Nos. 09-1454, 09-1478

In the Supreme Court of the United States

BOB CAMRETA, *Petitioner,*
v.
SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor, *Respondents.*

JAMES ALFORD, Deputy Sheriff, Deschutes County, Oregon, *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 OF *AMICI CURIAE* THE AMERICAN FAMILY RIGHTS ASSOCIATION, OREGON FAMILY RIGHTS, THE FAMILY ADVOCACY MOVEMENT, THE FAMILY LEGAL PROJECT OF NEBRASKA INC., THE HOME SCHOOL LEGAL DEFENSE ASSOCIATION, THE GEORGIA OFFICE OF FAMILY REPRESENTATION, THE U.D.C. DAVID A. CLARKE SCHOOL OF LAW LEGAL CLINIC, AND THE LEGAL ASSISTANCE FOUNDATION OF METROPOLITAN CHICAGO IN SUPPORT OF RESPONDENTS

CHRISTOPHER LANDAU, P.C.
Counsel of Record
MICHAEL A. GLICK
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com

January 31, 2011

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Pursuant to this Court's Rule 37.2, *amici curiae* respectfully file this brief in support of respondents.*

INTEREST OF *AMICI CURIAE*

Amici are a collection of non-profit organizations and advocacy groups with a strong interest in parental and family rights.

The American Family Rights Association is an association of parents, grandparents, former foster and adopted children, licensed social workers, and medical professionals dedicated to assisting parents and children facing government interference into their private lives. Similarly, Oregon Family Rights is a non-profit organization committed to promoting the well-being and preservation of families in Oregon. Oregon Family Rights advocates for the rights of parents accused of child abuse.

The Family Advocacy Movement is a national collaboration of parents, grandparents, family advocates, and other professionals who are committed to reforming the child welfare system by emphasizing the value of families. The Family Advocacy Movement seeks due process for all families involved in child protection cases.

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* Pursuant to this Court's Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief, and global consent letters evidencing such consent have been filed with the Clerk of this Court pursuant to this Court's Rule 37.3.

The Family Legal Project of Nebraska, Inc. is a non-profit organization whose mission is to bring attorneys, social workers, and volunteer advocates together in an integrated team to help families resolve legal disputes. Family Legal Project maintains a particular interest in the rules and regulations governing child protection, custody, and other issues concerning at-risk children.

The Home School Legal Defense Association (HSLDA) is a non-profit membership association of over 80,000 families formed to protect the rights of families to teach their children at home without interference from government officials. HSLDA's interest in child abuse investigations concerns parental consent rights over interrogations of their children. Given that requests to seize and interrogate home-schooled children are often made at the front door to the family home, HSLDA's families seek clarification of their consent rights.

The Georgia Office of Family Representation provides legal representation of parents in abuse and neglect cases, as well as social services and policy advocacy. The Office is dedicated to protecting and preserving the integrity of Georgia families against unreasonable state interference.

The University of the District Columbia David A. Clarke School of Law Legal Clinic represents the birth parents of children involved in the child abuse and neglect systems. In addition, the faculty overseeing this clinic have written, litigated, taught, and lectured extensively in the area of child abuse and neglect.

The Legal Assistance Foundation of Metropolitan Chicago (LAF) represents children, parents, foster

parents, and relatives who are involved with the Illinois state child welfare system. Through their Children's Law Project, LAF has worked for over thirty years to protect the due process rights of children and families in state and federal court. LAF seeks to keep children in safe, stable placements and to preserve family ties.

Amici and their members seek to ensure that parental rights are afforded proper deference when government officials interact with their children. In particular, *amici* urge this Court to make it clear that it is generally unreasonable for law enforcement officials to search or seize minor children without their parents' consent. Such a rule would safeguard the legitimate and constitutionally protected interests not only of the children, but also of their parents. Accordingly, *amici* hereby file this brief supporting respondent.

INTRODUCTION AND SUMMARY OF ARGUMENT

"[T]he liberty interest … of parents in the care, custody, and control of their children … is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., and Ginsburg and Breyer, JJ.); *see also id.* at 77 (Souter, J., concurring in the judgment); *id.* at 80 (Thomas, J., concurring in the judgment); *id.* at 95 (Kennedy, J., dissenting). That liberty interest, which this Court's cases have rooted in the Due Process Clause of the Fourteenth Amendment, is highly relevant in assessing whether the search or seizure of a minor child is "reasonable" under the Fourth Amendment. Because the "care,

custody, and control" of minor children is presumptively entrusted to their parents, the warrantless search or seizure of such a child by law enforcement officials is presumptively unreasonable absent parental consent or exigent circumstances. That approach protects both a minor child's Fourth Amendment right to freedom from "unreasonable" searches and seizures and the parents' right to the "care, custody, and control" of their minor children.

Petitioners' challenges to the decision below ignore the critical importance of parental consent in assessing the Fourth Amendment "reasonableness" of a law enforcement official's search or seizure of a minor child. Because petitioners have not denied that (1) their two-hour questioning of S.G. at her school was a Fourth Amendment "seizure," *see* Pet. App. 18, (2) they had no warrant or functional equivalent authorizing that seizure, Pet. App. 6, and (3) there were no exigent circumstances compelling the seizure, Pet. App. 36-37 n.17, they were required to seek parental consent. Because it is undisputed that petitioners neither sought nor obtained such consent, *see* Pet. App. 6, the seizure violated the Fourth Amendment. Accordingly, if this Court reaches the merits, it should affirm the judgment.

ARGUMENT

PETITIONERS' WARRANTLESS SEIZURE OF A MINOR CHILD WITHOUT PARENTAL CONSENT OR EXIGENT CIRCUMSTANCES VIOLATED THE FOURTH AMENDMENT.

This case turns on the simple and straightforward proposition that, absent a warrant (or its functional equivalent) or exigent circumstances, law enforcement officials generally

may not search or seize minor children without their parents' consent. In our society, parents stand as a barrier between their minor children and the State. Except in narrow circumstances, it is unreasonable for law enforcement officials to breach that barrier by searching or seizing a minor child without a parent's consent.

The Fourth Amendment by its terms protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. There is no question that minor children are "people" within the meaning of this Amendment, as under other provisions of the Constitution. *See, e.g.*, *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633, 2639 (2009); *New Jersey v. T.L.O.*, 469 U.S. 325, 334-36 (1985); *see also Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 506-07 (1969); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). The "secur[ity]" of minor children guaranteed by the Fourth Amendment is generally entrusted to their parents. Thus, when a child is searched or seized by law enforcement officials, it is impossible to assess the reasonableness of that search or seizure without considering "the closely related legitimate expectations of the parents or other caretakers, protected by the Fourteenth Amendment, that their familial relationship will not be subject to unwarranted state intrusion." *Darryl H. v. Coler*, 801 F.2d 893, 901 (7th Cir. 1986). The first question a judge should ask in assessing a case, like this one, involving the reasonableness of the search or seizure of a minor child is whether the parents' consent was sought—and if not, why not.

Minor children, after all, generally lack the capacity to make legally binding decisions on their own. *See, e.g.*, *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (acknowledging that "parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions"); *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 841 n.44 (1977) (parents have standing to raise their children's claims because "children usually lack the capacity" to make litigation decisions); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 672 (1999) (Kennedy, J., dissenting) ("The law recognizes that children—particularly young children—are not fully accountable for their actions because they lack the capacity to exercise mature judgment."). Indeed, "[f]or centuries it has been a canon of the common law that parents speak for their minor children." *Parham*, 442 U.S. at 621 (Stewart, J., concurring) (citing 1 William Blackstone, *Commentaries* *452-53; 2 James Kent, *Commentaries on American Law* *203-06; James Schouler, *A Treatise on the Law of Domestic Relations* 335-353 (3d ed. 1882); George W. Field, *The Legal Relations of Infants* 63-80 (1888)).

Indeed, parental consent requirements are ubiquitous in American law. *See, e.g.*, *Planned Parenthood of Cent. Mo. v. Danforth,* 428 U.S. 52, 102 (1976) (Stevens, J., concurring in part and dissenting in part) (noting that a minor "may not make an enforceable bargain," and "may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures" without parental consent); *Moe v. Dinkins*, 669 F.2d 67, 68 (2d Cir. 1982) (upholding state statute requiring minors to obtain consent of their

parents prior to marriage); *Zoski v. Gaines*, 260 N.W. 99, 102 (Mich. 1935) (applying traditional common-law rule that physicians are liable in tort for battery for operating on a minor child without parental consent); *Rishworth v. Moss*, 191 S.W. 843, 848 (Tex. Civ. App. 1916) (same); 29 U.S.C. § 213(c)(1)(A) (farm labor by minors requires parental consent); 18 U.S.C. § 922(x)(3)(A)(ii) (gun possession by minors requires parental consent); Cal. Health & Safety Code § 7150.15(a)(2) (organ donation by minors requires parental consent); Colo. Rev. Stat. Ann. § 25-4-2103 (tattooing of minors requires parental consent); Tex. Health & Safety Code Ann. § 146.0125 (body piercing of minors requires parental consent).

Reflecting these legal and cultural norms, this Court has long recognized a fundamental right of parents over the care, custody, and control of their minor children. *See, e.g.*, *Troxel*, 530 U.S. at 65 (plurality); *id.* at 77 (Souter, J., concurring in the judgment); *id.* at 80 (Thomas, J., concurring in judgment); *id.* at 95 (Kennedy, J., dissenting); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400-01 (1923). To say that this right is deeply rooted in our society would be an understatement; it is a pillar of our society. Indeed, no less than "[t]he history and culture of Western civilization" underscore the "primary role of the parents in the upbringing of their children," which "is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *see also Parham*, 442 U.S. at 602 ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit

with broad parental authority over minor children."); *Prince*, 321 U.S. at 166 ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."). This Court has squarely rejected the notion that a minor child is a "mere creature of the State." *Pierce*, 268 U.S. at 535.

Although courts may not rely on substantive due process rights to circumvent specific constitutional provisions, *see, e.g.*, *Graham v. Connor*, 490 U.S. 386, 393-94 (1989), that does not mean that such rights are irrelevant in assessing the scope of such provisions. To the contrary, the Fourth Amendment's standard of "reasonableness" affirmatively invites consideration of other constitutional values. Petitioners thus err by attempting to justify the reasonableness of their seizure of nine-year-old S.G. without any consideration of the rights and interests of her parents—including her mother, respondent Sarah Greene, who has never even been *accused* of any wrongdoing.

A search or seizure that fails to respect the deeply rooted and constitutionally protected right of parents over the care, custody, and control of their minor children is presumptively unreasonable. Just as it is constitutionally unreasonable for the government to usurp a parent's decision whether grandparents may visit a minor child, *see Troxel*, 530 U.S. at 65-72 (plurality); *see also id.* at 80 (Thomas, J., concurring in the judgment), it is constitutionally unreasonable for the government to usurp a parent's decision

whether law enforcement officials may seize a minor child.

Petitioners do not appear to challenge these principles as a general matter. Rather, they argue that "[s]eeking parental consent is simply not a safe or viable option when the suspected abuser is a parent." Camreta Br. 27; *see also* Alford Br. 41 ("[W]here a parent may be the abuser, seeking consent from either parent could be detrimental to the child."); U.S. Br. 29 ("[W]hile there will surely be many cases in which parental consent can be sought and obtained, there will be other cases in which it cannot—for example, cases involving single-parent families or families where both parents are alleged to have participated in the abuse. And even in two-parent families where only one parent is suspected, the other parent may not be open to cooperating with investigators.").

These arguments are puzzling, because they overlook the availability of a warrant or other judicial process as an alternative to parental consent. Where law enforcement officials deem parental consent impractical or counterproductive, they are free to seek a warrant or its functional equivalent from a neutral magistrate to search or seize a minor child. *See* Pet. App. 37 n.19. Among the questions any such neutral magistrate likely would ask is why they have not sought parental consent; if they can provide justification, there is no reason to think that their efforts would be stymied.

In this regard, the procedures in place here mirror the procedures approved by this Court in the abortion context. In particular, this Court has approved parental consent requirements for minor

girls to have abortions, provided there is some judicial bypass mechanism. *See, e.g.*, *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 899 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.); *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 510-19 (1990). Needless to say, law enforcement officials' ability to bypass parental consent in appropriate circumstances refutes the generalized charge that a default parental consent requirement is impractical or counterproductive. Absent exigent circumstances, a law enforcement official may search or seize a minor child without first seeking parental consent only with the prior approval of a neutral magistrate.

The law presumes, after all, that a minor child's parents are fit, *see, e.g.*, *Santosky*, 455 U.S. at 748, 760 & n.10; *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972), and that fit parents will act in the best interests of their minor children, *see, e.g.*, *Troxel*, 530 U.S. at 68-69 (plurality); *Parham*, 442 U.S. at 602. These presumptions are not overcome merely because law enforcement officials suspect one or both parents of wrongdoing. The possibility that some parents may act contrary to the best interests of their own minor children is "hardly a reason to discard wholesale those pages of human experience that teach that parents generally *do* act in the child's best interests." *Id.* at 602-03 (emphasis added); *see also id.* at 603 ("The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.") (emphasis in original).

Indeed, it is conceded here that law enforcement officials did not suspect respondent Sarah Greene, S.G.'s mother, of abusing her children, or being complicit in any such abuse, but nonetheless failed to seek her consent before seizing her minor daughter at school. The Government's generalized assertion that "even in two-parent families where only one parent is suspected, the other parent may not be open to cooperating with investigators," U.S. Br. 29, provides no sound basis for discounting the rights of a non-suspected parent. Law enforcement officials may not simply presume that such a parent will disregard the "natural bonds of affection [that] lead parents to act in the best interests of their children," *Parham*, 442 U.S. at 602 (citing Blackstone, *Commentaries* at *447; Kent, *Commentaries* at *190), to protect a spouse suspected of wrongdoing, *see* Vivek S. Sankaran, *Parens Patriae Run Amuck: The Child Welfare System's Disregard for the Constitutional Rights of Nonoffending Parents*, 82 Temp. L. Rev. 55, 86 (2009).

Petitioners' suspicions of Sarah Greene's husband thus provide no reason to suppose that she would not act in the best interests of her daughter. *See In re Carp*, 340 F.3d 15, 26 (1st Cir. 2003) ("The sins of the husband are not automatically visited upon the wife."); *Allison v. Roberts*, 960 F.2d 481, 485-86 (5th Cir. 1992) (refusing to impute a husband's fraudulent conduct to wife where there was "no evidence in the record linking [the wife] to false or fraudulent acts or plans," and where no agency relationship was established); *see also United States v. Dege*, 364 U.S. 51, 54 (1960) (rejecting the "medieval view that husband and wife are esteemed but as one Person in Law, and are presumed to have

but one Will" as a "blind imitation of the past") (internal quotation and citation omitted).

Thus, when it comes to seizing minor children, law enforcement officials cannot—in the absence of exigent circumstances—pursue an "act first, consult the parents later" approach. *See Doe v. Heck*, 327 F.3d 492, 524 (7th Cir. 2003) ("[B]ecause the defendants had no evidence giving rise to a reasonable suspicion that the plaintiff parents were abusing their children, or that they were complicit in any such abuse, the defendants violated the plaintiffs' right to familial relations by conducting a custodial interview of [a minor child] without notifying or obtaining the consent of his parents and by targeting the plaintiff parents as child abusers."); *see also Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000) ("[T]he police cannot seize children suspected of being abused or neglected unless reasonable avenues of investigation are first pursued, particularly where it is not clear that a crime has been—or will be—committed."); *cf. Croft v. Westmoreland Cty. Children & Youth Servs.*, 103 F.3d 1123, 1127 (3d Cir. 1997) (child protective agent violated father's rights by ordering him to leave his family without any basis to conclude that child had been abused or was in imminent danger of abuse); *Sevigny v. Dicksey*, 846 F.2d 953, 957-58 (4th Cir. 1988) (police officer violated mother's rights by arresting her on child abuse grounds without any investigation into the facts). This Court should make it clear that parental consent is the rule, not the exception, in assessing the Fourth Amendment reasonableness of a law enforcement official's search or seizure of a minor child.

It is worth noting, finally, that parents do not delegate their authority to consent to a law enforcement official's search or seizure of a minor child to the child's teachers or school administrators. *See, e.g.*, *T.L.O.*, 469 U.S. at 336 (rejecting argument that teachers and school administrators stand *in loco parentis* for purposes of authorizing Fourth Amendment searches and seizures). Whatever the scope of a parent's implicit consent to any searches or seizures of their minor children in the context of the educational process, such consent certainly does not extend to searches or seizures by law enforcement officials unrelated to the educational process. Indeed, this Court "has recognized that 'the concept of parental delegation' as a source of school authority is not entirely 'consonant with compulsory education laws.'" *Id.* (quoting *Ingraham v. Wright*, 430 U.S. 651, 662 (1977)); *see also Tenenbaum v. Williams*, 193 F.3d 581, 594 n.9 (2d Cir. 1999) ("The handing over of a child from a public school teacher to another State official ... is not the equivalent of the consent of the parents.").

In short, petitioners' warrantless seizure of S.G. at school was not "reasonable" under the Fourth Amendment because they did not seek parental consent and no exigent circumstances were present.

CONCLUSION

For the foregoing reasons, if this Court reaches the merits, it should affirm the judgment.

Respectfully submitted,

CHRISTOPHER LANDAU, P.C.
Counsel of Record
MICHAEL A. GLICK
KIRKLAND & ELLIS LLP
655 Fifteenth St., NW
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com

January 31, 2011

Counsel for Amici Curiae