birthday cake); Luanne Austin, *‘Zero Tolerance’ An Excuse for Lack of Judgment*, Daily News Record, Apr. 17, 2009, at B4 (jumping up to tap a hallway clock, accidentally damaging it).

While many of these arrests ultimately result in no formal legal

consequences (as prosecutors and judges recognize the impropriety of using the juvenile justice system), the effects of these arrests can nonetheless be devastating. A “first-time arrest during high school nearly doubles the odds of high school dropout, while a court appearance nearly quadruples the odds of dropout.” Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 Just. Q. 462, 473 (2006). This, “in turn, may set in motion a number of negative outcomes including unemployment and increased criminal involvement. *Id.* at 478 (citations omitted).

The Court of Appeals’ erroneous constitutional ruling reflects a misunderstanding of the arrest and other law enforcement duties of SROs, discussed in the authorities above. This Court’s consideration of the case is necessary to correct that error, and prevent the expansion of the school-to-prison pipeline.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests the Court to accept J. M.’s Petition for Review. It meets multiple criteria of RAP 13.4(b); the decision of the Court of Appeals conflicts with decisions of this Court, it involves a significant question of law under the Washington Constitution, and it is a matter of substantial public interest.

Respectfully submitted this 15th day of August 2011.

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