Nos. 09-1454 and 09-1478

In The Supreme Court of the United States

BOB CAMRETA,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

JAMES ALFORD, Deschutes County Deputy Sheriff,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND LEAGUE OF CALIFORNIA CITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

JOHN E.B. MYERS
Of Counsel
UNIVERSITY OF THE PACIFIC
MCGEORGE SCHOOL OF LAW
3200 Fifth Avenue
Sacramento, CA 95817
Phone: 916.739.7176
jmyers@pacific.edu

JOHN J. SANSONE
County Counsel
JOHN E. PHILIPS
Chief Deputy
GARY C. SEISER
Senior Deputy
Counsel of Record
OFFICE OF COUNTY COUNSEL
4955 Mercury Street
San Diego, CA 92111
Phone: 858.492.2550
Gary.Seiser@sdcounty.ca.gov
Counsel for Amici Curiae

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Additional Counsel:

JENNIFER B. HENNING
Litigation Counsel
CALIFORNIA STATE ASSOCIATION OF COUNTIES
1100 K Street, Suite 101
Sacramento, CA 95814
Phone: 916.327.7500
jhenning@coconet.org

PATRICK WHITNELL
General Counsel
LEAGUE OF CALIFORNIA CITIES
1400 K Street
Sacramento, CA 95814
Phone: 916.658.8281
pwhitnell@cacities.org

ANTECEDENT AND FAIRLY INCLUDED QUESTIONS PRESENTED

(1) Public school interviews of suspected child abuse victims are a vital tool for social workers and peace officers, allowing children to be contacted in a safe, neutral setting. Normally the interviews do not restrict the child's liberty any more than being in school does and do not intrude on the child's privacy beyond what the child is willing to tell. Absent egregious circumstances, when social workers or peace officers conduct public school interviews of suspected child abuse victims is the Fourth Amendment implicated?

(2) The Courts of Appeals are split regarding the standard for reviewing Fourth Amendment claims in child protection investigations. Determining the correct standard involves consideration of multiple interests, including children's right to be safe from abuse and neglect, which is a factor that should be considered in all Fourth Amendment analyses of child protection investigations. If the Fourth Amendment is implicated in a public school interview by a peace officer or a social worker of a suspected child abuse victim, should the traditional balancing test apply?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

RULES

STATUTES

TABLE OF AUTHORITIES – Continued

Page

OTHER

THE *AMICI CURIAE* SUBMIT THIS BRIEF IN SUPPORT OF PETITIONERS

The California State Association of Counties, and the League of California Cities respectfully submit this brief as *amici curiae* in support of Petitioners.

INTERESTS OF THE *AMICI CURIAE*[1]

The California State Association of Counties (CSAC) is a nonprofit corporation, the membership of which consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case involves issues affecting all California counties.

The League of California Cities (League) is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents,

[1] The parties have consented to the filing of *amicus* briefs in support of either party or of neither party. Pursuant to this Court's Rule 37.6, this brief was not authored in whole or in part by counsel for any party, and no person or entity other than the *amici curiae* made a monetary contribution to this brief's preparation or submission.

and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide – or nationwide – significance. The Committee has identified this case as being of such significance.

As representatives of California counties and cities, the *amici* have a compelling interest in ensuring the safety of children. The Ninth Circuit decision in this case is already having a significant adverse impact on child protection investigations and, if allowed to stand, is likely to have even greater effect. As such, the *amici* submit this brief in support of the Petitioners.

SUMMARY OF ARGUMENT

Child abuse and neglect is a national problem. Every school day thousands of children throughout this nation are interviewed in their schools regarding possible abuse and neglect. In many communities social workers take the lead in such investigations. In others, law enforcement does. In both, there is recognized value in limiting the number of interviews conducted of a suspected child abuse victim. These interviews are often conducted under the authority of state laws that recognize abused and neglected

children are most likely to answer interview questions honestly when they feel safe, such as at their schools; that interviewing children at their schools does not involve the privacy interests involved with at home interviews; and that the need to protect children from abuse and neglect is a compelling state and national interest.

This case arises from a public school interview of a nine-year-old suspected child abuse victim, S.G., whose father had been arrested for molesting another child, F.S. The interview was conducted by a social worker and observed by a peace officer. The facts regarding this interview at its inception provide the canvas for the legal issues this Court will address: determining the proper test for analyzing Fourth Amendment claims involving public school interviews by peace officers and social workers of suspected child abuse victims, outlining the many factors and interests that need be considered in such analyses, and considering whether temporary detentions of suspected child abuse victims for the purpose of public school interviews in cases such as this are normally reasonable at their inception under the traditional balancing test.

The *amici* support the arguments made by the Petitioners in their Briefs on the Merits, but write separately here to address two points not fully addressed by the Petitioners or the Ninth Circuit Court of Appeals, yet critical to a complete analysis of the issues on which this Court has granted certiorari. The first is whether at the inception of the interview there was a Fourth Amendment seizure. The second

is that a child's right to be safe from abuse and neglect is a compelling interest that must be considered in all Fourth Amendment analyses of child protection investigations. Whether there was a seizure is an antecedent question, and both are fairly included questions within those presented by the Petitioners and on which certiorari was granted.

In addressing these two points the *amici* note that both Fourth Amendment seizure law and child protection investigations proceed along a continuum. Peace officers may have contact with members of the public that do not involve a seizure, they may stop and temporarily detain members of the public for questioning as possible witnesses or suspects, and they may arrest suspects for criminal activity. So, too, in child protection, peace officers and social workers may have contact with members of the public, including children, that do not involve a Fourth Amendment seizure, they may temporarily detain a child for a complete interview at a multi-disciplinary child advocacy center, and they may take a child into protective custody. The applicability of the Fourth Amendment, the nature of the public and private interests involved, and the tests for the protection of those interests, differ as the acts of the government official, whether peace officer or social worker, proceed along those continuums.

Was the interview of the nine-year-old suspected child abuse victim in this case that was conducted by the social worker and observed by the peace officer a seizure at its inception? The Ninth Circuit said yes

because a peace officer was involved, creating a *per se* rule that all public school interviews of suspected child abuse victims by law enforcement implicate the Fourth Amendment. The *amici* assert they do not.

The children interviewed in such cases are not suspected of wrongdoing; they are suspected of being victims. The interview is not designed to elicit incriminating evidence against the children, but to help identify if the children have been abused or neglected, and if so, to assess what level of protection, if any, is needed. As such, the *amici* ask this Court to reach the antecedent and fairly included question presented in this brief: Absent egregious circumstances, do public school interviews by peace officers or social workers of suspected child abuse victims implicate the Fourth Amendment at their inception?

If, however, the interview was a seizure at its inception, what Fourth Amendment test applies? Rejecting a "special needs" exception, the Ninth Circuit used the same test it has used for taking a child into protective custody: warrant, court order, parental consent, or exigent circumstances. It failed, however, to consider the continuum along which child protection investigations and Fourth Amendment protections proceed. The Ninth Circuit did not consider whether the public school interview of the suspected child abuse victim in this case was an investigative detention that fell short of taking the child into custody. Instead, it decided it was a seizure tantamount to an arrest, applying the same test it would apply if the child was arrested or physically

removed from the home and taken into protective custody. In this it erred.

The *amici* agree with the Petitioners that the traditional balancing test of reasonableness should apply in analyzing public school interviews that implicate the Fourth Amendment. We also agree with Petitioner Alford that a "special needs" exception is justified in public school interviews of suspected child abuse victims due to the government's compelling need to protect children from abuse and neglect and the minimal intrusion on the child's liberty. We assert, however, that no such special exception is needed; if the Fourth Amendment is implicated in a public school interview of a suspected child abuse victim, it will be a detention falling short of a full seizure, rather than the functional equivalent of an arrest.

In balancing the public and private interests involved in all Fourth Amendment analyses of child protection investigations, the *amici* assert there is an additional private interest the Ninth Circuit and most courts have failed to consider; children have a right to and a compelling interest in being safe from abuse and neglect. Is this a constitutional right to protect them from abuse and neglect by their parents? No. Instead, it is a liberty interest separate from the Constitution but implicitly recognized by our founding documents. And it is a compelling interest that children have that is as fundamental, self-evident, and unalienable to a child's liberty interests as the child's right to familial association and privacy,

perhaps more. *See* The Declaration of Independence para. 2 (U.S. 1776). The *amici* submit it must be considered in all Fourth Amendment analyses involving child protection investigations.

ARGUMENT

I. ABSENT EGREGIOUS CIRCUMSTANCES, PUBLIC SCHOOL INTERVIEWS OF SUSPECTED CHILD ABUSE VICTIMS THAT ARE CONDUCTED BY A SOCIAL WORKER OR A PEACE OFFICER DO NOT IMPLICATE THE FOURTH AMENDMENT AT THEIR INCEPTION.

A. This Issue Is Antecedent To And Fairly Included In The Issues Raised By Petitioners, And Thus The Court Can Address This Issue.

The *amici* recognize that it is a rule of Supreme Court practice that only those issues raised by the parties or fairly included in such issues will be considered by the Court. Sup. Ct. R. 14(1)(a). But that rule is not always strictly followed. *Kolstad v. American Dental Association*, 527 U.S. 526, 540 (1999), citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 37 (1991) (Stevens, J., dissenting). Indeed, in *Vance v. Terrazas*, this Court noted, "[i]n any event, consideration of issues not present in the jurisdictional statement or petition for certiorari and not presented in the Court of Appeals is not beyond our power, and in appropriate circumstances we have

addressed them." *Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980).

Significantly, in *Arcadia v. Ohio Power*, this Court found there was an issue "antecedent" to those raised by the parties that needed to be addressed. *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990). In that case, the antecedent issue was identified by the Court. But on other occasions, the issue the Court reached was identified only by *amicus curiae*. *See, e.g.*, *Teague v. Lane*, 489 U.S. 288, 300 (1989); *Capital Cities Cable v. Crisp*, 467 U.S. 691, 697-98 (1984). *See also, Eugene Gressman et al., Supreme Court Practice* §§ 6.26(d) at 466, 13.4 at 741 (9th ed. 2007). Such is the case here.

The fundamental first question of any analysis regarding an alleged violation of the Fourth Amendment is whether the Fourth Amendment is implicated in the first place. The Ninth Circuit in this case held it was, but *amici* assert it was not. Instead, the *amici* assert that absent egregious circumstances, a public school interview by a peace officer or social worker of a suspected child abuse victim does not implicate the Fourth Amendment.

This issue is not new to the parties. The Ninth Circuit chose to follow the two-step inquiry of *Saucier v. Katz*, 533 U.S. 194 (2001). *Greene v. Camreta*, 588 F.3d 1011, 1021 (9th Cir. 2009). As such, it expressly addressed the question of whether the public school interview of the suspected child abuse victim implicated the Fourth Amendment. It found the interview was a seizure. *Id.* at 1022, 1027-28, 1030 n.18.

Moreover, the Petitioners recognized, although did not directly address in their Petitions for Certiorari, that not all public school interviews implicate the Fourth Amendment. Camreta Pet., at 12 ("Depending on the particular circumstances of an interview, interviewing a child may effect a Fourth Amendment seizure."), 13 ("Admittedly, not every interview of a potential child-abuse victim will amount to a constitutional seizure."), 15 ("[The Ninth Circuit's] decision is triggered only if, at some point during the interview of the potential child-abuse victim, state officials 'seize' that child."); Alford Pet., at 3 n.1 ("as case law from several of the circuits have made clear, not all interviews of suspected child abuse victims in public schools by law enforcement or child protective workers amount to seizures under the Fourth Amendment").

The *amici* assert this is an antecedent issue and fairly included in the issues raised by the Petitioners. Thus, this Court has jurisdiction to consider the question of whether, absent egregious circumstances, a public school interview conducted by a peace officer or social worker of a suspected child abuse victim implicates the Fourth Amendment. More specifically, it has jurisdiction to determine that absent egregious circumstances, public school interviews of suspected child abuse victims do not implicate the Fourth Amendment at their inception.

B. The Court Should Address This Issue To Provide Clear Guidance For Future Cases.

Although this Court has jurisdiction to address the issue of whether a public school interview conducted or observed by a peace officer automatically implicates the Fourth Amendment, should it? The *amici* submit it should.

The Ninth Circuit utilized the approach set out by this Court in *Saucier*, and observed "the constitutional standards governing the in-school seizure of a student who may have been abused by her parents are of great importance." *Greene*, 588 F.3d at 1021. As such, it expressly addressed the question of whether the public school interview of the suspected child abuse victim implicated the Fourth Amendment, noting it was doing so "to provide guidance to those charged with the difficult task of protecting child welfare within the confines of the *Fourth Amendment*." *Id.* at 1022, italics in original.

As written by Justice Scalia in a dissent joined by the then Chief Justice from the denial of a petition for certiorari, a constitutional determination made under the first prong of *Saucier* "is not mere dictum in the ordinary sense, since the whole reason we require it to be set forth (despite the availability of qualified immunity) is to clarify the law and thus make unavailable repeated claims of qualified immunity in future cases." *Bunting v. Mellen*, 541 U.S. 1019,

1023-24 (2004) (Scalia, J., dissenting). That is the situation here.

The Ninth Circuit held that having a peace officer, particularly an armed peace officer, accompany the social worker for the public school interview of the suspected child abuse victim "constituted sufficient entanglement with law enforcement to trigger the traditional Fourth Amendment prerequisites to seizure of a person." *Greene*, 588 F.3d at 1028. That determination has had a huge impact on the way child abuse investigations are done in the Ninth Circuit. In some instances, it has meant a child was not interviewed; in many others, it has delayed the interview and possible protection of children. The question of whether the presence of a peace officer at a public school interview of a suspected child abuse victim automatically implicates the Fourth Amendment is an issue of national importance that can and should be addressed by this Court.

C. Absent Egregious Circumstances, Public School Interviews Of Suspected Child Abuse Victims That Are Conducted By Social Workers Or Peace Officers Do Not Implicate The Fourth Amendment.

1. The Presence of a Peace Officer Does Not Automatically Mean a Public School Interview is a Seizure.

While this Court has not yet addressed the issue of public school interviews of suspected child abuse

victims, it has addressed the issue of peace officers being armed during contacts with the public and with such contacts taking place in limited space situations. And it has dealt with restrictions on a child's freedom of movement at public school. As this Court stated almost two decades ago, "Since *Terry*, we have held repeatedly that mere police questioning does not constitute a seizure."[2] *Florida v. Bostick*, 501 U.S. 429, 434 (1991). The *amici* submit the same is true when the interview is done by a social worker and a peace officer, regardless of which one questions and which one observes.

a. Peace Officers Have a Legitimate Role in the Protection of Children.

The Ninth Circuit speculated the peace officer in this case may have been present at the public school interview of the suspected child abuse victim, "reasoning that a nine-year-old girl would surely feel compelled to talk truthfully in the presence of a uniformed, armed police officer." It also speculated the peace officer may have been there solely for the purpose of gathering evidence of criminal activity. *Greene*, 588 F.3d at 1027-28. Those were the only two possibilities the Ninth Circuit could imagine. It was incorrect.

---

[2] *Terry v. Ohio,* 392 U.S. 1 (1967).

At the time of our founding and for many decades thereafter, child protection was carried out largely by private charitable organizations, orphanages, apprenticeships, and even the practice of indenturing the child as a servant. John E.B. Myers, *Child Protection in America: Past, Present, and Future*, ch. 1, at 11-26, ch. 2, at 47-48 (2006). Eventually, the responsibilities of child protection were gradually taken over by the government. *Id.* at ch. 3, at 71-76. But as late as the mid-twentieth century, hundreds of counties throughout this nation had no countywide system for child protection. Instead, many used police and the juvenile court's probation staff. *Id.* at 76. "Today, child protection is the domain of social work, with supporting roles for police, mental health, medicine, nursing, and law." Myers, *Child Protection in America*, ch. 3, at 50. But that does not mean peace officers are not directly involved in child protection. They are.

The *amici* recognize and agree with the information and arguments presented in the Petitioners' Briefs on the Merits and the *amicus* briefs in support of the Petitioners, regarding the benefits and regular practice of having social workers and peace officers work together in the investigative stage of child protection. This includes multi-disciplinary teams. These approaches are the norm and best practice in California also. *See*, *e.g.*, Cal. Penal Code §§ 11166.3, subdiv. (a) (communication between law enforcement agencies and county welfare departments investigating child abuse or neglect cases), and 13517 (development of procedures for minimizing the number of

times a child is interviewed by law enforcement personnel) (West 2010).

The *amici* also note California statutory law further demonstrates the state's expectation that its peace officers are to be involved in child protection investigations. Under current California law, whenever any government agency, including law enforcement, is investigating suspected child abuse or neglect and determines it is necessary to interview the suspected victim, the child may be interviewed on school premises during school hours regarding the report of abuse or neglect occurring in the child's home or an out-of-home care facility. Cal. Penal Code § 11174.3, subdiv. (a) (West 2010).[3] California peace officers do not have the discretion not to investigate child abuse. They are mandated to do so. *Alejo v. City of Alhambra*, 75 Cal. App. 4th 1180, 1186-90 (Cal. Ct. App. 1999). *See also* Cal. Stat. ch. 916, § 34 (2000) (Cal. Assemb. B. 1241) (stating subsequent statutory amendments were not intended to abrogate the holding in *Alejo*), http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_1201-1250/ab_1241_bill_20000929_chaptered.html (last visited Dec. 14, 2010). Likewise, California peace officers are mandatory reporters of suspected

[3] The child is provided the option of being interviewed in private or to select any adult member of the school staff, including both employees and volunteers, to be present during the interview. Cal. Penal Code § 11174.3, subdiv. (a) (West 2010).

child abuse and neglect. Cal. Penal Code § 11165.7 subdivs. (a)(19) & (34) (West 2010).[4]

As such, peace officers have a legitimate child protection role to fulfill. Peace officers are present to support and protect the social worker during the investigation process, to be a second set of eyes and ears to corroborate or refute the social workers' documentation and memory of the events, especially when the interview of the suspected child abuse victim is not able to be recorded, to avoid the need for multiple interviews of the suspected victim, and to fulfill the peace officers' own duties and responsibilities in the investigation of child abuse and neglect. There is nothing improper in having a peace officer present at a public school interview of a suspected

[4] Further, California peace officers may, without a warrant or court order, take a child into temporary custody under certain circumstances. Cal. Welf. & Inst. Code § 305, subdivs. (a), (b) & (d) (West 2010). At the initial or detention hearing police reports are often attached to social workers' reports, which constitute admissible evidence to support temporary protective custody of children, subject to certain provisions. Cal. R. Ct. 5.674(b). Indeed, a juvenile court making detention findings may rely solely on written reports by peace officers. Cal. R. Ct. 5.676(b). And at the jurisdiction hearing at which the juvenile court ultimately determines whether the factual allegations bring the child within the court's dependency jurisdiction, statements of police officers included in social workers' reports are an exception to the hearsay rule, subject to possible cross-examination or other challenge. Cal. Welf. & Inst. Code § 355 subdiv. (c)(1)(C) (West 2010). All demonstrate the involvement of California peace officers in child protection.

child abuse victim as either the questioner or an observer.

b. Not All Contacts With Peace Officers Are Fourth Amendment Seizures.

Despite the Ninth Circuit's conclusion that any time a peace officer participates in a public school interview of a suspected child abuse victim the Fourth Amendment is automatically implicated, that is not the case. *Greene*, 588 F.3d at 1028. In *Bostick*, this Court addressed the question of whether being on a bus when contacted by law enforcement meant a reasonable person would not have felt free to leave. It noted:

> Here, for example, ***the mere fact that Bostick did not feel free to leave the bus does not mean that the police seized him***. . . . Bostick's movements were "confined" in a sense, but this was the natural result of his decision to take the bus; ***it says nothing about whether or not the police conduct at issue was coercive***.

Bostick, 501 U.S. at 436 (emphasis added). It went on to say, "Bostick's freedom of movement was restricted by a factor independent of police conduct – *i.e.*, by his being a passenger on a bus." *Id.*; *see also*, *Immigration & Naturalization Service v. Delgado*, 466 U.S. 210, 218 (1984) ("Ordinarily, when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement

officials, but by the workers' voluntary obligations to their employers."). Thus, even in confined settings, contact with a peace officer does not automatically implicate the Fourth Amendment.

Likewise, in *Greene*, the Ninth Circuit went to great length to point out the social worker who conducted the public school interview was accompanied by an armed peace officer. *Greene*, 588 F.3d at 1017 ("visible firearm"), 1027 ("visible firearm"), 1028 ("armed police officer"), 1031 ("police officer carrying a firearm"), 1032 ("armed police officer"). And it held that having the peace officer accompany the social worker for the interview "constituted sufficient entanglement with law enforcement to *trigger the traditional Fourth Amendment prerequisites to seizure of a person*." *Id.* at 1028 (emphasis added). But the fact a peace officer is armed during a public school interview of a suspected child abuse victim does not automatically implicate the Fourth Amendment.

In *Bostick*, this Court reviewed a case in which "[t]wo officers, complete with badges, insignia and one of them holding a recognizable zipper pouch, containing a pistol boarded a bus," made contact with individuals on the bus, and eventually conducted a search of one individual's luggage. *Bostick*, 501 U.S. at 431-32 (quoting the Florida Supreme Court's underlying decision; internal quotation marks omitted). This Court did not decide whether a Fourth Amendment seizure had occurred, deciding to send it back to

the Florida Supreme Court to determine that question, now under the correct standard. *Id.* at 437-38.

This Court made clear, however, that the fact an armed police officer contacted a person on a bus did not decide the issue. This court found it "particularly worth noting" that "at no time did the officers threaten Bostick with a gun." *Bostick*, 501 U.S. at 432; *see also*, *id*., at 437. Further, there was no suggestion the pistol the officer was carrying "was ever removed from its pouch, pointed at Bostick, or otherwise used in a threatening manner." *Id.* at 432; *see also*, *Delgado*, 466 U.S. at 212 (noting that "at no point during any of the surveys was a weapon ever drawn.").

Similarly, in *United States v. Drayton*, 536 U.S. 194 (2002), this Court dealt with whether a peace officer being armed transformed a contact with a member of the public into a seizure. "That most law enforcement officers are armed is a fact well-known to the public. The presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon." *Id.* at 205.

This is no different with most children. Indeed, despite Deputy Alford being armed, the suspected victim in this case stated she was "generally comfortable around police officers, that Alford was nice to her and did not do anything to scare her, and that she trusted him." *Greene*, 588 F.3d at 1017. The mere presence of an armed peace officer at a public school

interview of a suspected child abuse victim does not implicate the Fourth Amendment.

2. To Implicate the Fourth Amendment, a Public School Interview of a Suspected Child Abuse Victim Must Limit the Child's Freedom of Movement Significantly Greater Than in Everyday Compulsory Attendance.

As addressed at length in the Petitioners' Briefs on the Merits, children in public school have a reduced expectation of and right to liberty and privacy. Camreta BOM at 30-34; Alford BOM at 50-53. The *amici* will not repeat that at length. It notes only that this and other courts have recognized that when children are at school their liberty is naturally restricted. "Traditionally at common law, *and still today*, unemancipated minors lack some of the most fundamental rights of self-determination – including even the right of liberty in its narrow sense, *i.e., the right to come and go at will*." *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 654 (1995) (emphasis added). *See*, *Wallace by Wallace v. Batavia Sch. Dist. 101*, 68 F.3d 1010, 1013 (7th Cir. 1995) ("[L]aw compels students to attend school, which deprives them of a level of freedom of mobility. Once under the control of the school, students' movement and location are subject to the ordering and direction of teachers and administrators."). Likewise, a student has a reduced expectation of privacy while at school. *New Jersey v. T.L.O.*, 469 U.S. 325, 342-43 (1985).

As the Tenth Circuit has well stated, ***"To qualify as a seizure in the school context, the limitation on the student's freedom of movement must significantly exceed that inherent in every-day, compulsory attendance."*** *Couture v. Bd. of Educ. of the Albuquerque Pub. Schs.*, 535 F.3d 1243, 1251 (10th Cir. 2008) (emphasis added). The *amici* agree.

Here, as with most such interviews, the public school interview did not implicate the Fourth Amendment at its inception. Nor did it significantly exceed the limitations on the child's liberty and privacy interests that are inherent in a child's everyday compulsory school attendance. School children are often directed or taken to other rooms or locations within their school. They are often asked questions or talked to by adults at the school including teachers, aides, school nurses, school police resource officers, or principals. At the outset, nothing here, or in most such public school interviews, significantly exceeded the normal limitations on a child's liberty or privacy interests inherent in compulsory school attendance, and hence the Fourth Amendment was not implicated at its inception.

3. A Public School Interview of a Suspected Child Abuse Victim is Not an Interrogation.

Although the Ninth Circuit was not asked to address whether the public school interview of the child was a search, it looked to many cases involving

searches, an analogy that is not always apt. *Greene*, 588 F.3d at 1023 n.7. In doing so, the Ninth Circuit's attitude toward the government officials in this case was also demonstrated by the court's repeated description of the interview of the suspected child abuse victim as an "interrogation." *Id.* at 1020, 1022-23, 1027 n.12, 1030. This characterization was incorrect.

An interrogation is questioning or its functional equivalent that is "reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). A public school interview of a suspected child abuse victim is not designed to elicit an incriminating response from the child. The child is a suspected victim. The interview is only designed to determine whether the child has been abused or neglected or is at substantial risk of such abuse or neglect, to help assess whether any other children in the home have been similarly abused or neglected, and whether any protective measures are needed. Thus, an interview of a suspected child abuse victim is not an interrogation.

D. Absent Egregious Circumstances, A Public School Interview Of A Suspected Child Abuse Victim Does Not Implicate The Fourth Amendment At Its Inception.

From these cases and discussions, a common thread emerges. Children's liberty at school is naturally and permissibly restricted by the very fact they

are attending school. A peace officer being armed does not render a contact a seizure absent pulling the weapon from the holster or otherwise brandishing the firearm. And a peace officer or social worker contacting a person in a place where that person's mobility is already limited, such as a bus, workplace, or school, does not by itself render that contact coercive or a seizure.

Applying that thread to the facts of this and most cases of public school interviews of suspected child abuse victims that are conducted by social workers and peace officers results in one conclusion. Absent egregious circumstances, such interviews do not implicate the Fourth Amendment at their inception. The *amici* ask this Court to so find.

II. IF THE FOURTH AMENDMENT IS IMPLICATED IN A PUBLIC SCHOOL INTERVIEW OF A SUSPECTED CHILD ABUSE VICTIM THAT IS CONDUCTED BY A PEACE OFFICER OR SOCIAL WORKER, THE TRADITIONAL BALANCING TEST SHOULD APPLY.

This Court has recognized that, "Child abuse is one of the most difficult crimes to detect and prosecute, in large part because *there often are no witnesses except the victim*. A child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent." *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (emphasis added). That realization was echoed

by one leading authority who wrote, "in many cases the need for the child's out-of-court statements is magnified by *a paucity of physical evidence and eyewitnesses*." John E.B. Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases*, § 7.01, at 478 (2005) (successor edition to John E.B. Myers, *Evidence in Child Abuse and Neglect Cases* (3d ed. 1997)) (emphasis added). Thus, an interview of the child is often the only means to obtain evidence of child maltreatment, especially sexual abuse. This is true not only in criminal cases, but in juvenile or family court cases brought for the child's protection. As such, whether a public school interview of a suspected child abuse victim implicates the Fourth Amendment at its inception is of great importance.

If the Fourth Amendment is implicated at the inception of such an interview, the *amici* agree with the Petitioners that the proper Fourth Amendment test is the reasonableness balancing test. They write separately here to emphasize that children's right and compelling interest in being safe from abuse and neglect is a factor that must be considered in all Fourth Amendment analyses of child protection investigations.

A. Children Have A Right And A Compelling Interest To Be Safe From Abuse And Neglect.

The rights of children are a matter of constant debate and evolvement not only in this country, but

throughout the world. There is no consensus. What is clear, however, is that children do have rights. The *amici* submit that in addition to the privacy and familial association interests, which many courts in this country have recognized children possess, at least to some degree, children also have a right and compelling interest to be safe from abuse and neglect.

Is this a constitutional right to protect them from abuse and neglect by their parents? No. Instead, it is a liberty interest separate from the Constitution, but implicitly recognized by our founding documents. And it is a compelling interest that children have that is as fundamental, self-evident, and unalienable to a child's liberty interests as the child's right to familial association and privacy, perhaps more. *See* The Declaration of Independence para. 2 (U.S. 1776).

In *Gates*, the Fifth Circuit recognized that child protection investigations in which a Fourth Amendment seizure takes place involve interests not present in most seizures in criminal cases. It noted that when a person is seized in a criminal case, it is to keep that individual from harming others. But when a child is seized in a child protection case, it is to keep others from harming the child. "Thus, while a Fourth Amendment seizure has taken place when the government seizes the alleged victim of child abuse, ***the government's interest is primarily in protecting the child, not in restricting the child's freedoms***." *Gates v. Tex. Dep't of Protective & Regulatory Servs*., 537 F.3d 404, 427-28 (5th Cir. 2008) (emphasis added).

Having spoken of the government's interest, the Fifth Circuit went on to speak of the child's interest in safety. "Therefore, when courts are called upon to balance the child's Fourth Amendment rights with the government's interests, ***it is important to recognize that the child's interests may align with the government's interests if, indeed, the child is at risk of abuse***." *Id.* at 428 (emphasis added). *See*, *Spiering v. Heineman*, 448 F.Supp.2d 1129, 1140 (D.Neb. 2006) (there are "two competing values of equal worth: the right of parents to parent and the right of children to safety.").

The *amici* could not have said it better. What is the source of children's right and compelling interest in being safe from abuse and neglect? The self-evident and inherent right of all men, women, and children to life and liberty. Whether conservative or liberal, Democrat or Republican, Christian, Jew, Muslim, or Buddhist, or a member of any other form of human or spiritual categorization; the *amici* assert that all reasonable people recognize children have a right to and compelling interest in being safe from abuse and neglect. The *amici* ask this Court to acknowledge that basis and to provide legal recognition of children's right and compelling interest to be safe from abuse and neglect.

B. Children's Right And Compelling Interest To Be Safe From Abuse And Neglect Is A Factor That Should Be Considered In All Fourth Amendment Analyses Of Child Protection Investigations.

This Court has often stepped forward to address questions relating to the rights of juveniles suspected of committing crimes or those who have been found to have committed such crimes. *See, e.g.*, *In re Gault*, 387 U.S. 1 (1967) (certain rights afforded adults charged with crimes apply to juveniles also); *Roper v. Simmons*, 543 U.S. 551 (2004) (death penalty cannot apply to those who were minors when the crime was committed); *Graham v. Florida*, 130 S. Ct. 2011 (2010) (life without possibility of parole cannot be imposed for nonhomicide offenses committed by minors). But this Court has not yet clearly provided similar guidance on the rights of child abuse victims and how those rights should impact the analysis of Fourth Amendment claims. Nor have the appellate courts, which have often commented on the state's compelling interest in protecting children, but rarely speak of the child's own right to safety, choosing instead to balance the state's compelling interest in child protection against the child's right to privacy or familial association. As already indicated, the Fifth Circuit is an exception.

The Fifth Circuit used the child's interest in safety, and the fact an abused child is normally living in the home with the abuser, to impact its definition of exigent circumstances. *Gates*, 537 F.3d at 429. The

amici assert it should also impact the decision as to whether a traditional balancing test should apply, rather than requiring a warrant, court order, parental consent, or exigent circumstances. It should apply to determine whether a particular action by law enforcement or social services was reasonable under the circumstances. Indeed, it should apply in any Fourth Amendment analyses.

The child is not a suspect in child protection investigations. The child is a potential witness, and more importantly, a suspected victim. Any court looking at any alleged Fourth Amendment violation in any phase of a child protection investigation should take into account the child's right and compelling interest in being safe from abuse and neglect.

Specifically, if the Fourth Amendment is implicated at the inception of a public school interview of a suspected child abuse victim, the traditional balancing test should apply. And in applying that standard, the *amici* submit the child's right to safety from abuse and neglect is a compelling interest that must be considered in any Fourth Amendment analysis of a child protection investigation.

To be clear, the *amici* do not contend that a child's right to and compelling interest in being safe from abuse and neglect should override all other considerations. *Gates*, 537 F.3d at 429. The child's right to privacy and freedom of movement, though restricted, and to familial association are also important factors to be considered when balancing

against the state's compelling interest in protecting children and the child's right to be safe in his or her home. Nor do the *amici* suggest a constitutional right to such safety exists thereby imposing a duty on government agencies; this Court has already dealt with that issue and found there is no such obligation. *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989).

But as a matter of fundamental rights and national policy, the right and compelling interest of children to be safe is a matter of great importance and should be considered by this and all other courts in any Fourth Amendment analysis of a child protection investigation.

C. Viewing An Actual Case Through A Requirement For A Warrant, Court Order, Parental Consent, Or Exigent Circumstances Shows The Dangers The Ninth Circuit's Approach Causes.

A recent California case demonstrates the danger that a requirement for a warrant, court order, parental consent, or exigent circumstances poses in child protection investigations. *People v. Assad*, 189 Cal. App. 4th 187 (Cal. Ct. App. 2010). In the *Assad* case, a twelve-year-old boy missed school one Monday. The following day he was present and two of his teachers noted he had a black eye and cuts on his face, was moving slowly, limping, kept falling asleep in class, and kept trying to keep the weight of his

backpack off his shoulder. Out of concern for his health, he was taken to the principal's office. *Id.* at 191.

The principal noted the boy "'looked very gray.'" His left eye was black with scratches below it; he had a scratch on his chin and another scratch on the right side of his upper lip. While it was a warm day, he was wearing a long-sleeve shirt with an undershirt. When the principal asked him several times how the injuries occurred, the boy repeatedly answered he had fallen off his bicycle. The principal did not believe him. The police and Child Protective Services were called. *Assad*, 189 Cal. App. 4th at 191.

What is significant for this Court's consideration is that at this point in *Assad* neither child protection nor the police had exigent circumstances to allow them to interview the boy. Nor did they have probable cause or even reasonable cause to get a warrant or court order for such an interview. The boy may well have fallen off his bike, and while obviously somewhat banged up and sore, there appeared no immediate need for medical attention or protective custody. Indeed, what they really had was some injuries and a principal's gut feeling the boy was not telling the truth. While that was enough to cause the social worker and peace officer to respond to the principal's call and talk with the boy, and while it was reasonable for them to do so, it would not have met the Ninth Circuit's standards. Applying the Ninth Circuit's requirement for a warrant, court order, exigent circumstances, or parental consent before they could interview the

boy, there was no basis for the police or social worker to interview the boy absent parental consent. Would they have been able to get the parent's consent? Read on.

When the police and child protection worker arrived, the boy was again brought to the principal's office. As with the principal, he told the officer and social worker that he had been injured in a bicycle accident. When asked to roll up his sleeves and lift his shirt, however, he refused to do so. *Assad*, 189 Cal. App. 4th at 191-92.

The boy's father arrived at the school a short time later to pick up his children. Like the boy, he told police his son had been hurt in a bicycle accident. The police did not believe the father and when that became apparent to him, the father admitted he sometimes lost his temper and that he had whipped his son's back one time. *Assad*, 189 Cal. App. 4th at 192. As reported by the appellate court that reviewed the father's conviction for mayhem and torture, he did far more than whip his son's back one time.

What had actually happened was the father, on three separate occasions over the two-day weekend, bound the boy's hands and feet to the bed, and beat the child on his back, chest, stomach, sides, and legs with a length of garden hose that had a metal fitting at the end of it. He had also bitten most of the boy's fingertips leaving bruises on both sides. From his waist to mid-nipple height almost 360 degrees around, the boy was severely bruised with abrasions

and open lesions at various stages of healing, some fairly fresh and some several days or weeks old. Five months later a doctor found the boy's extensive scarring on his torso and upper extremities was still very visible, with the doctor opining the scars would be a permanent disfigurement. The father had been physically abusing the boy for several years, some requiring hospital visits. He had once heated a knife blade on the stove and placed it on top of the boy's foot causing a burn. *Assad*, 189 Cal. App. 4th at 192-93.

The boy was not the only one abused. He had two sisters, one older and one younger. Their father had slapped both of them in the face, pulled the younger girl by the ear, and hit the older girl's hands with a wooden rolling pin. *Assad*, 189 Cal. App. 4th at 192. The older sister had attempted to intercede in the father's abuse of her brother, "because 'common sense' required her to do so." *Id.* at 193.

Why did the boy lie to both the principal and to the peace officer and social worker? Why did he refuse to lift up his shirt and roll up his sleeves? As was later determined, he lied and refused to lift up his shirt to protect his father. *Assad*, 189 Cal. App. 4th at 191-92.

The *Assad* case illustrates several points that are important to the issues presented in this case. First, the boy's right and compelling interest in being safe from abuse and neglect was being horribly violated in his own home over a long period of time, yet it had apparently not been discovered. Even physical abuse as tortuous and ongoing as this can escape notice by

teachers, other public school staff, and even medical professionals.

It also demonstrates that if the Ninth Circuit's requirement for a warrant, court order, parental consent, or exigent circumstances had applied, the child would likely never have been interviewed at the school, and likely would not have been followed up on. The boy's explanation was both possible and arguably reasonable. There was no sufficient evidence on which to obtain a warrant or court order, no sufficient evidence to establish exigent circumstances, and little or no likelihood the father would have consented to an interview of his son. Yet the child was being tortured and seriously abused, not just that previous weekend, but for years. The Ninth Circuit's approach would have placed that boy and his siblings at risk of further abuse in the home.

The *Assad* case also shows that just as nine-year-old S.G. may have recanted in this case when not taken into custody and faced with a lack of support at home, so too do children delay reporting the abuse they have suffered or deny such abuse to protect their parents. *United States v. Provost*, 969 F.2d 617, 621 (8th Cir. 1992); *United States v. George*, 960 F.2d 97, 101 (9th Cir. 1992).

Finally, the *Assad* case also demonstrates the issues raised in this case are faced not only in sexual abuse investigations, but in physical abuse and other types of child abuse and neglect investigations as well.

CONCLUSION

Our Nation has long needed this Court to resolve the well-established conflict and confusion created by the Courts of Appeals regarding the application of the Fourth Amendment to child protection investigations, including public school interviews of suspected child abuse victims. The *amici* agree with the Petitioners that the Ninth Circuit was wrong in requiring a warrant, court order, parental consent, or exigent circumstances for public school interviews in cases such as this. And, if the Fourth Amendment is implicated, they agree with the Petitioners that the Fourth Amendment balancing test for reasonableness is the proper test for this Court to require. But the *amici* ask this Court to do more.

The *amici* ask this Court to order briefing on the antecedent and fairly included issue raised in this brief: Whether, in the absence of egregious circumstances, a public school interview of a suspected child abuse victim that is conducted by a social worker and a peace officer necessarily implicates the Fourth Amendment at its inception. And the *amici* ask this Court to find that it does not.

The *amici* also request this Court to address the fairly included issues of children's right to and compelling interest in being safe from abuse and neglect, and how it impacts Fourth Amendment analysis in child protection investigations. They ask this Court to find that children have such a right, and that the child's right to be safe from abuse and neglect is a

factor that must be considered in all Fourth Amendment analyses of child protection investigations.

Protecting children from abuse and neglect is an enormous task, yet it is a task that is of great importance to this country, its families, and its most vulnerable members – children. This Court now has the opportunity to establish clear and reasonable guidance, within the Constitution, for social workers and peace officers to begin that task. The *amici* ask that it do so.

Respectfully submitted December 17, 2010,

JOHN J. SANSONE, County Counsel
JOHN E. PHILIPS, Chief Deputy
GARY C. SEISER, Senior Deputy
Counsel of Record
OFFICE OF COUNTY COUNSEL
4955 Mercury Street
San Diego, CA 92111
Phone: 858.492.2500
Gary.Seiser@sdcounty.ca.gov
Counsel for Amici Curiae

JOHN E.B. MYERS
Of Counsel
UNIVERSITY OF THE PACIFIC
MCGEORGE SCHOOL OF LAW
3200 Fifth Avenue
Sacramento, CA 95817
Phone: 916.739.7176
jmyers@pacific.edu

Additional Counsel:

JENNIFER B. HENNING
Litigation Counsel
CALIFORNIA STATE ASSOCIATION OF COUNTIES
1100 K Street, Suite 101
Sacramento, CA 95814
Phone: 916.327.7500
jhenning@coconet.org

PATRICK WHITNELL
General Counsel
LEAGUE OF CALIFORNIA CITIES
1400 K Street
Sacramento, CA 95814
Phone: 916.658.8281
pwhitnell@cacities.org