Consolidated Case Nos. 09-1478 and 09-1454

In The Supreme Court of the United States

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,

Respondents.

BOB CAMRETA,

Petitioner,

v.

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

Respondents.

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

BRIEF FOR PETITIONER JAMES ALFORD

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QUESTION PRESENTED

Does the Fourth Amendment require a warrant, court order, parental consent, or exigent circumstances before law enforcement and child welfare officials may conduct a temporary seizure and interview at a public school of a child whom they reasonably suspect was being sexually abused by her father?

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The decision of the United States Court of Appeals for the Ninth Circuit is published at *Greene v. Alford*, 588 F.3d 1011 (9th Cir. 2009) and is reprinted in the Appendix to the Petition for a Writ of Certiorari at 1. The decision of the District Court is unpublished. It can be retrieved at *Greene v. Alford*, CIV. 05-6047-AA, 2006 WL 758547 (D. Or. Mar. 23, 2006) and is reprinted in the appendix to the petition at 56.

JURISDICTION

The Ninth Circuit issued its opinion on December 10, 2009. Petitioner, having previously received an extension of time within which to file, timely filed a petition for rehearing/rehearing *en banc* on February 4, 2010 which the Ninth Circuit denied on March 1, 2010.

The petition for a writ of certiorari was filed on June 1, 2010 and granted on October 12, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The District Court had jurisdiction pursuant to 28 U.S.C. § 1331.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> 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.

STATEMENT OF THE CASE

I. Proceedings Below

S.G., nine years old at the time of the underlying events, sued in the United States District Court for the District of Oregon asserting that petitioners Oregon Department of Human Services ("DHS") caseworker Bob Camreta and Deputy Sheriff James Alford ("petitioner") (collectively, "petitioners") had unreasonably seized her at a public school in violation of the Fourth Amendment. (J.A. at 12-31) S.G.'s claim arose from a one to two-hour interview conducted in her school's conference room. (App. to Cert. Pet. at 58) The interview took place after Camreta had received information leading him to suspect S.G.'s father had sexually abused her and her five-year old sister. (App. to Cert. Pet. at 5, 58) The District Court granted petitioners summary judgment, ruling that

although S.G. had been seized, no constitutional violation had occurred because the seizure was reasonable given the circumstances. (App. to Cert. Pet. at 66-67)

The District Court found the analysis in *Doe v. Bagan,* 41 F.3d 571 (10th Cir. 1994) persuasive. (App. to Cert. Pet. at 65) *Bagan* considered whether the seizure of a nine-year old boy by a social services caseworker at a public school to question him about his suspected sexual abuse of another child violated the Fourth Amendment. 41 F.3d at 573-74. Applying the reasonableness test of *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), *Bagan* held no constitutional violation had occurred, as the seizure "was justified at its inception because a victim of child abuse had identified [the boy] as her abuser," and "a ten-minute interview with a caseworker was reasonably related in scope to determining [the boy]'s role in the incident." 41 F.3d at 574 n. 3.

Applying the same standard to the present case, the District Court concluded the seizure of S.G. was reasonable at its inception because it was supported by reasonable suspicion that S.G. had been sexually abused by her father, and was reasonable in scope because the circumstances justified the interview's length. (App. to Cert. Pet. at 65) The District Court ruled alternatively that, even if the seizure had been unconstitutional, qualified immunity protected petitioners from liability. *Id.* at 66.

On appeal the Ninth Circuit rejected the District Court's reasoning on the Fourth Amendment issue, but agreed with its qualified immunity ruling. (App. to Cert. Pet. at 44-45) Accordingly, it affirmed the District Court as to its grant of summary judgment to petitioners, but reversed the District Court's ruling as to the Fourth Amendment violation. (App. to Cert. Pet. at 55) Petitioners' appeal only challenges the Ninth Circuit's substantive Fourth Amendment analysis, not the issue of qualified immunity.[1]

The Ninth Circuit relied on *Ferguson v. City of Charlotte,* 532 U.S. 67 (2001) to conclude the standard employed by the District Court cannot apply to in-school child abuse interviews conducted with law enforcement involvement. (App. to Cert. Pet. at 30-36) The panel reasoned that *Ferguson* barred the application of the *T.L.O.* standard where "law enforcement personnel or purposes" are too deeply involved in a seizure. *Id.* Thus, rather than balancing the government's interests in the interview against S.G.'s expectations of privacy, it held "the general law of search warrants applies to child abuse investigations" where law enforcement personnel or purposes are involved. *Id.* at 36-37.

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[1] The opening brief of petitioner Camreta addresses why the issue of qualified immunity does not preclude this Court's review in this case. The same reasons justifying review of Camreta's appeal apply to Alford's appeal. For this reason, Alford adopts Camreta's arguments in this regard.

II. Statement of Facts

On Thursday, February 20, 2003, Camreta received reports concerning the possible sexual abuse of two girls, S.G., age 9, and her little sister K.G., age 5. The report stated that Nimrod Greene ("Nimrod") had been arrested February 12, 2003, on charges that he had sexually abused a seven-year old boy referred to as F.S. The report described the circumstances of Nimrod's arrest and reported possible sexual abuse by Nimrod against his two daughters, S.G. and K.G. (Camreta Aff., p. 2, and exhibits 2 and 3, District Court Docket #44 (J.A. 2))

The reports stated that police had been called to F.S.' family home to investigate statements he had made to his parents concerning Nimrod. Detectives interviewed F.S. and his parents. F.S., in substance, told detectives that he was alone with Nimrod earlier that day and that Nimrod had grabbed or squeezed his "pee pee" while he was sitting on the chair in the living room.

F.S.' parents corroborated that Nimrod had indeed been at their home that day and that he and F.S. were alone together in the living room while they were occupied with other guests. F.S. came out of the living room and approached his mother and asked to speak with her. Nimrod, who appeared intoxicated, attempted to prevent F.S. from speaking with his mother. Seeing that his presence upset her son, F.S.' mother told Nimrod to "back off," and Nimrod left shortly thereafter. Sometime after Nimrod left, F.S.

told his parents that while in the living room Nimrod had grabbed or squeezed his "pee pee" while he was sitting on the chair in the living room and that he didn't like it, he didn't want Nimrod to do it again, and that a similar encounter had happened in the past. *Id.*

During the investigation, F.S.' parents also told the detective how both Nimrod and his wife, Sarah Greene, had made comments in the past suggesting that Nimrod had sexually abused their daughters. For instance, Nimrod had told F.S.' father that Sarah had accused him of molesting his daughters. F.S.' parents said they had no firsthand knowledge of actual abuse, but told the detective that similar comments had been made in the past by both Nimrod and Sarah. *Id.*

F.S.' mother also told the detective that Sarah was afraid of Nimrod. She mentioned that Sarah had confided to her about how she didn't like the way Nimrod makes the girls sleep in his bed when he is intoxicated, and didn't like the way he acts when they are sitting on his lap. Many of Sarah's complaints about Nimrod concerned his actions while intoxicated. *Id.*

The reports also stated that when detectives questioned Nimrod regarding F.S., Nimrod became "very nervous and started sweating." When Nimrod was informed that F.S. had told his parents Nimrod had touched him on his privates, he became extremely nervous, "laughed nervously, waved his

hands, would stand up and sit down, sweat, wring his hands, and fidget." The report noted that Nimrod was so nervous that the detective questioning him "could see his pulse in his neck." Nimrod agreed to meet the detective at the Sheriff's Office to answer questions. Nimrod failed to appear at the time agreed for the interview. *Id.*

The day after receiving the initial report, Camreta learned Nimrod had been released on bail from custody following his arrest and was having unsupervised contact with his daughters. Based on his experience and training, Camreta knew that child sex offenders often act on impulse and often direct those impulses against their own children. He also knew that S.G., K.G., and Nimrod continued to live with S.G.'s and K.G.'s mother, Sarah Greene, who based on the reports from the investigation into what had happened to F.S., apparently knew that Nimrod had been abusing S.G. and K.G. and had done nothing. (Camreta Aff., p. 2, and exhibits 2 and 3, District Court Docket #44 (J.A. 2))

On Monday, February 24, 2003, Camreta began a child protective services assessment concerning S.G. and K.G. Camreta knew where S.G. attended school and that school was in session. Believing the school was an appropriate environment to help make S.G. feel safe, and desiring to conduct the interview away from the influence of her parents or other potential distractions, Camreta decided to interview S.G. at her

school that day. He did not contact S.G.'s parents before conducting the interview.[2] In-school interviews of this type are a regular practice of child protective workers such as Camreta and are consistent with DHS rules and training. Camreta requested the assistance of the Deschutes County Sheriff's Office, and petitioner was dispatched to the school. (Camreta Aff., pp. 2-4, District Court Docket #44 (J.A. 2); (Christopher Bell Aff., exhibit 1, pp. 3-4) (Excerpts from the Deposition Transcript of James Alford); District Court Docket #49 (J.A. 3))

Upon arriving at the school, petitioners notified the administration they were there and received permission to interview S.G. at school. A counselor went to S.G.'s class, retrieved her and brought her to a large conference room adjacent to the school's administrative offices, where petitioners were waiting. The two were introduced to S.G. and the counselor

[2] Oregon law permits child abuse assessments to occur on public school grounds and does not always require advance notice to the parents. *See* Or. Rev. Stat. § 419B.045 (2001) (requiring notice to the school administrator, but not to a child's parents) and Or. Admin. R. 413-020-0430(5)(h) (2002). The statutes and regulations at issue in this case have undergone revisions since these events occurred. The 2001 compilation of the Oregon Revised Statutes contains the versions in effect at all times material to the events at issue herein. Some of the statutes at issue were amended in 2003, but those amendments were not effective on the date of these incidents. The 2002 Oregon Administrative Rules compilation contains the versions of the rules in effect at the time of S.G.'s interview. The 2003 amendments to the rules did not take effect until July 2003.

left. (Camreta Aff., pp. 2-4, District Court Docket #44; Christopher Bell Aff., exhibit 1, pp. 5-8; exhibit 2, pp. 2-4) (Excerpts from the Deposition Transcript of S.G.); District Court Docket #49 (J.A. 3)).

Once there, S.G. sat down at a table with Camreta, who asked her questions. Camreta's questions were sensitive to S.G.'s gender and age. According to Camreta, the interview lasted about an hour. S.G. believed it lasted closer to two hours. To make her comfortable Camreta began with light conversation about school, where she had lived in her life, her cats, her family, and homework. Camreta began to discuss S.G.'s father with her, and she disclosed that he had sexually abused her. Camreta documented her admissions in his written report:

> (a) She had heard about "good" and "bad" touches; she knew it was important to tell the truth; (b) "When he drinks he tries to do it," meaning "he tries to touch me somewhere in my private parts. Then I go to my room and lock the door"; (c) The last time this occurred was "just last week" on the outside of her clothing and she had tried to tell him to stop; (d) Her dad stopped the private part touching "yesterday because he isn't going to drink anymore"; (e) The touching of private parts started when she was three; (f) The touching involved the chest and buttock areas, outside of her clothing. Her father sometimes "mumbled during the touching"; (g) S.G.'s mother knew about the touching; her mother had said within the last couple of

> days that "she had to deal with my dad"; and
> (h) The touching was "one of our secrets," with her little sister, K.G.

(Camreta Aff., pp. 2-4, and Ex. 3, District Court Docket #44 (J.A. 2); Christopher Bell Aff., exhibit 2, pp. 4-6; District Court Docket #49 (J.A. 3))

According to S.G., petitioner "just sat there" during the interview. He did not ask her any questions or otherwise participate. Neither petitioner touched or threatened her. S.G. said petitioner was nice to her, she trusted him, and he never did anything to frighten her. She said it was common for police officers to be present at school and she was comfortable in their presence. Based upon what S.G. had told him, Camreta concluded that she was in need of protective social services and arranged to have services provided to S.G. and her family. (Camreta Aff., pp. 4-8, exhibits 3-12, District Court Docket #44 (J.A. 2); Christopher Bell Aff., exhibit 2, pp. 7, 10, 12, 15-17; District Court Docket #49 (J.A. 3); J.A. 60)

SUMMARY OF ARGUMENT

The government need to protect children from abuse and neglect is compelling. In some contexts actions taken in furtherance of such interests must be tailored narrowly, not so under the Fourth Amendment. The Fourth Amendment requires the government to act reasonably when conducting a search or

seizure. The reasonableness of a seizure is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.

In deciding this case, the Ninth Circuit departed from these established principles. It gave only a passing nod to reasonableness and balancing of interests. Instead, it undertook an analysis of the degree to which the Oregon child welfare statutes evidenced "entanglement of law enforcement and social service officials in the state's investigation of child abuse." (App. to Cert. Pet. at 32) Once the court concluded that the Oregon system "encourag[ed] entanglement between law enforcement and social service workers," balancing was over – the "general law of search warrants" applied. The Ninth Circuit believed this "general law" imposed a rule which required such brief seizures to be justified by a warrant, court order, exigent circumstances or parental consent. (App. to Cert. Pet. at 35)

The decision below is flawed in two important respects. First, the proper analytical framework is to engage in a balancing of the relevant public and private interests at stake, not reflexively imposing a requirement of a warrant or probable cause. The second flaw flows naturally from the first. Had the Ninth Circuit balanced the relevant interests as required, it would have concluded that reasonableness here compels neither a warrant nor probable cause.

The rule announced below serves as a systematic disincentive for police or child welfare officials to act even in cases where to do so would substantially further the public's interest in protecting a child from harm. The rule places responsible officials in an impossible position, particularly in close cases. On the one hand, a warrant or probable cause requirement discourages taking the modest measure of escorting a suspected child abuse victim to a private location and speaking with her about whether she is safe at that very moment. On the other, it encourages hasty and injudicious action to prevent second guessing of the exigency of a particular circumstance. A responsible Fourth Amendment balance weighs in favor of standards which encourage officials to act in the public interest. When one considers that a typical seizure in this type of situation consists of escorting a child to a nearby private location and talking to her it becomes clear that the imposition of a warrant and probable cause requirement do not meaningfully protect either the public or private interests.

Instead of the unworkable, and frankly dangerous, rule announced by the Ninth Circuit, this Court should apply a reasonableness test similar to the one articulated in *New Jersey v. T.L.O*. Under such a test a government official, including a police officer, acts reasonably when he seizes a child whom he reasonably suspects has been abused and is in need of protection. A constitutionally reasonable seizure is no more intrusive than reasonably needed to determine

if the child has been abused or is in need of protection.

ARGUMENT

I. The Fourth Amendment Requires a Seizure to be Judged Using "Traditional Standards of Reasonableness"

The Fourth Amendment to the United States Constitution, as applied to the states as well as local governments through the Fourteenth Amendment, provides that the state shall not violate "[t]he right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures." "As the text of the Fourth Amendment indicates, the ultimate measure of a government search or seizure is 'reasonableness.'" *Vernonia School District 47J v. Acton,* 515 U.S. 646, 652 (1995). Consequently, the touchstone of any analysis under the Fourth Amendment is "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Terry v. Ohio,* 392 U.S. 1, 19-20 (1968). Such reasonableness ultimately depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Dunaway v. New York,* 442 U.S. 200, 208-09 (1979) (citing *Terry,* 392 U.S. at 22-27); *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977).

A. The Court Should Use "Traditional Standards of Reasonableness" to Judge the Interview of S.G. by Balancing Her Expectations of Privacy Against the Government's Interest in Protecting Her from Abuse

Three lines of Supreme Court authority command the seizure here to be evaluated according to a balancing of relevant public and private interests and not by automatically imposing a warrant, court order, exigent circumstances or parental consent requirement.

First, modern practice establishes that the proper Fourth Amendment analysis of *any* challenged search or seizure proceeds in two steps. The first step is a historical one which compels the Court to examine "the statutes and the common law of the Founding Era" and determine if the founders would have regarded the practice as unlawful. *Virginia v. Moore*, 553 U.S. 164, 168 (2008); *Vernonia,* 515 U.S. at 652-53. Where history is inconclusive, the Court proceeds to the second step – "assessing, on the one hand, the degree to which [the government practice] intrudes upon an individual's privacy and, on the other, the degree to which [the intrusion] is needed for the promotion of legitimate governmental interests."[3] *Moore,* 553 U.S. at 171; *Vernonia,* 515 U.S. at 652-53.

[3] Such balancing has been referred to by this Court as analyzing searches and seizures under "traditional standards of reasonableness." *See Moore*, 553 U.S. at 171.

This straightforward approach applies regardless of whether a search or seizure is calculated to advance criminal, civil, administrative, special, non-special, or some other combination of governmental interests.

Second, if the modern approach does not compel such a balancing of interests, this Court's 2004 decision in *Illinois v. Lidster*, 540 U.S. 419 (2004) does. *Lidster* holds that seizing a person to discover if he or she is a witness to a crime is fundamentally different than seizing a person to determine if he or she has committed a crime. The Court recognized this proposition to comprise "a valid and important distinction" for Fourth Amendment purposes. *Id.* at 428 (Stevens, J., concurring). Regardless of historical ambiguity, *Lidster* states that seizures of the witness-seeking type are analyzed by balancing the relevant public and private interests at stake. Whether Fourth Amendment reasonableness requires a warrant or probable cause is determined by reference to this balance of interests, not by presumptively requiring either.

Third, if the Court determines *Lidster* does not govern, or that it needs to depart from the modern practice, another body of case law, the "special needs" cases, requires the Court to evaluate S.G.'s seizure under traditional standards of reasonableness. "[W]hen 'special needs,' beyond the normal need for law enforcement," drive the need for a search or seizure, the Court evaluates the practice "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate

government interests" to determine if warrant and probable cause requirements are impracticable. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989).

B. This Court's Modern, Two-Step Approach to Analyze Fourth Amendment Questions

In the first (historical) step of the modern analysis, the Court "look[s] to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve." *Moore,* 553 U.S. at 171. "When history has not provided a conclusive answer," the Court proceeds to the second step, "analyz[ing] a search or seizure in light of traditional standards of reasonableness." *Id.* This analysis involves "assessing, on the one hand, the degree to which [the government practice] intrudes upon an individual's privacy and, on the other, the degree to which [the intrusion] is needed for the promotion of legitimate governmental interests." *Moore*, 553 U.S. at 171; *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999). This approach assesses the Fourth Amendment propriety of the S.G. interview by employing traditional standards of reasonableness.

1. The Historical Record of the Founding Era Provides "No Clear Answer" as to Whether the Framers Sought to Protect Children from Interviews Like S.G.'s When They Adopted the Bill of Rights

"The historical materials on what the Framers thought of official searches of children, let alone of public school children . . . are extremely scarce." *Vernonia*, 515 U.S. at 686 n. 1 (O'Connor, J., dissenting). This scarcity is unsurprising – the Bill of Rights did not apply to the states when the Fourth Amendment was adopted. *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833). The Founders adopted the Fourth Amendment out of fear of "indiscriminate searches and seizures conducted under the authority of 'general warrants.'" *Payton v. New York*, 445 U.S. 573, 583 (1980). The states, not the federal government, exercised authority over the welfare of children.[4] Thus, S.G.'s interview does not resemble the abuses prompting the ratification of the Fourth Amendment.

Nonetheless, the power of a state to act in the best interests of vulnerable citizens was well-established at the founding of the Republic. Under the English constitutional system the King, as father of the nation, possessed the power to act in protection

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[4] John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 452-53 (2008).

of the nation's weak and powerless, namely "infants, idiots, and lunatics."[5] Hence, at the founding of the United States, the power of *parens patriae* was passed to the states to be exercised by their respective legislatures. *Fontain v. Ravenel*, 58 U.S. 369, 384 (1854).

Earlier, during the colonial era, parents essentially owned their children and could generally do with them as they pleased, including using disciplinary methods that would be considered abusive in today's society.[6] This Court has acknowledged that children enjoyed substantially fewer "rights" at the time of the framing, *Vernonia,* 515 U.S. at 665 n. 4, and that compulsory school attendance did not emerge until more than fifty years after adoption of the Fourth Amendment. *Id.* at 653 n. 1. Thus, what children's "rights" are while attending school was surely not contemplated by the Founders when drafting the Fourth Amendment.

In addition, criminal prosecution of child abuse was virtually unknown,[7] and government seizures of

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[5] 1 W. Blackstone, *Commentaries on the Laws of England*, Ch. 17, 463 (1765).

[6] *See* Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and Pierce and the Child as Property,* 33 WM. & MARY L. REV. 995, 1037 n. 182 (1992) (quoting Michael Grossberg, GOVERNING THE HEALTH LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA 54 (1985)).

[7] The 1874 child abuse trial concerning Mary Ellen Wilson has been popularly regarded as the first recorded case of prosecution of child abuse as a crime. *See* Eric Shelman and Stephen

(Continued on following page)

children to protect them from abuse were accomplished through colonial (and later state) "poor laws."[8] Neglected children of parents who "suffer[ed] their Children to live idly,"[9] were seized and "bound out" as apprentices to more desirable families.[10] Prior judicial approval of these highly invasive, long-term seizures was by no means universal. *Compare Warner v. Swett*, 7 Vt. 446, 450 (1835) (Vermont poor law "conferred a discretionary authority" on town overseers to bind out children without prior judicial approval); *Schermerhorn v. Hull*, 16 N.Y. (Johns) 270 (N.Y. Sup. Ct. 1816) (overseer not required to obtain prior judicial approval before binding out father's child); *with*

Lazoritz, M.D., THE MARY ELLEN WILSON CHILD ABUSE CASE AND THE BEGINNING OF CHILDREN'S RIGHTS IN 19TH CENTURY AMERICA, McFarland & Company (2005); Howard Markel, *Case Shined First Light on Abuse of Children*, NEW YORK TIMES (December 14, 2009); *How One Girl's Plight Started the Child Protection Movement*, American Humane Association, (available at http://www.americanhumane.org/about-us/who-we-are/history/mary-ellen.html) viewed December 6, 2010 (citing Sallie A. Watkins, *The Mary Ellen Myth: Correcting Child Welfare History* 35 SOCIAL WORK 500 (1990)). The case of Mary Ellen Wilson may not have been the first child abuse case prosecuted as a crime, as a prior case involving the apparent prosecution of a child's parents on allegations they "excessively punished" their child occurred 34 years earlier. *Johnson v. State,* 21 Tenn. 283 (1840).

[8] *See* William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteen States*, 31 U. RICH. L. REV. 111, 121 (1997) (hereafter *Reluctant Charity*).

[9] *Moore v. Ganim*, 660 A.2d 742, 810 (Conn. 1995) (quoting LAWS OF HIS MAJESTY'S COLONY IN CONNECTICUT IN NEW ENGLAND (B. Green & J. Allen pubs. 1702) pp. 94-95).

[10] *Reluctant Charity* at 153.

King v. Brockway, 2 Root 86, 86 (Conn. Super. Ct. 1794) (magisterial consent required before seizure and indenture of neglected child). Here, as in *Vernonia* "there was no clear practice, either approving or disapproving the type of [seizure] at issue at the time" the Fourth Amendment was adopted. 515 U.S. at 652.

Given this record, Justice O'Connor's observation in *Vernonia* concerning the scarcity of founding era materials on official searches of children extends to official seizures of children. What is certain is that existing historical sources emphatically do not "point to a 'clear answer [that] existed in 1791 and has been generally adhered to by the traditions of our society ever since.'" *Atwater v. City of Lago Vista*, 532 U.S. 318, 345 (2001) (quoting *County of Riverside v. McLaughlin*, 500 U.S. 44, 60 (1991) (Scalia, J., dissenting)). If anything, the American norm permitted severely invasive and prolonged seizures of children undertaken for their welfare on little evidence and with scant judicial oversight. Thus, this unclear history demands that the question presented by this case be resolved using "traditional standards of reasonableness." *Moore*, 553 U.S. at 171.

2. When History is Not Clear, "Traditional Standards of Reasonableness" Govern, Not the "General Law of Search Warrants"

Three decisions from this Court demonstrate the Ninth Circuit erred when it failed to assess the reasonableness of S.G.'s interview with a balancing of interests approach. Instead, it reviewed the Oregon statutory scheme governing the interview at issue, and concluded it "encourage[d] entanglement between law enforcement and social service workers." (App. to Pet. for Cert. at 35) After that determination, no balancing took place, and the so-called "general law of search warrants" governed. *Id.* This was the wrong approach.

Virginia v. Moore, *Atwater v. City of Lago Vista*, and *Wyoming v. Houghton* each counsel against reflexively imposing a warrant or probable cause requirement when police are "entangled" in a search or seizure. In each case police officers performed the Fourth Amendment intrusion solely in furtherance of the state's general interest in law enforcement. *Moore* involved police conducting a warrantless arrest and incidental search. 553 U.S. at 166. *Atwater* also concerned a challenge to the police's authority to make a warrantless arrest. 532 U.S. at 323. *Houghton* implicated a warrantless search of an automobile passenger's belongings when probable cause existed to search the automobile, but not the passenger's belongings. 526 U.S. at 303.

The Court trod the same decisional path in each case. First, it conducted a historical analysis of the challenged actions. When it found the historical record evidence of a warrant or probable cause requirement "equivocal,"[11] not providing a "clear answer,"[12] or inconclusive,[13] it evaluated police actions under "traditional standards of reasonableness."[14] Significantly, it did not impose the "general" law of anything, or a requirement of probable cause or a warrant. Instead, as petitioner urges, the Court evaluated the intrusion under traditional standards of reasonableness. *Moore*, 553 U.S. at 171. This analysis, not the Ninth Circuit's mechanical approach, is the proper method for evaluating whether S.G.'s interview complied with the Fourth Amendment.

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[11] *Houghton*, 526 U.S. at 303.

[12] *Atwater*, 532 U.S. at 345 (quoting *McLaughlin*, 500 U.S. at 60 (Scalia, J., dissenting)).

[13] *Moore*, 553 U.S. at 171 (noting history's failure to provide "a conclusive answer" to the question).

[14] *Moore*, 553 U.S. at 171 ("[w]hen history has not provided a conclusive answer, we have analyzed a search or seizure in light of traditional standards of reasonableness"); *Atwater*, 532 U.S. at 346 ("when historical practice fails to speak conclusively to a claim grounded on the Fourth Amendment, courts are left to strike a current balance between individual and societal interests by subjecting particular contemporary circumstances to traditional standards of reasonableness"); *Houghton*, 526 U.S. at 299-300 ("[w]here [the historical] inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness").

C. *Illinois v. Lidster*

The Court may not need to consider the Court's modern approach in determining whether a balancing of traditional standards of reasonableness represents the correct means of evaluating this case. There exists an important Fourth Amendment distinction between the seizure of a suspect and the seizure of a potential witness. In *Illinois v. Lidster,* 540 U.S. 419 (2004), the Court evaluated suspicionless seizures of motorists at a police checkpoint. The checkpoint's "primary law enforcement purpose" was to "ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others." *Id.* at 423. The Court had previously decided a highway checkpoint case in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). The *Lidster* respondent argued that the *Edmond* Court had categorically rejected suspicionless stops of motorists undertaken for purposes of criminal law enforcement. The *Lidster* Court rejected that argument, observing:

> The checkpoint stop here differs significantly from that in *Edmond.* The stop's primary law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others. The police expected the information elicited to help

> them apprehend not the vehicle's occupants, but other individuals.

Id. at 423 (emphasis in original). Thus, a police officer seeking information about a crime that someone else has committed engages in a fundamentally different kind of law enforcement activity from a police officer seizing and interrogating a person suspected of a crime. The activity of the information-seeking officer is ill-suited to Fourth Amendment concepts like individualized suspicion and warrants. The Court recognized this distinction, evaluated the former seizure by balancing the public and private interests implicated by the activity, and concluded the seizure was reasonable. *Id.* at 428.

Lidster is not significant in that it governs how the government and private interests in this case should be balanced. Rather, it is significant because it validates petitioner's contention that, regardless whether the seizure here fits within the "special needs" line of cases discussed in section C below, this Court should not automatically impose (as did the Ninth Circuit) a warrant, court order, parental consent, or exigent circumstances requirement as indispensible conditions of constitutional reasonableness. As with the Court's "modern" and "special needs" approaches, *Lidster* requires the use of traditional standards of reasonableness to balance the public and private concerns implicated by a seizure. *Lidster*, 540 U.S. at 426.

Standing alone, *Lidster* requires the Court to reject any suggestion that the Fourth Amendment necessarily imposes a warrant or probable cause requirement on S.G.'s seizure. If the Fourth Amendment requires a warrant, court order, exigent circumstances, or parental consent, such a requirement can only be ascertained by engaging in a balancing of the relevant public and private interests implicated by this type of seizure.

D. "Special Needs"

Even if the Court's modern approach, or its approach in *Lidster* do not compel evaluation of S.G.'s seizure in light of traditional standards of reasonableness, the nature of the seizure here fits comfortably within the "special needs" line of cases. These cases, like those in the Court's other approaches, eschew blind application of a warrant or probable cause requirement. Instead, "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable,'" probable cause and a warrant are not required components of Fourth Amendment reasonableness. *Skinner*, 489 U.S. at 619.

In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) Justice Blackmun observed that when "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirements impracticable," the Fourth Amendment requires reasonableness to be assessed through a balancing of

interests. 469 U.S. at 351 (Blackmun, J., concurring). Since this observation, the Court has invoked "special needs" in the context of warrantless searches of schoolchildren by school officials, warrantless home searches of probationers, suspicionless drug testing of high school athletes, and suspicionless drug testing of railroad and customs service employees. *Bd. of Ed. of Ind. Sch. Dist. No. 92 of Pottawatomie Co. v. Earls,* 536 U.S. 822, 827-30 (2002) and *Vernonia,* 515 U.S. at 664-65 (schoolchildren); *Skinner*, 489 U.S. at 619 (railroads); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 677 (1989) (customs service).

1. What Constitutes a "Special Need"?

Some controversy exists as to what constitutes a sufficiently "special" need to trigger a balancing inquiry. However, two cases in which the Court held that the asserted government need was not sufficiently "special" to invoke the doctrine provide guidance.

In *Chandler v. Miller*, 520 U.S. 305 (1997), the Court considered a Georgia statute which required all political candidates to submit to a urinalysis prior to running for office. *Id.* at 309. The State contended the requirement was reasonable based upon the premise of the "incompatibility of unlawful drug use with holding high state office." *Id.* at 318. It further asserted that the statute was justified "because the use of illegal drugs draws into question an official's judgment and integrity; jeopardizes the discharge of

public functions, including antidrug law enforcement efforts; and undermines public confidence and trust in elected officials. . . . The statute . . . serves to deter unlawful drug users from becoming candidates and thus stops them from attaining high state office." *Id.* This Court held the proffered need was insufficiently "special" and essentially amounted to nothing more than "set[ting] a good example" *Id.* at 322. Thus, to be "special" a need must involve concerns which are "real and not simply hypothetical," and must represent a "concrete danger." *Id.* at 319. Symbolism does not constitute a "special need." *Id.*

In *Ferguson v. City of Charlotte,* 532 U.S. 67 (2001), the Court considered a drug testing policy which targeted expectant mothers presumed to be at higher risk for drug abuse for suspicionless urine tests for the presence of cocaine. Women who tested positive were given a choice, attend substance abuse treatment or be arrested. The *Ferguson* Court rejected the state's attempt to justify these searches as advancing the "special governmental need" of health and safety of expectant mothers and infants because, according to the Court, the "immediate" means of accomplishing this purpose was the generation of evidence for criminal prosecution of the women who were tested. *Id.* at 83-84 ("the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce patients into substance abuse treatment"). *Ferguson* holds that government officials cannot use the special needs cases

as a loophole to implement suspicionless searches for law enforcement purposes. 532 U.S. at 85.

Read together, *Chandler* and *Ferguson* provide a rough analytical framework for a determination of whether a governmental need is sufficiently "special" to constitute a Fourth Amendment "special need." *Chandler* requires that a Fourth Amendment "special need" be something other than "set[ting] a good example." *Chandler*, 520 U.S. at 532. The hazards which the program is designed to ameliorate must be "real and not simply hypothetical" and must represent a "concrete danger." *Id. Ferguson* holds that government officials cannot use "special needs" as a loophole to implement suspicionless searches for law enforcement purposes. 532 U.S. at 85. If the rule in *Ferguson* applies to a challenged governmental action, then the "primary purpose" of the action as well as its "immediate objective" must be something other than generation of evidence for criminal law enforcement purposes. *Id.* at 83.

2. "Special Needs" Govern the Seizure at Issue Here

"It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is compelling." *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). "A democratic society rests, for its continuance, upon the healthy, well-rounded

growth of young people into full maturity as citizens." *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). "There is no more worthy object of the public's concern" than the welfare of children. *Wyman v. James*, 400 U.S. 309, 318 (1971).

There is nothing "hypothetical" or "symbolic" about the immensity of the problem posed by the abuse and victimization of children in American society today. In 2008, child welfare officials received approximately 3,300,000 reports of child abuse involving approximately 6,000,000 children.[15] After assessment or investigation, 690,061 different children were found to have been victims of abuse.[16] More than 69,000 of these children were abused sexually.[17] Of all abuse, 81.2% was perpetrated by one or both parents.[18] The hazards of abuse are real, and the danger concrete.

The seizure at issue in this case was undertaken pursuant to Oregon's child welfare statutes. These statutes reflect the measured response the State has ordained in investigating and responding to the needs

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[15] U.S. Dept. of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau (2010). *Child Maltreatment 2008* at 6. Available at http://www.acf.hhs.gov/programs/ch/stats_research/index.htm#can.

[16] *Child Maltreatment 2008* at 2.

[17] *Child Maltreatment 2008* at 45, Table 3-10 (69,184 victims).

[18] *Child Maltreatment 2008* at 28, Figure 3-6.

of its abused and neglected children. All governmental activities relative to such children are guided by the State's expressions of policy in Or. Rev. Stat. § 419B.010 (2001):

> The Legislative Assembly finds that for the purpose of facilitating the use of protective social services to prevent further abuse, safeguard and enhance the welfare of abused children, and preserve family life when consistent with the protection of the child by stabilizing the family and improving parental capacity, it is necessary and in the public interest to require mandatory reports and investigations of abuse of children and to encourage voluntary reports.

There is no express intent to further criminal law enforcement interests in the policy statement or, for that matter, anywhere else in the statutory scheme. The statutes do not encourage "entanglement between law enforcement and social service workers," as the Ninth Circuit concluded below. (App. to Pet. for Cert. at 35) Under Oregon law, a child abuse investigation begins when a report is made to either police or the Department of Human Services ("DHS"). Once a report is received, DHS must notify local law enforcement and vice versa. Or. Rev. Stat. § 419B.015. After cross-notification occurs, either DHS or the law enforcement agency must immediately investigate the "nature and cause of the abuse." Or. Rev. Stat. § 419B.020(1)(a). If the investigation concludes there is "reasonable cause" to believe abuse has occurred, the only result mandated by the scheme is protective.

DHS must provide "protective social services" if necessary to protect the child from further abuse or to safeguard her welfare. Or. Rev. Stat. § 419B.020(2).

The "initial and continuing focus" of the statutory scheme here is the protection of the child, not anyone's arrest or prosecution. The duty to investigate and provide protective services exists regardless of whether a suspect can be identified or apprehended. The statutes and rules applicable to this seizure devote significant attention to the child's needs for protection and social services. An abused child can be taken into protective custody, placed in shelter care, or released to a parent or other responsible person. Or. Rev. Stat. § 419B.175. If a child's needs include shelter care, civil protective proceedings are mandatory, as are "protective social services." Or. Rev. Stat. § 419B.185(1) and 419B.020(2). Criminal law enforcement concerns are required by statute to take a back seat to the state's overarching interests in protection. Or. Rev. Stat. § 418.747(5) (in all child abuse investigations "[p]rotection of the child is of primary importance"). The authorities permitting information sharing do not treat sharing for law enforcement purposes preferentially. Information discovered in an investigation is provided on an equal basis for law enforcement and non-law enforcement purposes. *See* Or. Rev. Stat. § 419B.035(1) and (2) (setting forth circumstances in which DHS may release confidential child abuse investigatory information). Criminal prosecution is not an ingredient in the success or failure of Oregon's system of child

abuse investigation and response. Here investigation of abuse and protection of children occur *regardless* of the outcome or existence of a criminal case.

As can be seen from the bleak statistics concerning child abuse, *Chandler's* requirement of real and concrete danger is satisfied. It is also clear *Ferguson's* "ultimate" versus "immediate" purpose test (to the extent it is even required or applicable), is also satisfied. Oregon's statutory scheme demonstrates that the primary, ultimate, and immediate purpose of the seizures here is to determine if a child has been abused and is in need of protection. This purpose is distinct from a "general law enforcement" purpose. Law enforcement interests, while significant, are always subordinate to the child's need for protection. *See* Or. Rev. Stat. § 418.747(5).

Because "special needs" are present in this context, the question of whether the Fourth Amendment required S.G.'s seizure to be authorized by a warrant, court order, exigent circumstances or parental consent must be determined by "balancing [the seizure's] intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests." *Vernonia,* 515 U.S. at 653. For the reasons discussed in sections III and IV below, the proper Fourth Amendment balance here is that a warrantless seizure of a child who is reasonably suspected of being a victim of abuse and in need of protection is reasonable so long as the seizure is no more intrusive than is reasonably necessary to

determine if the child has been abused and in need of protection.

E. An Identical "Traditional Reasonableness" Standard Applies to All Three Modes of Analysis

The same process and standards of determining Fourth Amendment reasonableness apply no matter which of the three modes of analysis ("modern" approach, "special needs," or *Lidster*) the Court selects. In any event, the reasonableness determination is made "by assessing, on the one hand, the degree to which [the challenged practice] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Moore*, 553 U.S. at 171; *Lidster*, 540 U.S. at 427 ("in judging reasonableness we look to 'the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty"); *Vernonia*, 515 U.S. at 653 (reasonableness in "special needs" context "is judged by balancing [the practice's] intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests"). Where a "responsible Fourth Amendment balance" weighs against the imposition of a warrant or probable cause requirement, the Court holds the Fourth Amendment imposes no such requirement. *See, e.g., Earls*, 536 U.S. at 830 ("special needs" requires "a fact-specific balancing of the intrusion on the

children's Fourth Amendment rights against the promotion of legitimate governmental interests"); *Atwater*, 532 U.S. at 347 (applying "traditional standards of reasonableness" to determine arrests outside a private home for a "very minor criminal offense" do not require a warrant); *Von Raab*, 489 U.S. at 677 (finding a "special need" and, after balancing the public interest in the Service's testing program and the privacy interests, upholding a program of warrantless, suspicionless drug testing of some Customs Service employees against Fourth Amendment challenges); *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) ("balancing intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interest" justified 16-hour warrantless detention at the international border based on reasonable suspicion of drug smuggling).

Hence, no matter the approach, the Ninth Circuit's adamant refusal to balance the intrusion on S.G.'s privacy with the governmental interests involved was just plain wrong. Instead of blithely declaring the "general law of search warrants applies to child abuse investigations," it should have evaluated the intrusion based upon "traditional standards of reasonableness," balancing "on the one hand the degree to which [the seizure] intruded on . . . privacy and, on the other, the degree to which it was needed for the promotion of legitimate governmental interests." *See Moore*, 553 U.S. at 171.

Application of the proper reasonableness balance in this case includes no warrant or probable cause requirement. Here, properly analyzed, a government official (including a police officer) acts reasonably when he or she, without a warrant, seizes a schoolchild based upon a reasonable suspicion that the child has suffered abuse and needs protection. A constitutionally reasonable seizure should be no more intrusive than what is reasonably needed to determine if the child has been abused and requires protection.

II. "Traditional Standards of Reasonableness" Demonstrate that S.G.'s Interview Was Reasonable

Evaluating a seizure under "traditional standards of reasonableness" involves a weighing of (1) the gravity of the public concerns served by the seizure; (2) the degree to which the seizure advances the public interests; and (3) the severity of the interference with individual liberty. *Lidster,* 540 U.S. at 427 (citing *Brown v. Texas,* 443 U.S. 47, 51 (1979)). Use of this tripartite protocol demonstrates the reasonableness of the S.G. interview.

A. Seizures of this Type are Reasonable Because They Serve the Broad and Weighty Public Interest of Protecting Children from the Harmful Effects of Abuse

Child abuse, and in particular child sexual abuse, is a pervasive problem of national significance. As shown above, *infra.,* p. 29, the latest national statistics concerning child abuse establish it is a problem of "staggering"[19] proportions. The immediate effects of such abuse only begin to tell the story, as its destructive effects persist for years. Those victims who survive the abuse have a higher incident of psychiatric illness,[20] alcoholism,[21] drug addiction,[22] marital and family problems[23] and suicide attempts.[24] The threat posed by all forms of child abuse is at least as compelling as the threat presented by illicit childhood drug use considered in *Vernonia* and *Earls.* 536 U.S. at

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[19] App. to Pet. for Cert. at 3.

[20] Jeffery B. Bryer, et al., *Childhood Sexual and Physical Abuse as Factors in Adult Psychiatric Illness,* 144 AM. J. PSYCHIATRY 1426, 1430 (1987); Elaine Carmen, et al., *Victims of Violence and Psychiatric Illness,* 141 AM. J. PSYCHIATRY 378 (1984).

[21] Shanta R. Dube, et al., *Long-Term Consequences of Childhood Sexual Abuse by Gender of Victim*, 28 AM. J. PREV. MED. 430, 434 (2005).

[22] Frederick S. Cohen and Judianne Densen-Gerber, *A Study of the Relationship Between Child Abuse and Drug Addiction in 178 Patients: Preliminary Results,* 6 CHILD ABUSE AND NEGLECT 383-87 (1982).

[23] Dube, *supra*, FN 21 at 435.

[24] *Id.*

834-36; 515 U.S. at 660-64. Children deserve to be protected from abuse, and interviews such as S.G.'s advance the state's interest in protecting children from abuse.

To establish a grave public concern, it is unnecessary for the state to demonstrate its conduct was motivated by a public concern closely related to the specific facts of a particular search or seizure. Instead, where the state shows that its conduct was driven by a legitimate concern about a problem of broad, general significance, the Court will accept the justification and recognize the serious public concern. In V*ernonia,* the Court stated:

> It is a mistake . . . to think that the phrase "compelling state interest," in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concern, so that one can dispose of a case by answering in isolation the question: Is there a compelling state interest here? Rather, the phrase describes an interest that appears *important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy.

515 U.S. at 661 (emphasis in original).

Consistent with this principle, the Court has found numerous widespread societal problems sufficiently grave to weigh in favor of searches or seizures conducted without a warrant, probable cause or in some cases individualized suspicion. *See, e.g., United*

States v. Knights, 534 U.S. 112, 121 (2001); *Griffin v. Wisconsin,* 483 U.S. 868, 873-75 (1987) (recidivism supports warrantless home searches of parolees and probationers); *Lidster,* 540 U.S. at 426-27 (concern regarding the need to locate witnesses to a crime supports suspicionless, warrantless traffic stop); *Michigan Dept. of State Police v. Sitz,* 496 U.S. 444, 451 (1990) (dangers of drunk driving supports suspicionless, warrantless traffic stops); *New York v. Burger,* 482 U.S. 691, 708-09 (1987) (problem of automobile theft supports suspicionless, warrantless junkyard inspections); *Montoya de Hernandez,* 473 U.S. at 538-40 (interest in drug interdiction supports an extended, warrantless detention); *United States v. Martinez-Fuerte,* 428 U.S. 543, 561-64 (1976) (concerns of border security support warrantless stops).

Closer to S.G.'s case, the Court held the general concern of preventing "the substantial harm of childhood drug abuse provide[d] the necessary immediacy" to support warrantless, suspicionless drug tests in *Earls* and *Vernonia*. 536 U.S. at 834-36; 515 U.S. at 660-64. *Earls* and *Vernonia* show that a grave public concern exists where the state seeks to protect children from harm. In both cases, the Court believed that "drug abuse among the Nation's youth" constituted a sufficiently "pressing concern" to support warrantless, suspicionless drug testing at public schools. *Earls,* 536 U.S. at 834-35; *Vernonia*, 515 U.S. at 661-62. That children were threatened served to intensify the gravity of the government's interest. So in *Earls* the Court stated, "As in *Vernonia,* 'the

necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction.'" *Id.* at 834-35 (quoting *Vernonia,* 515 U.S. at 662).

For these reasons, the public concern served by interviews to protect children from abuse clearly support a temporary in-school detention of a suspected child abuse victim. This concern is consistent with this Court's holdings placing the protection of children at the pinnacle of those interests served by government. Thus, the Fourth Amendment balance weighs heavily in favor of standards which encourage this sort of activity.

B. Seizures of this Type are Reasonable Because They Substantially Advance the Public's Interest in Protecting Children from the Harmful Effects of Abuse

In analyzing the degree to which a seizure advances the public interest, the Court considers the efficacy of the seizure as a means for meeting the public interest. *See Lidster,* 540 U.S. at 427; *Sitz,* 496 U.S. at 453-55; *Burger,* 482 U.S. at 709-10. The efficacy analysis is "not meant to transfer from politically accountable officials to the courts the decision as to which law enforcement techniques should be employed to deal with a serious public danger." *Sitz*,

496 U.S. at 453. Rather, the "choice among reasonable alternatives remains with the government officials" who have a more complete understanding of the issues involved, and their choice of methods to address the problem at issue is owed substantial deference. *Id.*

1. The Public Interest in Child Protection is Advanced by a System of Coordinated Investigations and Early, Face-to-Face Interviews With Suspected Victims Conducted Away from Potential Undue Influence

The Oregon legislature has clearly determined interviews such as S.G.'s are an effective means of protecting children from abuse. Obviously, without first determining whether a child is being abused, the state cannot begin to protect her. A face-to-face discussion with a child about suspected abuse constitutes an effective, if not the most effective, means to determine whether abuse is occurring. Such interviews permit officials to speak directly with and observe suspected victims. In addition to speaking to her, an investigator can observe the child's physical appearance, demeanor, emotional state, and level of hygiene. He can see if she appears malnourished or in acute distress. He can assess if she may have a disability which should be considered in determining her need for protection. Such insight simply cannot be gained without speaking directly to a child.

Where, as here, a suspected abuser is a parent, or where the suspected abuser's identity is unknown, the public interest is served by meeting the child away from the potential abuser or the abusive environment. Parents are frequent perpetrators of abuse. Discussing possible abuse in front of one or both parents could affect a child's ability to respond honestly or may prove to be traumatic. Especially where the potential perpetrator is a parent, children will often be reluctant to disclose abuse, or may recant once they have disclosed, due to family pressure.[25] Several courts have recognized this dynamic.[26] Further, where a parent may be the abuser, seeking consent from either parent could be detrimental to the child. Either parent could intentionally or unintentionally influence the child before an interview can take place.

Finally, children's interests are served when officials have the flexibility of having either a social

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[25] Lindsay Malloy, M.A., Thomas D. Lyon, J.D., and Jodi Quas, Ph.D., *Filial Dependency and Recantation of Child Sexual Abuse Allegations,* 46 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 162, 163, 166 (Feb. 2007); Dara Loren Steele, Note, *Expert Testimony: Seeking an Appropriate Admissibility Standard for Behavioral Science in Child Sex Abuse Prosecutions,* 48 DUKE L.J. 933, 938-39 (1999).

[26] *See, e.g., United States v. Butterfly,* 182 F.3d 928 (9th Cir. 1999); *United States v. George,* 960 F.2d 97, 101 (9th Cir. 1992); *United States v. Provost,* 969 F.2d 617, 621 (8th Cir. 1992). *See also State v. Storch,* 612 N.E.2d 305, 315 (Ohio 1993) ("Child abuse victims, susceptible to parental influence, are likely to change testimony . . . ").

service worker, a police officer, or both conduct these interviews. In Oregon, child welfare agencies and law enforcement are required to coordinate efforts during child abuse investigations.[27] Coordination facilitates efforts to conduct interviews jointly, thereby reducing the number of times a child may have to discuss an uncomfortable topic with strangers.

Repeated questioning of abused children has been described as a "second victimization," in which the suspected victim is subjected to multiple interviews requiring repeated descriptions of the abuse.[28] In a recent case, Dr. Catherine Dixon, the Clinical Director of the Mississippi Children's Advocacy Center in Jackson explained "by coordinating the multi-agency response to child abuse, and by designating a forensic interviewer, children are spared the additional stress and better information is obtained, inevitably leading to better decision-making. And better decision-making positively impacts child protection and prosecution outcomes." *Kazery v. State,* 995 So.2d 827 (Miss. App. 2008).

Some may disagree with the approach Oregon has taken. They could believe child welfare and police concerns about parental influence or coercion of victims are overblown, or that in conducting seizures of

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[27] *See, e.g.,* Or. Rev. Stat. §§ 418.747, 418.783, and 418.784.

[28] John E.B. Myers, *The Legal Response to Child Abuse: In the Best Interest of the Children?*, 24 J. FAM. L. 149, 182-84 (1985).

this type officials discount the possibility of trauma caused by an interview conducted away from a loving parent. The Court need not enter this debate to resolve this case. The Court's analysis of the efficacy of a seizure is "not meant to transfer from politically accountable officials to the courts the decision as to which law enforcement techniques should be employed to deal with a serious public danger." *Sitz*, 496 U.S. at 453. It has also rejected any assertion that a search or seizure is illegal simply because there may exist a less intrusive method to advance the state's objectives. *Montoya de Hernandez,* 473 U.S. at 542. The means chosen by Oregon to advance its interest in protecting children are reasonable and clearly do advance significantly the public's interest in protecting children from abuse.

2. The Public's Interest in Child Protection Would be Impeded by a Warrant Requirement for Seizures of this Type

Applying a warrant requirement to seizures of this type would frustrate the government's purpose. The Court has recognized the government's interest in dispensing with a warrant is strongest when the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the intrusion. *Skinner,* 489 U.S. at 623 (citing *T.L.O.,* 469 U.S. at 340). Requiring a warrant in the present context would work against the public interest by interfering with the very purpose of these interviews.

The Court has consistently upheld warrantless searches and seizures where the delay in obtaining a warrant would frustrate the government's interest in prompt action. *See Skinner,* 489 U.S. at 623-24 (warrant unnecessary before testing for the presence of drugs and alcohol because alcohol and other drugs are eliminated from the blood stream at a constant rate, and testing needed to occur as quickly as possible to ensure detection); *Burger,* 482 U.S. at 710 (the delay inherent in obtaining a warrant would frustrate the government's attempts to deter automobile theft at junkyards because "stolen cars and parts often pass quickly through an automotive junkyard," and "flexibility as to time, scope, and frequency" of inspections were necessary to further the statute's purpose); *Griffin,* 483 U.S. at 876 (the delay inherent in obtaining a warrant would make it more difficult for probation officials to respond quickly to evidence of misconduct); *T.L.O.,* 469 U.S. at 340 (warrant requirement unsuited to school environment where school officials need to act swiftly to impose discipline).

The systemic burdens of a warrant requirement in this context are contrary to the public interest. Any apprehension that a child may have been abused or is in need of protection deserves prompt attention. A warrant requirement would introduce delays at the critical first moments of any case while officials do their best to determine how likely it is that a particular child will be hurt in the time it takes to find a judge to review a warrant application. The public

interest is not served by these systemic burdens or a requirement that introduces the need for an on-the-spot, highly fact specific determination of risk at a time when information is at its scarcest. Moreover, a child abuse assessment implicates not only concepts familiar to judges, but also specialized knowledge relating to a child's mental or psychological functioning, cultural heritage, and special needs. Or. Rev. Stat. § 419B.005(1)(a)(B) (abuse includes mental injury which is determined by reference to psychological functioning and child's culture).

This case provides an apt illustration of the systemic burdens of a warrant requirement in the context of child welfare interviews. Petitioners knew that Nimrod recently had been released from jail after being arrested on charges of sexually abusing a seven-year old boy. They had evidence that S.G. and her five-year old sister had been sexually abused by Nimrod and that their mother feared him. They knew that Nimrod would be having unsupervised contact with his suspected victims. Thus, petitioners were left with a stark choice, use the methods at their disposal to determine whether S.G. had been abused and to protect her from such abuse, or risk allowing the suspected abuse to continue while they developed information concerning abuse in some other fashion. Under a warrant regime, while petitioners engaged in the laborious process of obtaining evidence from sources other than S.G., they would have had to continually assess the situation confronting S.G. to determine if it was *dangerous enough* to justify

emergency action. A warrant requirement, with the attendant need to support the warrant with evidence demonstrating probable cause, would frustrate the efforts of state officials to act quickly to protect the safety of children where abuse is suspected and would interfere with the ability of DHS caseworkers and police officers to assess and meet a vulnerable child's social service needs.

3. The Public's Interest in Child Protection Would be Impeded by a Probable Cause Requirement for Seizures of this Type

The Court has consistently held that in contexts where individuals have reduced expectations of privacy, warrant and probable cause requirements have a lessened application. *Knights,* 534 U.S. at 118-22; *Burger,* 482 U.S. at 702 (citing *T.L.O.,* 469 U.S. at 353 (Blackmun, J., concurring)); *Griffin,* 483 U.S. at 873-76 (rejecting probable cause standard in favor of "reasonable grounds" standard for in-home searches of probationers); *O'Connor v. Ortega,* 480 U.S. 709, 721-25 (1987) (plurality) (reasonable suspicion standard adopted for work-related searches of employees' desks and offices). Nevertheless, where the "balance of interests precludes insistence on a showing of probable cause, [the Court has] usually required some quantum of individualized suspicion before concluding that a search is reasonable." *Skinner,* 489 U.S. at 624 (citing *Martinez-Fuerte,* 428 U.S. at 560). A showing of individualized suspicion, however, is

"not a constitutional floor[ ] below which a search must be presumed unreasonable." *Skinner*, 489 U.S. at 624. "[W]here the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the search would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Id.*

The Court has been willing to reject a probable cause requirement where it would frustrate legitimate governmental needs for flexibility and swiftness in conducting a search or a seizure. For instance, the *Skinner* Court held that requiring *any* individualized suspicion in implementing drug and alcohol screening of railroad employees would "seriously impede" the government's goal of detecting and preventing drug and alcohol use by railroad employees. *Id.* at 628-31. The Court held that because of the hidden, fleeting nature of the evidence the drug testing regime was designed to detect (the presence of alcohol and narcotics in the blood or urine), suspicionless drug screening was necessary to further the government's purpose. *Id.* Similarly, in *T.L.O.,* the Court refused to require school administrators to obtain probable cause before searching students for suspected violations of school rules because to do so would unduly frustrate the government's need for flexibility and swiftness in imposing discipline and maintaining order in its schools. 469 U.S. at 337-41. Instead, the Court imposed a requirement of reasonable suspicion before such a search could occur, reasoning that such

a standard would strike an appropriate balance between student privacy and the government's need for flexibility and swiftness. *Id.* at 342-43; *see also, Griffin,* 483 U.S. at 876 ("the probation agency must be able to act based upon a lesser degree of certainty than the Fourth Amendment would otherwise require in order to intervene before a probationer does damage to himself or society.").

The above-cited cases amply demonstrate why a probable cause standard should not be imposed before interviews such as the interview of S.G. can take place. As demonstrated below, the privacy interests of students attending public school are clearly reduced, and therefore the intrusion into students' privacy resulting from such interviews is minimal. On the other hand, the government has a crucial need for flexibility and swiftness in responding to credible allegations of abuse. For instance, children with reduced verbal or cognitive abilities would suffer acutely from a probable cause standard. The children who are the least able to make the spontaneous detailed, consistent disclosures which would establish probable cause are the ones who would benefit most from an assessment conducted by a patient, trained professional. Imposing a requirement of probable cause would clearly frustrate the needs of the government, and the Court should reject Respondents' pleas to the contrary.

C. Seizures of this Type are Reasonable Because They Minimally Intrude on a Child's Privacy Interests

The degree to which an individual can expect to be free from government intrusion into her privacy varies depending upon where the intrusion takes place and/or what legal relationship the government has undertaken concerning the individual at the time of the intrusion. As explained in *Vernonia*:

> The Fourth Amendment does not protect all subjective expectations of privacy, but only those society recognizes as "legitimate." What expectations are legitimate varies, of course, with context, depending for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park. In addition, the legitimacy of certain privacy expectations vis-à-vis the State may depend upon the individual's legal relationship with the State. For example, in *Griffin v. Wisconsin,* we held that, although a "probationer's home, like anyone else's, is protected by the Fourth Amendment," the supervisory relationship between probationer and State justifies "a degree of impingement upon [a probationer's] privacy that would not be constitutional if applied to the public at large."

Id. at 654 (quoting *Griffin,* 483 U.S. at 873-75).

1. Children, and Even More So Children Who Attend Public School, Have a Lesser Expectation of Privacy Than Does the General Public

In contexts where the government has taken on a supervisory relationship with a particular group, individuals within that group often cannot expect the same level of individual liberty as can the public at large. *Knights,* 534 U.S. at 119; *Griffin,* 483 U.S. at 873-75 (parolees and probationers).

Children possess diminished expectations of both privacy and liberty simply by virtue of their minority: "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,* 515 U.S. at 654 (citing Am.Jur.2d, *Parent and Child* § 10 (1987)).

Children have an even lesser expectation of freedom while attending public school, where the government has taken on both custodial and tutelary functions with regard to schoolchildren. *Id.* at 654-56 ("Central, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster."); *Earls,* 536 U.S. at 829-32 ("As in *Vernonia,* the context of the public school environment serves as the backdrop for the analysis of the privacy interest at stake. . . . A student's privacy interest is limited in a public school

environment where the State is responsible for maintaining discipline, health and safety."); *T.L.O.,* 469 U.S. at 348-50 (Powell, J., concurring) (The school environment requires that students be subjected to greater controls than those appropriate for adults).

Indeed, the Court considered the reduced privacy expectations of children at public school to be "[t]he most significant element" in determining that the drug testing programs in *Vernonia* and *Earls* were constitutionally reasonable. *Vernonia,* 515 U.S. at 665; *Earls,* 536 U.S. at 831 ("In upholding the drug testing program in *Vernonia,* we considered the school context '[c]entral' and '[t]he most significant element.' ") It has made clear that where the government has assumed the role of protecting the safety of children, as in the public school context, the privacy interests of children are necessarily reduced.

While the Court has not had occasion to consider the nature of a child's expectations of privacy at a public school in the context of child abuse interviews, the Fifth Circuit addressed this very issue in a similar situation in *Gates v. Texas Dept. of Protective and Regulatory Services*, 537 F.3d 404 (5th Cir. 2008). In *Gates,* the Fifth Circuit concluded a child's diminished expectations of privacy are the same relative to the seizure of a child at school during a child abuse investigation as they were in the context of the *Vernonia* drug testing program. *Id.* at 432.

Using traditional standards of reasonableness to evaluate the seizures involved, the court acknowledged the vast difference between a seizure of a child from her home and a seizure at a public school, where a child's liberty and privacy interests are reduced:

> Temporarily seizing a child from a public school in order to interview him in a safe place is decidedly different than seizing a child from his home for the purpose of removing him from allegedly abusive parents. . . . To begin with, the rights of children to freely move about, especially within a public school, are not as extensive as adults' rights. The Supreme Court has recognized that Fourth Amendment rights of children "are different in public schools than elsewhere; the 'reasonableness inquiry cannot disregard the schools' custodial and tutelary responsibilities for children.'" Thus, while the Fourth Amendment is not non-existent, students have a lesser expectation of privacy. Further, unemancipated minors lack the right to come and go at will, remaining subject to the control of their guardians or parents. Consequently, seizing a child from a public school is a lesser intrusion into the freedoms the child would otherwise enjoy, as those freedoms have already been limited.

Id. (citing *Vernonia,* 515 U.S. at 654-57). Based on this assessment, the Fifth Circuit found such interviews resulted in only a minimal invasion into the privacy rights of children who were seized, removed

from their school, and brought to a completely unfamiliar location to be interviewed. *Id.*

Given this Court's holdings in *Vernonia, Earls,* and *T.L.O.,* and considering the Fifth Circuit holding in *Gates,* the S.G. interview resulted only in a minimal intrusion into her privacy interests. S.G. was nine years old at the time of the interview. For that reason alone, regardless of her location or her relationship with the state, she simply did not enjoy the same expectations of privacy generally enjoyed by adults. Further, the interview occurred at a time and place where her expectation of privacy was diminished even more, at her public school during school hours.

2. The Means by Which Seizures of this Type are Accomplished are Not Seriously Invasive

The means petitioners used to interview S.G. were minimally invasive. They tailored her interview according to the procedures established in Oregon law. They first obtained consent from school officials to speak with her. They arranged for a school counselor to escort her to a school conference room for the interview, rather than removing her from class directly. The interview was also conducted in private, apart from faculty and other students, thereby avoiding any potential embarrassment or the disclosure of any sensitive information to persons not involved in the investigation.

In *Gates,* the Fifth Circuit recognized that interviewing children "in a safe place" reduces the intrusiveness of the interview. 532 F.3d at 432. Thus, it held it minimally intrusive for state officials to remove children from their school to an unfamiliar location to conduct child abuse interviews. *Id.* Unlike the *Gates* interviews, S.G.'s interview took place at her school, a familiar environment. The interview conference room was adjacent to the school's administrative offices, where school employees were present. Thus, compared with the children in *Gates,* who were shuttled by complete strangers to a completely alien environment, S.G. endured much less intrusion.

Even more striking, unlike the invasive searches involved in *Earls, Vernonia,* and *T.L.O.*, S.G. was not forced to disrobe, urinate into a cup, or be subjected to an invasive search of her person or effects. Rather, she was detained at her public school, where her already limited expectations of privacy were further reduced. Seizures such as this one, which involve subjects with a diminished expectation of privacy, are simply less intrusive than "searches of the body or the home." *Ferguson,* 532 U.S. at 83 n. 21. Clearly, S.G.'s seizure was much less invasive than the searches this Court found reasonable in *Earls, Vernonia,* and *T.L.O*.

Similarly, the Court's holdings in *Skinner, Griffin,* and *Knights* highlight the minimally intrusive nature of this activity. The *Skinner* Court rejected a probable cause requirement for drug and alcohol testing, and instead authorized suspicionless testing

involving drawing blood and urine from subjects. In *Griffin* and *Knights,* the Court rejected a probable cause requirement in favor of reasonable suspicion despite the fact that the searches were of the individual's home. A citizen's Fourth Amendment interests are at their highest at the threshold of their home and inside of their bodies. *Ferguson*, 532 U.S. at 84 n. 21; *Skinner*, 489 U.S. at 623; *Payton v. New York*, 445 U.S. 573, 585 (1980) (unreasonable intrusion into home "chief evil" Fourth Amendment designed to prevent). Yet, the Court in *Skinner*, *Griffin*, and *Knights* condoned intrusions into these sensitive areas. The activity here, conducted at a public school, is even less invasive than the searches upheld in *Skinner, Griffin,* and *Knights.*

Moreover, the Court has never held that the act of posing questions to individuals, by itself, intensifies the intrusiveness of a seizure. In fact, prior decisions seem to indicate that mere questioning by government officials, without more, does nothing to enhance a seizure's intrusiveness. *See, e.g., Lidster,* 540 U.S. at 425; *United States v. Drayton,* 536 U.S. 194, 204 (2002) (after boarding a bus and asking questions of passengers, nothing said by a police officer during questioning would have suggested to a reasonable person that they were barred from leaving the bus); *I.N.S. v. Delgado,* 466 U.S. 210, 216-17 (1984) (mere questioning, by itself, does not result in a seizure). Nothing in this record demonstrates that petitioner or Camreta used coercive or intimidating tactics in asking S.G. questions. They certainly did

not subject her to a harsh or threatening interrogation, and she certainly was not asked questions designed to elicit incriminating evidence against her. Instead, Camreta simply asked questions while Alford "just sat there."

Finally, given the circumstances leading up to and including S.G.'s interview, its duration was reasonable. Despite the Ninth Circuit's reservations concerning the interview's length, the court acknowledged cases from other circuits holding that student detentions of a similar length or longer were reasonable. (App. to Cert. Pet. at 42-43)[29]

More importantly, the Ninth Circuit failed to consider that in analyzing reasonableness of seizures under the Fourth Amendment this Court has "consistently rejected hard and fast limits" to the duration of any given seizure. *Montoya de Hernandez,* 473 U.S. at 542-43 (citing *United States v. Sharpe,* 470 U.S. 675, 686 (1985)). Instead, the Court has held that "common sense and ordinary human experience must govern over rigid criteria," and "[a]uthorities must be allowed 'to graduate their response to the demands of

[29] *E.g.*, *Couture v. Bd. of Educ. of Albuquerque Pub. Schs.,* 535 F.3d 1243, 1254 (10th Cir. 2008) (detention for "one hour and thirty-five minutes" was reasonable); *Shuman v. Penn Manor Sch. Dist.,* 422 F.3d 141, 149 (3rd Cir. 2005) (detention lasting "no more than four hours" was reasonable); *Wofford v. Evans,* 390 F.3d 318, 321 (4th Cir. 2004) (one and one-half hours detention was reasonable).

any particular situation.'" *Montoya de Hernandez,* 473 U.S. at 542-43 (citing *Sharpe,* 470 U.S. at 685).

In *Montoya de Hernandez,* the Court held the 16-hour warrantless detention of a suspected drug smuggler was reasonable in circumstances far more intrusive than the present. 473 U.S. at 542-43. The Court noted that the inspectors who detained the suspect had reasonable suspicion to believe she was attempting to smuggle narcotics across the border in her alimentary canal. *Id.* While the Court acknowledged the duration of the detention exceeded the duration of other detentions it had previously approved under the reasonable suspicion rubric, the Court concluded that under the particular circumstances, the extended detention of the suspect was reasonable. *Id.*

Looking at the circumstances of the seizure, the Court acknowledged "alimentary canal smuggling cannot be detected in the amount of time in which other illegal activity may be investigated through brief *Terry*-type stops." *Id.* This is because such smuggling "presents few, if any external signs," and a quick frisk will not detect the presence of narcotics. *Id.* Because the suspect refused consent to an x-ray, the Court concluded the inspectors had only two alternatives: "detain her for such time as necessary to confirm their suspicions, a detention which would last much longer than the typical *Terry* stop, or turn her loose . . . carrying the reasonably suspected contraband drugs." *Id.*

Taking its cue from "another *Terry*-stop case," the Court reasoned "[t]he Fourth Amendment does not require a policeman who lacks the precise level of information for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Id.* at 544 (citing *Adams v. Williams,* 407 U.S. 143 at 145 (1972)). Thus, the Court held, given the circumstances, it was reasonable for customs officers to detain the suspect "for the period of time necessary to either verify or dispel the[ir] suspicion." *Id*.

Montoya de Hernandez informs the Court's review of S.G.'s interview. No reasonable person would expect that the information needed to determine if 9-year old S.G. had been abused or needed protection could be obtained during a brief stop as in *Terry*. It ignores reality and common sense to suggest such an interview could be conducted by asking a few direct questions without first "breaking the ice" and trying to gain some level of trust or rapport with a young child. Camreta commenced the interview with S.G. by engaging in age-appropriate small talk about such familiar, non-threatening topics as school, homework, where she had lived, her pet cats, and her family. (Camreta Aff., pp. 2-4 and Ex. 3) Looking to the context of the interview, it is entirely reasonable that such a conversation would be time-consuming. Petitioners were complete strangers to S.G., and Camreta would be posing difficult questions of S.G. in what was likely a confusing and uncomfortable situation. S.G.'s own account of the conversation reveals the

Petitioners acted reasonably. According to S.G., after Camreta asked her some friendly questions the two began to speak about her father. (S.G. Aff., p. 2 ¶ 7) S.G. told Camreta that her father touched her "all over." (S.G. Aff., p. 2 ¶ 9) ("I told the man, yes, my dad touches me all over"). Camreta asked about these touches and S.G. told him these were not "bad touches." *Id.* Camreta approached the same topic, in several different ways for about an hour, but all S.G. would say was "I don't think my dad touched me in a bad way." *Id.*

Reason does not require abrupt termination of an abuse assessment if a frightened 9-year old girl says she does not "think" there is anything "bad" about being touched "all over" by her father, even if she says it several times over the course of an hour. Victims are sometimes reluctant to divulge that they have been abused, or may recant once they have divulged the abuse, especially where the perpetrator is a parent.[30] Camreta acted reasonably in continuing to ask questions, in several different ways, about S.G.'s father touching her "all over." It was reasonable to attempt to determine why (or even if) this frightened girl "thought" being touched "all over" by her father was not "bad." Subsequent questioning did nothing to dispel Camreta's reasonable suspicion of abuse. S.G.'s interview illustrates precisely why the Court has rejected a "bright line rule" to limit the duration of

[30] *See, supra,* FN 21 and 25.

seizures and why it should continue to do so here. Where pertinent information develops during the course of questioning, government officials act reasonably by continuing questioning to further develop such information. As the Court stated in *Montoya de Hernandez,* "[a]uthorities must be allowed 'to graduate their response to the demands of any particular situation.'" *Id.* at 542. While the record is unclear as to the exact moment S.G. began to describe her father's actions as abusive, it is clear this did occur. Petitioners were not required simply to terminate their questioning over some arbitrary concern about the length of the interview. *Id.* at 544. Rather, the Fourth Amendment authorized them to continue the interview "to either verify or dispel" their suspicion that S.G. had been abused. *Id.*

Finally, before the interview commenced, petitioners had significant evidence indicating S.G. not only had been abused but also faced the possibility of further abuse when she returned home; and they also knew that her younger sister was at risk. At some point during the interview, S.G. began to acknowledge her father's abuse. When that occurred, petitioners faced a choice similar to that faced by the customs agents in *Montoya de Hernandez*: Extend their questioning to obtain sufficient evidence to confirm or dispel their suspicions, or return S.G. to her home, where they reasonably suspected she and her little sister would be at risk for continued abuse. Petitioners were not required by the Fourth Amendment to choose the latter option.

III. The Court Should Adopt a Standard Similar to *T.L.O.*, Which Would Permit Child Protection Caseworkers and Law Enforcement Officers With Reasonable Suspicion of Abuse to Seize a Child for an Interview. Such a Standard Would Ensure Such Seizures are Reasonable in Scope and Protect the Interests of the Child

The *T.L.O.* Court fashioned a standard of student searches based on the approach of *Terry v. Ohio*, yet tailored to the public school context. 469 U.S. at 341-43. In announcing the standard, the Court stated:

> [T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the action was justified at its inception;" second, one must determine whether the search actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place." Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are *reasonable grounds* for suspecting that the search will turn up evidence that the student has violated or is violating the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light

> of the age and sex of the student and the nature of the infraction.

Id. (quoting *Terry,* 392 U.S. at 20) (emphasis added).

The Court concluded this standard would "neither unduly burden the efforts of school authorities to maintain order in their school nor authorize unrestrained intrusions upon the privacy of schoolchildren." *Id.*

Here, a similar balance of factors exists, but weighs even more heavily in favor of adopting a standard of reasonable suspicion. Children attending a public school simply do not enjoy the same privacy rights as those generally enjoyed by adults, whereas the government has an exceedingly compelling interest in protecting children from the devastating effects of abuse. The public's interest in protection is advanced by speaking to a suspected abuse victim and personally assessing her condition to at least the same degree the public's interest is advanced by finding and confiscating a pack of cigarettes from a middle school student. Surely, if the government's interest in acting swiftly to enforce a school's disciplinary rules against smoking justified the warrantless search in *T.L.O.*, its interests in protecting children from child abuse in all its forms justifies the adoption of a similar standard for interviews to investigate reasonably credible allegations of abuse and a child's need for protection.

The Court's adoption of a similar standard in this case would respect children's personal liberties while ensuring child welfare and law enforcement officials have the necessary flexibility to act swiftly in cases where credible evidence suggests a child is being abused. The interviews authorized by Oregon law provide a measured, narrowly tailored approach to investigate allegations of abuse and to determine if a child needs protection. The scope of such interviews is limited by Or. Rev. Stat. Ch. 419B and the statutory primacy given to the child's interests. *See,* Or. Rev. Stat. § 418.747(5). The very fact that such interviews often occur at a child's school gives a child's privacy interests further protection. Additionally, the *T.L.O.* standard gives caseworkers and law enforcement the flexibility they need to respond to allegations of abuse. Unquestionably, the government's need to act swiftly to respond to credible allegations of abuse such as those existing in this case is compelling. This is especially true when the potential abuser is one or both of the parents, a family member, a guardian, or anyone else close to a child. In this context, the immediacy of the need to verify the allegations of abuse is significantly heightened. After all, where else is a child to go when the school bell rings? The insidious nature of such abuse makes clear that requiring probable cause and/or a warrant before a child can be interviewed in the manner S.G. was would unduly

interfere with the government's exceedingly important duty to protect children from abuse.

The reasonableness standard ought to apply without regard to whether an interview is conducted by a social service worker or a police officer, or both. A unitary standard advances the state's interest in protection by allowing early decisions regarding the level of police or social worker involvement to be based upon the child's immediate needs, not upon whether a criminal prosecution may occur later. A separate standard applicable in cases where police are "involved" or, as here, merely present, imposes a systemic disincentive to police involvement even when police could provide a calming influence to a volatile situation or respond to a location faster than social services. For these reasons, the Court should reject the Ninth Circuit's unfounded holding that a warrant, court order, exigent circumstances, or parental consent must be obtained before temporarily seizing at a public school a child who is reasonably suspected to be a victim of child abuse. Instead, the Court should adopt a reasonableness standard similar to the standard formulated in *New Jersey v. T.L.O.*

CONCLUSION

Petitioner respectfully requests this Court to reverse the judgment of the Ninth Circuit and remand this case to the District Court with instructions

to enter summary judgment in favor of Alford on the basis that S.G.'s Fourth Amendment rights were not violated.

Respectfully submitted,

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