Nos. 09-1454 and 09-1478

In The
Supreme Court of the United States

BOB CAMRETA,

Petitioner,

v.

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

Respondents.

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.

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

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. When official defendants prevail in the court of appeals by virtue of qualified immunity and plaintiff does not seek review of that judgment, meaning that she can no longer win any relief against defendants, but defendants seek review of statements in the court of appeals' opinion addressing whether defendants' conduct was constitutional, are those statements unreviewable in this Court?

2. Whether a police officer and a child protective services investigator violated the Fourth Amendment when they conducted a two-hour-long custodial interrogation of a nine-year-old girl at her school building, to determine if she was the victim of paternal child abuse, without a warrant or court order, without exigent circumstances, and without the consent of her mother.

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JURISDICTION

Respondents object to petitioners' statements of jurisdiction. This Court does not have jurisdiction to review the court of appeals' ruling that petitioners violated S.G.'s Fourth Amendment rights, because that question presents no Article III case or controversy. *See* Argument, Section I, *infra*.

STATEMENT OF THE CASE

Petitioners' Seizure of S.G.[1]

On February 24, 2003, at about 1:00 p.m., a uniformed deputy sheriff with a gun visible in his holster (petitioner James Alford),[2] and an Oregon Department of Human Services ("DHS") investigator (petitioner Bob Camreta) appeared at the Bend elementary school that nine-year-old S.G. attended. *Greene v. Camreta*, 588 F.3d 1011, 1017 (9th Cir. 2009). The sheriff and investigator directed school staff to remove the girl from her class and bring her

[1] The case comes to this Court following rulings on petitioners' summary judgment motions. 588 F.3d at 1020. Consequently, for purposes of this appeal, the facts must be viewed in the light most favorable to respondent.

[2] James Alford has not worked for Deschutes County since 2005, no longer works in law enforcement, and now lives in Arizona. *See* http://www.linkedin.com/pub/james-alford/a/261/2a1 (last visited January 18, 2011). On December 20, 2010, Alford's counsel of record confirmed that Alford is no longer employed with the Deschutes County Sheriff's Office.

to an empty conference room near the principal's office. (J.A.[3] 4, Doc. #53, Exh. D, p. 5) The school employee left S.G. alone, behind closed doors, with the two male strangers. *Id*. Alford and Camreta did not identify themselves to S.G. No one explained to her why she was there (J.A. 71), and she was "too scared to ask [Camreta] any questions." (J.A. 55) Throughout the two-hour interrogation that ensued, S.G. was too frightened even to ask for a glass of water, much less to tell petitioners that she felt sick. (J.A. 55, 58)

Camreta had been assigned to investigate allegations that suggested S.G.'s father might have sexually abused her, allegations the police had reported to DHS in connection with their ongoing criminal investigation of S.G.'s father regarding an unrelated child. 588 F.3d at 1016. Alford joined Camreta at S.G.'s interview "to investigate the criminal half of . . . the investigation." (J.A. 38)

Although Camreta had learned of the allegations regarding S.G. three or four days earlier, *Greene v. Camreta*, 2006 WL 758547 *1 (D. Or. 2006), and the police investigation had been pending for two weeks (Doc. #44, Exh. 2, p. 1), neither Camreta nor Alford spoke to S.G.'s mother, Sarah Greene, before interrogating S.G., so they did not have her consent to the

[3] J.A. refers to the Joint Appendix. Doc. # (hereinafter Doc. #) refers to documents in the District Court Docket.

interview.[4] 588 F.3d at 1016. Camreta and Alford also did not know that S.G. suffered from significant developmental delays, particularly in spoken language (J.A. 42), verbal reasoning ability, and overall reasoning. (Doc. #136, Exh. 3) She was eligible for special educational services because of the "communication disorder." *Id*.

Camreta interrogated S.G. while Alford silently observed. (J.A. 60) When Camreta asked S.G. if her father touched her "all over [her] body," she said "yes," referring to affectionate hugs, kisses, and piggy-back rides. (J.A. 71) Camreta then asked "over and over again" if "some of those were bad touches." *Id.* Over and over again, S.G. said "no." *Id.* In response to the frightened nine-year-old's repeated and clear denials of abuse, Camreta "would say, 'No that's not it,' and then ask me [S.G.] the same question again." *Id.* "For over an hour," Camreta repeated "the same questions, just in different ways. . . ." *Id.* In the process, he educated S.G. about child sexual abuse; S.G. had been unfamiliar with the topic. (J.A. 55-56)

S.G. denied all allegations of abuse for almost two hours. (J.A. 48, 54, 55, 57) Towards the end of the school day, she could see through the window blinds that the school buses were arriving to take the

[4] Petitioners did not have a warrant or court order, and there were no exigent circumstances justifying a seizure of S.G. 588 F.3d at 1017, 1030 n.17. They also did not speak to Nimrod Greene, S.G.'s father, before interrogating S.G. (Doc. #53, Exh. D, p. 3)

children home. (J.A. 48) S.G. did not believe that she was free to leave the room without Camreta and Alford's permission (J.A. 70-71), and she was correct. (J.A. 40) Fearing that the school bus would leave without her at dismissal time (Doc. #53, Exh. A, p. 25), the frightened child decided to lie, "just to get out of the room." (J.A. 57) She assented to Camreta's leading questions about abuse, "saying yes to whatever he said" (J.A. 71), because, "I had a feeling that's what he wanted to hear, just lies, not truth." (J.A. 57) Camreta and Alford then allowed her to leave. (J.A. 71-72)

S.G. was so upset by the coercive interrogation that she vomited five times that night after returning home. (J.A. 63, 72) She could not eat dinner or even drink Gatorade. (Doc. #53, Exh. B, p. 16)

Since the interrogation, S.G. has repeatedly denied that her father abused her. (*See* Doc. #44, Exh. 11, p. 6; Doc. #53, Exh. C, p. 11; Doc. #65) No recording exists of the interrogation, although Alford had a tape recorder with him[5] (J.A. 39), and no documentation of the specific questions Camreta asked or the specific answers S.G. gave exists. (Doc. #53, Exh. D, p. 5)

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[5] As a result, the abusive nature of Camreta's questioning has not been preserved. However, counsel's heavy-handed, abusive questioning of S.G. at her deposition was transcribed. (Doc. #53, Exh. C) S.G. testified that Camreta's questioning was even more "scary" and "stern" than counsel's questioning. (Doc. #53, Exh. C, p. 20)

Interview Protocols and the Seizure of S.G.

The current professional literature is rife with expert studies of factors that negatively affect interviews of children, leading to false information. Based upon those studies, numerous experts, including the National Institutes of Health, have set guidelines for forensic interviews in cases of alleged child abuse, especially sex abuse.[6] Oregon, like many states, has adopted official guidelines for interviewing children who may be victims of abuse. *See* Oregon Interviewing Guidelines (2d ed. 2004), available at http://www.doj.state.or.us/crimev/pdf/orinterviewingguide.pdf ("Oregon Guidelines"). The Oregon Guidelines, developed after "a thorough literature review," *id*. at 3, emphasize that investigators should prepare carefully for interviews with alleged victims of child abuse by, *inter alia*, determining whether the child has any developmental delays or other disabilities. *Id.* at 60.

[6] Lamb, "Structured forensic interview protocols improve the quality and informativeness of investigative interviews with children: A review of research using the NICHD Investigative Interview Protocol" (2007), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2180422/. *See also, e.g.,* Annon, "Recommended Guidelines for Interviewing Children in Cases of Alleged Sexual Abuse," 6 IPT Journal (1994), available at http://www.ipt-forensics.com/journal/volume6/j6_3_2.htm; "The Role of Law Enforcement in the Response to Child Abuse and Neglect" (1992), available at http://www.childwelfare.gov/pubs/usermanuals/law/index.cfm; Wakefield, "Guidelines on Investigatory Interviewing of Children: What is the Consensus in the Scientific Community?" 24 AM. J. FORENSIC PSYCHOLOGY 57 (2006) (summarizing and tabulating results from 61 books and articles), available at http://www.ipt-forensics.com/library/ajfp1.htm.

See also id. at 187-95 (importance of identifying special needs). The Guidelines warn that some children will find a police officer's "badge, gun, or radio intimidating," and recommend that [t]he interviewer should be dressed in modest clothes." *Id.* at 43.[7] The child should be told the likely length of the interview. *Id.* at 61-62.

Interviews should be carefully documented, "preferably via audio or video recording." *Id.* at 27, 26, 133. "It is especially critical that evaluations of children with special needs be documented in the most sophisticated manner possible." *Id.* at 191.

The Oregon Guidelines repeatedly emphasize that interviewers must be neutral and guard against actions or questions that, even inadvertently, might communicate bias to the child, *e.g., id.* at 28, 37-39, 43, 63-64, 75-76, 148-49, 168, as "interview bias is consistently associated with high rates of false reports among nonabused children." *Id.* at 38. Therefore, the interviewer should "remain open to the possibility that no abuse occurred," *id.* at 39, and "when children are nondisclosing [of abuse], the interviewer should first consider the possibility that the child was not abused." *Id*. at 167.

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[7] Federal guidelines completely prohibit interviewers from carrying weapons: "In all child interviews, the officer should remove and secure his/her weapon so that it is out of sight prior to the interview." "The Role of Law Enforcement in the Response to Child Abuse and Neglect" (1992) http://www.childwelfare.gov/pubs/usermanuals/law/index.cfm.

Moreover, the Oregon Guidelines warn that children are likely to respond to any indications that they are not giving the interviewer the information he seeks:

> Children are also socialized to please adults and to avoid challenging or correcting them. If an adult implies knowledge of an event and this knowledge disagrees with the child's memory, the child may report the adult version despite accurate memory . . . and . . . may try to provide answers that make the adult happy. These assumptions about adults are more pronounced with younger children but may still be present to some degree in children as old as 9 to 10. Children may read verbal and nonverbal cues of an adult in order to decide how to please the adult. The importance of avoiding leading questions and preconceived biases is underscored by knowledge of children's social assumptions in the interviewing context. *Id.* at 148.

"Unacceptable tactics" include "leading questions, repeated questioning, . . . or coercing children (e.g. 'You can't leave until you tell me what happened')." *Id.* at 168. Not only do such actions lead to unreliable information, "these tactics may adversely impact the child's mental health." *Id.* at 76. Petitioners'

interrogation of S.G. violated all of those rules, and generated false information from S.G.[8]

Events Leading Up to the Seizure of S.G.

S.G.'s father, Nimrod Greene, came to the attention of law enforcement two weeks before petitioners interrogated S.G., when Greene's employer Franklin Smith, and his wife, Melissa, told police that Greene had touched the genital area of Smith's seven-year-old son, F.S., outside the boy's denim pants.[9] When the police came to investigate, Smith told them that Nimrod had said that his wife, Sarah Greene, had accused Nimrod of molesting his own daughters (S.G. and her five-year-old sister, K.G.) when he was drunk and that she didn't like the girls to lie in bed with him when he had been drinking. (Doc. #44, Exh. 2, p. 1) Despite those alleged statements, the Smiths inexplicably continued to employ and entertain Greene, kept a bottle of vodka in their home solely for Greene, had left Greene alone with their two young sons in the boys' bedroom and, on February 10, 2003, left

[8] For an explanation of the relevance of petitioners' violation of the guidelines to the analysis of whether petitioners violated the Fourth Amendment, *see* Argument, Section II, *infra*.

[9] In Smith's original statement to the police, he claimed that F.S. said that Nimrod Greene had grabbed or squeezed his son's penis, while the child was fully dressed. (Doc. #44, Exh. 2, p. 2) F.S. did not corroborate the allegation, but said only that Greene had grabbed him in the crotch area. *Id*.

Greene alone with F.S. for 20 or 25 minutes. (Doc. #44, Exh. 2, pp. 1-2)

The police arrested Nimrod Greene on February 12, 2003, for touching F.S. Although they were required to report to DHS the allegations that Greene might have abused his daughters, Or. Rev. Stat. §419B.010(1), they did not do so until February 20, 2003, more than a week later. (Doc. #44, Exh. 3, p. 2) DHS investigator Camreta learned that Greene had been released on bail and had returned home to his family. (Doc. #44) Nonetheless he took no action for three more days. Petitioners did not contact the Smiths for additional information about the allegations or the Smiths' knowledge of the Greene family, nor did they question Nimrod or Sarah Greene, or anyone else. As a result, petitioners had no additional information about the allegations, or about the Greene family, before their seizure of S.G. on February 24, 2003.

The Aftermath of Petitioners' Seizure of S.G.

When Camreta and Alford released S.G. from their custody after two hours, S.G., who continued to feel sick, took the bus home. (J.A. 72) When she arrived there, she discovered petitioners in her living room, talking to her mother. *Id.* Because of petitioners' presence, her mother could not console her, and S.G. ran upstairs, nauseated. (J.A. 49, 72; Doc #53, Exh. B, p. 17)

Petitioners told Sarah Greene about the accusations and about the KIDS Center, which would provide sex abuse evaluations for her daughters, including both physical examinations and sensitive age-appropriate questioning by trained social workers and/or psychologists.[10] (J.A. 49) Sarah Greene immediately agreed to take her daughters to the KIDS Center. (J.A. 18)

Petitioners claim that S.G. told them during the interrogation that she would lock her bedroom door in order to escape from her father. (Doc. #44, p. 3) Her mother showed them S.G.'s door, which had no lock. (J.A. 48) After petitioners left, S.G. told her mother about the interrogation, including that she had answered "yes" to questions when the true answer was "no." (Doc. #53, Exh. C, p. 15) Nevertheless, Mrs. Greene promptly attempted to schedule sessions for both daughters at the KIDS Center, attempts which were thwarted by Camreta, who called the KIDS Center to postpone the sessions. (Doc. #53, Exh. B, pp. 18, 19, 26-27)

[10] The KIDS Center, like all Child Advocacy Centers, provided child abuse evaluations with a multi-disciplinary team in a non-threatening atmosphere, using non-coercive interviewing techniques. Encouraged by federal law, 42 U.S.C. §13002(a), by 2006 there were more than 600 CACs nationwide, www.ncjrs.gov/pdffiles1/ojjdp/218530.pdf.

Camreta testified before the grand jury which, on March 6, 2003, indicted Nimrod on five counts of sexual abuse of S.G., plus one count of sexual abuse of Smith's son. (Doc. #44, Exh. 4, p. 3) Nimrod Greene was re-arrested the next day. Although Greene was now in jail, preventing any suspected harm from occurring, on March 11, 2003, Camreta removed both girls from their mother's custody. (Doc. #44, p. 6, Exh. 3, pp. 13-14)

The girls remained in foster care for three weeks. (Doc. #44, pp. 6, 8) Despite Sarah Greene's repeated attempts to schedule evaluations at the KIDS Center both before and after the girls were taken into foster care, K.G. was not evaluated there until March 20, 2003, and S.G. was not evaluated until March 31, 2003. (J.A. 67, 68; Doc. #53, Exh. B, p. 27; Doc. #44, Exh. 10, p. 1, Exh. 11, p. 1)

At the KIDS Center, the girls underwent forensic interviews and had physical examinations, all conducted by specially trained professionals. The KIDS Center staff found no evidence that either girl had been sexually abused. (Doc. #44, Exh. 3, p. 1) KIDS staff, however, did recommend that both children receive counseling, including for the trauma they suffered due to being taken from their mother and placed in foster care. (Doc. #44, Exh. 10, p. 17; Exh. 11, p. 18)

On the afternoon of S.G.'s evaluation, the juvenile court ordered that S.G. and K.G. be returned to their mother's custody and dismissed the juvenile

court case. Subsequently, the state dismissed all criminal charges against Nimrod Greene related to his daughters.[11] 588 F.3d at 1020. Nonetheless, S.G. continues to believe that her inability to withstand petitioners' interrogation was the cause of the subsequent disruption of her family's life and her father's prosecution.[12]

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[11] Maintaining his innocence, Greene submitted an *Alford* plea with respect to a reduced charge against him related to F.S. Sarah Greene explained that the family had been bankrupted by the cost of defending the first trial, and could not afford a second trial. (J.A. 64-65) Also, Nimrod Greene decided to accept a deal offered by the District Attorney because it would not require him to serve time in prison, so he could continue to work and to support the family. *Id*.

[12] "Q. Don't you understand that the reason you can't see your dad right now is because of the abuse?

A. No.

Q. Do you think it has anything to do with the lies you say you told?

A. Yes.

Q. Does that make you feel real bad?

A. Yes. . . .

Q. Do you think that your dad's in trouble now because you lied about him?

A. Yes.

Q. Do you feel real bad about that?

A. Yes." (Doc. #53, Exh. C, pp. 18-19)

Because the district court granted summary judgment to the petitioners, the record is otherwise undeveloped as to the significant emotional harm that petitioners caused S.G.

Proceedings Below

Sarah Greene filed suit under 42 U.S.C. §1983 on behalf of herself and both her daughters, naming petitioners among the defendants.[13] 588 F.3d at 1020. Only one of the claims in that lawsuit is now before this Court – that the seizure of S.G. at her school violated her Fourth Amendment rights.[14] The district court granted summary judgment to petitioners on that claim, ruling both that the seizure was constitutional and that even if it were not, petitioners were entitled to qualified immunity. 2006 WL 758547 at *3-*5.

At the time, the district court was required, under this Court's holding in *Saucier v. Katz*, 533 U.S. 194 (2001), to consider the constitutionality of the petitioners' actions before evaluating qualified immunity. By the time the court of appeals issued its opinion, however, this Court had decided *Pearson v.*

[13] Respondents have since moved to Florida, and have no intention of relocating back to Oregon.

[14] In other claims, Greene and her daughters alleged violations of their Fourteenth Amendment rights because (1) Camreta intentionally presented false information to the Juvenile Court to obtain an order to remove the children from Sarah's custody, and (2) both Camreta and the KIDS Center unreasonably interfered with Sarah's right to be with her children and with the children's right to have their mother present during an intrusive medical examination. 588 F.3d at 1020. The court of appeals reversed the grant of summary judgment to Camreta on those claims, *id.* at 1033-37, and petitioners did not seek review of those rulings in this Court.

Callahan, 555 U.S. 223, 129 S. Ct. 808 (2009), which relaxed *Saucier*'s requirements, giving lower courts discretion as to whether to reach the underlying constitutional question before ruling on qualified immunity. *Id.,* 129 S. Ct. at 818. The court of appeals exercised its discretion under *Pearson* to decide whether petitioners in fact violated S.G.'s constitutional rights, before determining, separately, whether petitioners were nonetheless entitled to qualified immunity.

The court of appeals analyzed the constitutional question as petitioners urged it to – by looking to *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), and its progeny, a line of cases that have defined a "special needs" exception to the Fourth Amendment's warrant and probable cause requirements.[15] The court of appeals

[15] In this Court, petitioners argue that the court of appeals erred by relying on this line of cases and that it should have instead relied on other cases. Camreta particularly relies on *Terry v. Ohio*, 392 U.S. 1 (1968), and *Illinois v. Lidster,* 540 U.S. 419 (2004). Camreta Brief 9-10; *see also* Alford Brief 15. Yet neither Camreta nor Alford so much as cited *Lidster* in their original appellate briefs, *see* Cam.App.Br. ii-iii (Table of Authorities); Alf.App.Br. iv-viii (same). Camreta mentioned *Terry* only once, when quoting the district court's opinion, Cam.App.Br. 8, and Alford repeatedly referred to the *Terry* holding as synonymous with *T.L.O.* Alf.App.Br. 12, 17, 19. In this Court, Alford relies not only on *Lidster*, but also on three other cases as emblematic of the analysis he now wishes the court of appeals had undertaken: *Virginia v. Moore*, 553 U.S. 164 (2008); *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), and *Wyoming v. Houghton,* 526 U.S. 295 (1999). Alford Brief 21. None of these cases were cited to the court of appeals at *any* stage of the

(Continued on following page)

noted that "despite defendants' heavy reliance upon" *T.L.O.*, in that case this Court "was considering 'only searches carried out by school authorities acting alone and on their own authority.'" 588 F.3d at 1024, quoting 469 U.S. at 341 n.7 This limitation was significant and made *T.L.O.* inapplicable, the court of appeals reasoned, because this "Court's decision in *T.L.O.* was premised on a 'special need' of government not present in this case: 'the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds.'" 588 F.3d at 1024, quoting 469 U.S. at 339. The court of appeals further noted that this Court has recently and repeatedly reiterated "the narrowness of *T.L.O.*" 588 F.3d at 1024, citing *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633, 2639 (2009), and *Ferguson v. City of Charleston*, 532 U.S. 67, 79 n.15 (2001).

The court of appeals also considered petitioners' claim that "the government's 'special need' to protect children from sexual abuse justifies a departure from both the warrant and probable cause requirements in

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proceedings. More significantly, both Camreta and Alford expressly urged the court of appeals to evaluate S.G.'s seizure pursuant to *T.L.O.* and its progeny. Alf.App.Br. 12-19 (explicitly arguing that the "special needs" doctrine established in *T.L.O.* should apply); Cam.App.Br. 16-20 (repeatedly citing *T.L.O.* and lower courts relying on it). Neither petitioner suggested that a different analysis even existed until they petitioned for rehearing and rehearing *en banc*. Petn. Rehearing. Camreta and Alford now complain that the court of appeals decided the case without considering arguments they themselves failed to make until after the opinion was issued, if they were made at all.

a case such as this one." 588 F.3d at 1026. Reviewing the special needs doctrine, the court noted that this Court consistently requires that the special needs be "'beyond the normal need for law enforcement.'" *id.*, quoting *Griffin v. Wisconsin,* 483 U.S. 868, 873 (1987), and that there be "'no law enforcement purpose behind the searches . . . and . . . little, if any entanglement with law enforcement' in conducting them," 588 F.3d at 1027, quoting *Ferguson*, 532 U.S. at 79 n.15. In fact, the court of appeals observed, this "Court hasn't relaxed traditional Fourth Amendment protections when the main purpose of an ostensibly administrative search was to gather evidence for use in subsequent criminal proceedings. . . ." *Id.*

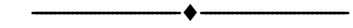
The court of appeals therefore analyzed whether "law enforcement personnel and purposes were too deeply involved in the seizure of S.G. to justify applying the 'special needs' doctrine," and concluded that they were. *Id.* That involvement was both active and specific. The "police were conducting an ongoing investigation of S.G.'s father, and Camreta requested that Deputy Sheriff Alford, a uniformed police officer carrying a visible firearm, accompany him to the interview." *Id.* at 1027. The court of appeals concluded:

> Once the police have initiated a criminal investigation into alleged abuse in the home, responsible officials must provide procedural protections appropriate to the criminal context. At least where there is, as here, direct involvement of law enforcement in an in-school seizure and interrogation of a suspected

> child abuse victim, we simply cannot say, as a matter of law, that she was seized for some 'special need, beyond the normal need for law enforcement.'
>
> In short, applying the traditional Fourth Amendment requirements, the decision to seize and interrogate S.G. in the absence of a warrant, a court order, exigent circumstances, or parental consent was unconstitutional.

Id. at 1030.

Although the court of appeals concluded that petitioners had violated S.G.'s Fourth Amendment rights, it also held that petitioners were entitled to qualified immunity. *Id.* at 1030-33. Therefore, the court of appeals affirmed the district court's judgment in petitioners' favor. Petitioners nonetheless petitioned for certiorari, seeking review of whether the court of appeals' Fourth Amendment ruling was correct.



SUMMARY OF ARGUMENT

I. The court of appeals' ruling that petitioners' seizure of nine-year-old S.G. violated her Fourth Amendment rights is not reviewable because it was not part of that court's judgment. This Court reviews judgments, not opinions. *California v. Rooney*, 483 U.S. 307, 311 (1987). In addition, petitioners cannot appeal because they prevailed in the court of appeals. Only an aggrieved party may appeal from a

judgment. *Deposit Guarantee Nat. Bank v. Roper*, 445 U.S. 326, 333 (1980). Petitioners and the United States rely on an exception to this principle for appeals of rulings that are "collateral to the judgment on the merits." 445 U.S. at 334. Here, however, the Fourth Amendment ruling goes to the heart of the merits. *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939), upon which the United States relies, is not to the contrary. There, this Court approved a purely technical amendment to the judgment decree issued by the district court in a case in which they prevailed. But this Court expressly held that review of the merits would be inappropriate.

This Court also has no jurisdiction over petitioners' appeals from the Fourth Amendment ruling because those appeals present no Article III case or controversy. The dispute here is moot, as petitioners present only a hypothetical dispute about the law. Regardless of the outcome in this Court, respondent can gain nothing from petitioners. Petitioners likewise have no personal stake in the outcome and so lack standing. Petitioners implicitly concede this point by focusing all their arguments for standing on the interests of the Deschutes County and the State of Oregon, neither of which are parties here. The United States also fails in its efforts to manufacture an Article III dispute. In particular, its attempt to liken statements in an appellate opinion to a declaratory judgment or an injunction "running against the government as a whole" (U.S. Brief 13), are unavailing. *See*, *e.g., Hewitt v. Helms*, 483 U.S. 755, 758-59

(1987) (rejecting the notion that a "judicial pronouncement" without effect on "the behavior of the defendant towards the plaintiff" can be characterized as a declaratory judgment). Indeed, if this Court were to accept the United States' argument, any government official whose job might be affected by a ruling would have standing to appeal. Such a dramatic expansion of appellate standing is both implausible and undesirable.

Petitioners rely principally on *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808 (2009) to support their plea for review, arguing that *Pearson* allows for appeals in a situation, like this one, where a lower court finds that official defendants violated the plaintiff's constitutional rights but also holds that those defendants are protected by qualified immunity. *Pearson*, however, says nothing of the kind, and it even discusses the difficulties such defendants would face in trying to appeal. *Id.* at 820. Moreover, this Court will ultimately be able to decide the underlying constitutional issues presented in such cases; the issues are likely to recur in numerous cases and in different postures that this Court unquestionably can decide.

If this Court declines to review the Fourth Amendment ruling, that ruling should remain intact. *Karcher v. May*, 484 U.S. 72 (1987) (ruling remains intact when losing party does not appeal). The ruling likewise must remain intact should this Court dismiss the writ as improvidently granted.

II. Petitioners violated S.G.'s Fourth Amendment rights through their custodial interrogation of her. There is no dispute that petitioners seized S.G., nor is there any dispute that S.G. was suspected of no wrongdoing. The history of the Fourth Amendment, which is where the constitutional inquiry begins, establishes that the seizure was unconstitutional. At the Founding, witnesses could be compelled to speak only upon an order from a magistrate. As a result, the seizure of S.G. violated the Fourth Amendment.

Even without such historical evidence, the traditional requirements of the Fourth Amendment – a warrant and probable cause – apply here. Child abuse investigations are prime examples of the situations in which a neutral magistrate's review of the evidence is particularly valuable. Like petitioners here, officials may overreact to allegations or intimations of child abuse, perhaps with the best of intentions. *Cf. Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978) (noting the dangers of "devolv[ing] almost unbridled discretion upon executive and administrative officers, particularly those in the field."). Likewise, the familiar standard of probable cause applies here. Petitioners' seizure of S.G. was not the sort of brief and spontaneous stop that this Court has occasionally approved on the lower standard of reasonable suspicion. *Terry v. Ohio*, 392 U.S. 1 (1968) (reasonable suspicion), but was a two-hour planned interrogation of a terrified nine-year-old girl.

None of this Court's cases, including *Illinois v. Lidster*, 540 U.S. 419 (2004), suggest that an amorphous reasonableness standard applies whenever officials detain witnesses rather than suspects. To the contrary, *Lidster* evaluated numerous features of the traffic stop at issue in that case, including that it was extremely brief, and that the questioning, equivalent to asking a person on the street for information, was minimal and not "likely to provoke anxiety or to prove intrusive." *Id.* at 424. Here, in contrast, petitioners not only traumatized S.G., but their questions intruded on her private family life and on Sarah Greene's constitutionally-protected interests in controlling her child's education and interactions with other adults.

This Court's "special needs" doctrine likewise does not support petitioners. Law enforcement was deeply involved in S.G.'s seizure, which alone renders the special needs doctrine inapplicable. *Ferguson v. City of Charleston*, 532 U.S. 67, 81 n.5 (2001). In addition, the seizure here is entirely different from the circumstances in which this Court has applied the special needs doctrine. Unlike other special needs cases not involving probationers or parolees, S.G. and her mother consented to nothing. Moreover, the school-based special needs cases rely entirely on rationales not present here: school officials' need to maintain order and discipline and the impracticality of expecting school officials to get a warrant when confronted with rebellious, even dangerous, students.

Even under the reasonableness-balancing test petitioners propose, the seizure of S.G. is unconstitutional. The seizure here was highly intrusive. There are, moreover, several important public interests at stake in such a seizure – not only the government interest in detecting child abuse, but also an interest in obtaining accurate results from its investigations, an interest in not needlessly breaking families apart, and an interest in minimizing trauma to children who are being interviewed. Most significant, however, is that the petitioners' custodial interrogation of S.G. served *none* of the interests at issue. Not only did it traumatize the child and her family, but interviews of this type lead to highly unreliable information. With such unreliable information, officials are at grave risk *both* of needlessly removing children from their parents *and* of being unable to protect children from abuse because the information obtained is not reliable. The State of Oregon itself acknowledges these realities. The State has adopted Guidelines for Interviewing Children consistent with widely accepted recommendations that expressly counsel against the heavy-handed tactics used by petitioners. And the State has created, with federal support, multidisciplinary centers where suspected victims of abuse can be interviewed in an appropriate manner. One, the KIDS Center, was available to petitioners and S.G. was eventually evaluated there, where no evidence of abuse was found. Despite that available resource, petitioners unaccountably decided to interrogate S.G. at her school, in violation of numerous

protocols and recommendations. For all of these reasons, their conduct was unreasonable and therefore unconstitutional, even under the standard they themselves promote.

Camreta in fact does not even defend his conduct during the interview. Instead, he asks this Court to decide only the hypothetical question of whether this interview – or in fact *any* school based interview to investigate an allegation of child abuse – was constitutional at its inception. Camreta Brief 34. Nothing in this Court's precedents supports Camreta's plea to bifurcate the reasonableness inquiry by looking only at the seizure's inception and not at its scope. Nor does the case law support giving officials such broad authority to seize children in schools, even with the best of intentions. Most notably, however, even looking at Camreta's conduct before he spoke a word to S.G., the seizure was unreasonable. He failed to prepare for the interview in any way, failed to do the most minimal of investigations before interrogating her, and failed to take advantage of the available resources – notably the KIDS Center – that could have both protected S.G. and her family from unnecessary trauma and produced reliable information about whether she was being abused.

ARGUMENT

I. THE COURT OF APPEALS' RULING THAT PETITIONERS' SEIZURE OF S.G. VIOLATED HER FOURTH AMENDMENT RIGHTS IS NOT REVIEWABLE AND SHOULD BE LEFT INTACT

A. The Court of Appeals' Fourth Amendment Ruling Is Not Reviewable Because It Was Not Part of That Court's Judgment and Because Petitioners Prevailed by Virtue of That Judgment

This Court "reviews judgments, not statements in opinions." *California v. Rooney,* 483 U.S. 307, 311 (1987) (per curiam), quoting *Black v. Cutter Laboratories,* 351 U.S. 292, 297 (1956). But in asking this Court to review the Fourth Amendment ruling, which was not part of the judgment that the court of appeals entered *for them* when it held that they were entitled to qualified immunity, petitioners are asking this Court to do precisely what that principle forbids:[16]

[16] In *Rooney,* the police searched the trash bin at Rooney's apartment building. 483 U.S. at 309. Based on evidence found in the trash, and other evidence, the police obtained a search warrant for his apartment. Rooney moved to suppress the evidence found in his apartment, as the fruit of an unconstitutional search. The California Court of Appeal agreed with Rooney that the trash search was unconstitutional, but held that there was, nonetheless, enough valid evidence supporting the search warrant. It therefore denied the motion to suppress. The State of California appealed to this Court, asking for review of the ruling with respect as to the trash search, but did not challenge the judgment, which had approved the search

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"that the Court of Appeal reached its decision through an analysis different than this Court might have used does not make it appropriate for this Court to rewrite the [lower] court's decision, or for the prevailing party to request us to review it." 483 U.S. at 311. Similarly, the court of appeals' use of analysis that may be adverse to the non-parties' long-term interests (*see* Camreta Brief 43-44), even while the court was ruling for petitioners, does not allow the non-parties State and County to, in effect, appeal from the court's Fourth Amendment "analysis."

Because they *prevailed* in the court of appeals, petitioners cannot appeal. Only an aggrieved party may appeal from a judgment. *Deposit Guarantee Nat. Bank v. Roper*, 445 U.S. 326, 333 (1980). Petitioners and the United States attempt (Camreta Pet. 29; Alford Brief 4, n.1; U.S. Brief 15-21) to rely upon an exception to this rule: that "[i]n an appropriate case, appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits," *Roper*, 445 U.S. at 334. The "collateral" requirement derives from *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949). But "'collateral to' the merits" under *Cohen* and its progeny means "'*completely* separate from the merits of the action.'" *Puerto Rico Aqueduct*

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warrant. *Id.* at 309-11. This Court granted certiorari, *see id.* at 308, but ultimately dismissed the writ as improvidently granted, in part on the ground that the "trash-search issue . . . has never been the subject of an actual judgment," *id*. at 314.

& Sewer Authority v. Metcalf & Eddy, Inc. 506 U.S. 139, 144 (1993) (citation omitted, emphasis added). Thus, in *Roper*, this Court identified the decision whether to grant class certification as the type of "*procedural* ruling [that is] collateral to the merits of a litigation." 445 U.S. at 336 (emphasis added).

In this case, in contrast, the ruling that petitioners seek to appeal was at the very heart of S.G.'s case: "a claim that . . . [her Fourth Amendment] rights have been violated," *Mitchell v. Forsyth,* 472 U.S. 511, 527-28 (1985) (defining a "merits . . . claim" as calling for "consider[ation] [of] the correctness of the plaintiff's version of the facts, . . . [and] determin[ation] [of] whether the plaintiff's allegations . . . state a claim [for relief]"; distinguishing collateral claim as calling for neither).

The United States relies on *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939), to argue that the Fourth Amendment ruling was "collateral." But in *Electrical Fittings*, the relief sought was deletion of a portion of the district court's final decree adjudging a patent both valid and not infringed. *Id.* at 242. The petitioners, who were defendants below, asked to have the decree amended so that it no longer included a judgment of the validity of the patent held by respondents, plaintiffs below. *Id.* The *Electrical Fittings* petitioners did *not* ask, as petitioners do here, for this Court to review the merits of the lower court's legal determinations about the validity of plaintiff's patent. The *Electrical Fittings* petitioners requested only that the district court's final *judgment*

be amended so that it did not mention the patent's validity, asking the appellate court to address a purely technical error – or, as this Court put it in *Roper*, a "procedural error." 445 U.S. at 335 n.7.[17] The *Electrical Fittings* court held that appellate jurisdiction existed *only* for the technical correction and "*not* for the purpose of passing on the merits," 307 U.S. at 242 (emphasis added).

B. The Court of Appeals' Fourth Amendment Ruling Is Not Reviewable Because the Appeals Present No Article III Case or Controversy

1. The Dispute Petitioners Bring to This Court Is Moot

The Fourth Amendment dispute is moot because S.G., in deciding *not* to petition for certiorari from the judgment against her, abandoned that claim. S.G. can gain no relief on her Fourth Amendment claim from petitioners, regardless of any ruling this Court might make. It follows that there is no live case or controversy. *See Lewis v. Continental Bank Corp*., 494 U.S.

[17] In *Roper*, this Court explained that the *Electrical Fittings* district court had been "correct in inquiring fully into the validity of the patent . . . but incorrect to adjudge the patent valid after ruling that there had been no infringement." *Id.* (internal citation omitted). In contrast, the court of appeals here engaged in an analysis that this Court has expressly authorized – deciding the constitutional question first and thereafter reaching the question of qualified immunity. *See Pearson*, 129 S. Ct. at 818.

472, 478-79 (1990) (dispute is not alive when "no matter how the Commerce Clause issues in this suit are resolved, [Continental's] application can constitutionally be denied"); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) ("federal courts are without power to decide questions that cannot affect the rights of the litigants in the case before them") ("To be cognizable in a federal court, a suit . . . 'must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts'"). *See also* C. Wright, A. Miller, E. Cooper, 13B Federal Practice and Procedure §3533 (updated through 2010) ("Some of the easiest mootness principles apply to cases in which plaintiff abandons requests for relief.").

To be sure, petitioners continue to dispute the correctness of the court of appeals' ruling that their seizure of S.G. violated her rights. But as this Court recently and unanimously explained, a "contin[uing] . . . dispute about the lawfulness of State action" does not alone make for an Article III case or controversy. *Alvarez v. Smith*, 130 S. Ct. 576, 580 (2009). The government seized personal property from the *Alvarez* plaintiffs, who contended that "the failure of the State to provide a speedy postseizure hearing" violated their due process rights. *Id.* at 579. By the time the case reached this Court, all plaintiffs had either resolved or abandoned the underlying claims regarding their property. Since they had not sought damages in their original complaint, they had no active claim

for relief. *Id.* at 578-79. The case was therefore moot. Even though "[t]he parties . . . continue to dispute the lawfulness of the State's hearing procedures . . . that dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights, [but is] [r]ather . . . an abstract dispute about the law. . . ." *Id.* at 580.

Even though petitioners here, as in *Alvarez*, continue to insist on "the lawfulness of State action," *id.* at 580, and to "dispute" (*id.*) the court of appeals' determination that they violated S.G.'s Fourth Amendment rights,[18] the same mootness conclusion is

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[18] Respondent's choice to argue in the alternative that the court of appeals' ruling was correct does not create a live case or controversy. Both parties in *Alvarez* argued against mootness and both sought a ruling on the merits. Official Oral Argument Transcript at 5, 34, available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-351.pdf. That argument did not make the dispute any more concrete.

The United States suggests that this Court has "heard and decided numerous cases in which the non-appealing party has little or no interest in defending the . . . judgment." U.S. Brief 18. But the one decision of this Court that it cites for that proposition, *Pacific Bell Tel. Co. v. Linkline Communications, Inc.*, 129 S. Ct. 1109 (2009), was a case in which the Court ruled that, notwithstanding respondent's failure to defend the judgment, it continued to have a substantial interest in the outcome of the case that was "adverse" to that of petitioner, "not only in the litigation as a whole, but in the specific proceedings before this Court." *Id.* at 1117. The United States' reliance (U.S. Brief 18) on cases in which this Court has appointed amici to defend the court of appeals' judgment is also misplaced. In those cases, the respondent retained a substantial stake, but disagreed with what the court of appeals had said about that stake, thus

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compelled by understanding that the dispute here is entirely divorced from "any actual controversy about the plaintiffs' particular legal rights," *id.*: Both petitioner Camreta and the United States implicitly concede this point, as they urge this Court to decide whether petitioners' actions were constitutional. *See* Camreta Brief 39 ("reasonableness of the scope of th[e] seizure [of S.G.] . . . including whether the [two-hour] interview of S.G. was reasonable . . . depends on the resolution of heavily disputed facts . . . [and] that resolution should not occur in this case"); (U.S. Brief 32) ("This Court need not decide . . . whether the [two-hour] interview in this case was conducted in a reasonable manner")).

Moreover, the "dispute about the law" in *Alvarez* was between *parties*, the State's Attorney on the one hand and plaintiff property owners on the other. In contrast, the "dispute about the law" here is, under *petitioners*' theory of standing and as discussed below, between the State of Oregon and Deschutes County on the one hand and unidentified children on the other, none of whom are parties to this case. And unlike respondents in *Electrical Fittings*, on which the United States relies, S.G. has no on-going personal interest in the resolution of this dispute. The *Electrical Fittings* respondents had an obvious interest

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requiring appointment of an amicus to defend the court of appeals' judgment in whole or in part. *See Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1243 (2010); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 226 n.1 (2002).

in retaining a judgment that their patent was valid. In contrast, it is exceedingly unlikely that S.G. ever will be subjected to a child welfare investigation again, much less at the hands of petitioners; as she is almost 18 and no longer lives in Oregon.

2. The Court of Appeals' Fourth Amendment Ruling Is Not Reviewable Because Petitioners Lack Standing

"[T]he case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. . . . *[T]he parties must continue to have a 'personal stake in the outcome' of the lawsuit.*" *Lewis*, 494 U.S. at 478-79 (citation omitted) (emphasis added). *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 543-44 (1986) ("no personal stake in the outcome of the litigation and therefore . . . [no] standing to file the notice of appeal").

Petitioners effectively concede that they personally lack standing to seek review of the Fourth Amendment ruling by focusing exclusively on harm that might come to *the State and the County,* as if the State and the County had been substituted as party petitioners for Camreta and Alford respectively. Camreta Brief 43 ("State of Oregon . . . appears on Camreta's behalf here");[19] (Alford Brief, *passim* (never

[19] Oregon's decision to indemnify its employees (*see* Camreta Brief 43, n.6) is not tantamount to assuming party status in a federal court lawsuit. If it were, then such indemnification would

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suggesting that Alford individually has any interest in review of Fourth Amendment ruling, in contrast to the "[county] government," which allegedly does)). Petitioners' failure even to argue that they have a personal stake in this case – despite their knowledge that reviewability is at issue – alone dooms their pleas for review. *See Bender*, 475 U.S. at 542 (explaining, with respect to appellate standing, that "at an irreducible minimum, Art. III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury") (internal quotation marks and citations omitted).

Moreover, the State and the County themselves cannot appeal because they are not parties.[20] This

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constitute an implicit back door waiver of the State's Eleventh Amendment immunity, when this Court's decisions require that a State's consent to suit in federal court – its waiver of its Eleventh Amendment immunity – must be "unequivocally expressed." *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984). *See Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944).

[20] S.G.'s complaint originally joined the County as a party defendant to her Fourth Amendment claim on a *Monell* theory. (J.A. 12, 26) The County argued, however, that "there is no evidence of an official policy, custom or practice [giving rise to the interrogation to which S.G. was subject and] adopted by Deschutes County." County Mem. in Support of Summary Judgment (Doc. #47, p. 17) The district court agreed, and granted summary judgment to the County on the Fourth Amendment claim against it. *Greene v. Camreta*, 2006 WL 758547 *5 (D. Or. 2006).

Now the County seeks to have it both ways. In seeking this Court's review, Alford, whom the County apparently views as its

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Court has long held that "one who is not a party or has not been treated as a party to a judgment has no right to appeal therefrom." *Karcher v. May*, 484 U.S. 72, 77 (1987). *See Bender,* 475 U.S. at 545 (school board member sued in his official capacity "not permit[ted] . . . to 'step into the shoes of the Board' and invoke its right to appeal"). Petitioners cannot claim standing based on the alleged interests of non-parties Oregon and Deschutes County.

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alter ego, took the opposite position from the one the County had successfully argued in the district court, not only conceding the existence of the policy it had said there was "no evidence" of, but trumpeting the policy's existence as a reason *for* granting the writ. Alford Pet. 14-15. Noting those inconsistent positions, on December 2, 2010, respondent's trial counsel filed in the district court "Plaintiff's Amended Motion for Relief From Judgment As to Defendant Deschutes County." In that Rule 60 motion, respondent invoked the doctrine of judicial estoppel to seek reinstatement of the County as a party defendant to S.G.'s Fourth Amendment claim. On January 4, 2011, the district court denied the Rule 60 motion as premature, but without prejudice to its renewal after this Court rules in this case. (Doc. #139)

Counties do not enjoy qualified immunity in §1983 cases. *Owen v. City of Independence, Mo.,* 445 U.S. 622 (1980). *If* the County, after this Court's decision, is eventually reinstated as a defendant in this action, and *if* the Fourth Amendment issue is eventually decided against it in the court of appeals, and *if,* at that stage, it decided to seek review of such a ruling in this Court, then, as a party to the case, it could do so without any question being raised as to reviewability. That possibility is an additional prudential reason for this Court to decline to review the Fourth Amendment ruling. *See Rooney*, 483 U.S. at 313 ("too many 'ifs' in that proposition to make our review appropriate at this stage").

Nor would the alleged interests of the State and the County be sufficient to support standing even if they were parties. Petitioners argue that the State and the County have concerns about the effect of the Fourth Amendment ruling on their conduct, or their employees' conduct, going forward. *See* Camreta Brief 43-44 ("State of Oregon . . . bound by the Ninth Circuit's constitutional ruling *in future cases*"; "absent the ability to seek further review in this case, . . . [State] must either comply with what it believes to be an erroneous decision or . . . incur significant liability"). *Accord,* Alford Brief 12 (same for "responsible officials"). The "'stake in the outcome' of the lawsuit," *Lewis,* 494 U.S. at 478-79, that the State and the County claim is thus not a stake in *this* lawsuit. *See id.* at 479 ("Article III question is not whether the requested relief would . . . [have an effect] as to the world at large, but whether [respondent] Continental [Bank] has a stake in that relief"). Such a hypothetical concern does not give rise to Article III standing. *See* II.F., *infra*.

Unlike petitioners themselves, the United States alleges that petitioners personally have standing to appeal to this Court: "[p]etitioners in this case have standing to challenge the court of appeals' constitutional ruling because it effectively prohibits them from job-related activities" and "routine investigative technique[s]" that they "would otherwise engage [in]." U.S. Brief 9, 16. But the United States cites nothing to support its claim. Standing cannot be based solely on the factually unsupported statements of an amicus. Moreover, any burden that petitioners

face is just as hypothetical as those supposedly faced by the State and County – the possibility that in some future case, their conduct might be affected by their concern about liability. This "burden" is so hypothetical that neither Camreta nor the United States actually wants this Court to determine whether petitioners' actions were unconstitutional.[21]

For similar reasons, the United States' attempt to compare petitioners' interests here to the interests of petitioners in *Electrical Fittings* fails. The United States argues that the adverse consequences to petitioners here – being prevented from using a

[21] The possibility that petitioners themselves or similarly situated State investigators and County sheriffs would, in some future child abuse investigations, be inclined to resort to the interrogation practices the court of appeals found unconstitutional appears extremely remote, in light of the 2004 Oregon Guidelines (discussed in II.E.3, *infra*), which, if followed, would rule out such practices. To be sure, the record below is devoid of any evidence respecting the impact of these Guidelines, which were promulgated after the custodial interrogation of S.G. But the very absence of such evidence shows that what petitioners are asking for is an advisory opinion on whether they may violate their State's own guidelines. This Court may not issue "advisory opinions in a controversy which has not arisen," *Coffman v. Breeze Corp*., 323 U.S. 316, 324 (1945) (citing many cases).

Additionally, Alford may not, as a factual matter, legitimately claim standing. Alford no longer works for Deschutes County or in law enforcement. *See* n.2, *supra*. It is therefore extremely unlikely that Alford will ever again participate in a child abuse investigation. *See* U.S. Brief 19 (conceding that a government official in petitioner's position may lack standing to appeal if "there is insufficient likelihood that he will again engage in the practice that has been ruled unconstitutional").

particular "investigative technique" – "are substantially more certain and imminent than the concerns about 'unspecified future litigation' asserted by the appellants in *Electrical Fittings*." U.S. Brief 16-17 (quoting *Roper*, 445 U.S. at 337). The *Roper* court explained, however, that the *Electrical Fittings* petitioners had shown that they had a "personal stake in the appeal required by Art. III," sufficient to establish their standing to seek review of the court of appeals' ruling there. *Roper*, 445 U.S. at 337. Here, in contrast, not only does neither petitioner meet his burden of establishing his "personal" stake, but neither even argues that he has one.

At the heart of the United States' argument for reviewability is the remarkable contention that the Fourth Amendment ruling is the equivalent of "an injunction or declaratory judgment *against the government as a whole*." U.S. Brief 13 (emphasis added). Elsewhere, the United States describes the court of appeals' opinion as an "injunction-like notice" that effectively enjoins "all similarly situated officials" within the Ninth Circuit, with disobedience to the "injunction" resulting in these officials becoming "personally liable for damages." U.S. Brief 9. This argument is an attempt to invest petitioners with sufficient personal interest to meet Article III's requirements.

This Court has already rejected the notion that a ruling in an appellate opinion that affords no relief can be the functional equivalent of a declaratory judgment. In *Hewitt v. Helms*, 482 U.S. 755, 758-59

(1987), as here, the court of appeals had found that a plaintiff's constitutional rights had been violated, but that the defendants had qualified immunity from liability for damages. The plaintiff sought attorneys' fees as a prevailing party, arguing that the statement that his rights had been violated "was at least the equivalent of a declaratory judgment." *Id.* at 761. This Court rejected the argument, noting that what makes "a judicial pronouncement . . . a proper judicial resolution of a 'case or controversy' rather than an advisory opinion[,] is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff*." *Id.* at 761 (emphasis in original). The lower court's "statement of law," *id.* at 763, in *Hewitt* may have given the plaintiff some "moral satisfaction," *id.* at 762, but such a statement is "not the equivalent" of a declaratory judgment and is "not appealable in the same manner as . . . entry of a declaratory judgment." *Id.* at 763.

The notion that the Fourth Amendment ruling here is the functional equivalent of an injunction is equally without merit. The court of appeals did not enjoin anything, and its Fourth Amendment ruling bears none of the indicia of an "injunction" described in Fed. R. Civ. P. 65(d). Like a declaratory judgment, moreover, an injunction is entered upon a finding that a defendant is liable, whereas here the court of appeals ruled that defendant petitioners were *not* liable. Further, an injunction requires a defendant to take or not to take particular actions *with respect to the plaintiff*. *See City of Los Angeles v. Lyons*, 461

U.S. 95, 101-07 (1983) (injunction will not issue absent showing that *plaintiff* is likely to suffer future injury as a result of the acts sought to be enjoined, and that injunction will consequently prevent likely injury). The Fourth Amendment ruling does not direct petitioners (much less "similarly situated officials" or "the government as a whole" (U.S. Brief 9, 13)), to do or refrain from doing anything as to S.G. Nor could S.G. seek any remedy for a "violation" regarding an unrelated child. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 112 (1969).

The United States' likening of statements of law in an appellate opinion as being functionally equivalent to a declaratory judgment or an injunction "against the government as a whole," (U.S. Brief 13), or even against just the governments within the Ninth Circuit (Camreta Brief 43-44), would confer standing to appeal here on, for example, child welfare investigators or law enforcement officers in Hawaii or Alaska similarly situated to petitioners, the predicate for the latters' standing being, under the United States' theory, the same as its predicate for petitioners' own standing: all would be bound by or subject to the (supposed) injunction or the (supposed) declaratory judgment the court of appeals has issued. The United States is therefore urging, albeit implicitly, a vast expansion of appellate standing, and an overturning of the rule that standing to appeal adverse appellate judgments is always restricted to parties only, no matter what *stare decisis* effect the judgment and accompanying decision may have on non-parties,

see Karcher, 484 U.S. at 77, results that would have staggering implications for this Court.

C. Denying Review of the Fourth Amendment Ruling Is Consistent with *Pearson v. Callahan*

In dissenting from the denial of certiorari in *Bunting v. Mellen*, 541 U.S. 1019, 1022 (2004), Justice Scalia, joined by Chief Justice Rehnquist, characterized the mandatory order of decision rule in *Saucier v. Katz*, 533 U.S. 194 (2001) (constitutional question first, then qualified immunity), as having created a "procedural tangle." Justice Scalia proposed a fix, or, more precisely, *alternative* fixes to the described "tangle": [w]e should *either* make clear that constitutional determinations are not insulated from our review . . . , *or* else drop any pretense at requiring the ordering in every case [as *Saucier* mandates]." *Id.* at 1025 (emphasis added). Justice Stevens, writing for himself and Justices Ginsburg and Breyer, favored the alternative that would relax the *Saucier* rule. *Bunting*, 541 U.S. at 1019 ("Relaxing that [*Saucier*] rule could solve the problem that Justice Scalia addresses in his dissent.").

The fix that five members of this Court subscribed to in *Bunting* – relaxing the mandatory *Saucier* rule so that it became optional – became the law in *Pearson*. 129 S. Ct. at 818. The *Pearson* Court thereby adopted the second of the two alternative fixes Justice Scalia had prescribed in *Bunting*, *i.e.*, "dropping

any pretense at requiring the [*Saucier*] ordering in every case." 541 U.S. at 1025 (Scalia, J., dissenting).

Petitioners now read the *Pearson* court *also* to have adopted the first of Justice Scalia's alternative fixes: permitting this Court's review of the constitutional determinations in every qualified immunity case. Camreta Brief 41-44. But *Pearson* itself does not say anything like that. To the contrary:

> Where a court holds that a defendant committed a constitutional violation but that the violation was not clearly established, the defendant may face a difficult situation. As the winning party, the defendant's right to appeal the adverse holding on the constitutional question may be contested.

Pearson, 129 S. Ct. at 820.

In this context, petitioners' reading of *Pearson* understands it to overturn, *sub silentio* and despite the language just quoted, this Court's "settled [practice]" of refusing to entertain an appeal by prevailing party to a judgment. *See Bunting*, 541 U.S. at 1023 (Scalia, J., dissenting). It is implausible, however, that the *Pearson* court overturned such a longstanding and well-known principle without clearly saying so. *See Steel Co. v. Citizens For a Better Environment*, 523 U.S. 83, 98 (1998) (prior decision "not meant to overrule, *sub silentio,* two centuries of jurisprudence").

The United States says that if this Court were not free to review rulings such as the Fourth Amendment ruling below, then that would greatly

retard the "'development of constitutional precedent,'" (U.S. Brief 12) (citation omitted) and "'be unfair to the litigant [seeking such review],'" *id*. at 20 (citing *Bunting,* 541 U.S. at 1024 (Scalia, J., dissenting from denial of certiorari)). However, "the development of constitutional law is by no means entirely dependent on cases in which a defendant may seek qualified immunity," in that "most of the constitutional issues . . . presented in §1983 damages actions and *Bivens* cases also arise in cases in which that defense is not available." *Pearson,* 129 S. Ct. at 821-22. Further, this Court's review of constitutional rulings often will not be foreclosed in qualified immunity cases when the losing plaintiffs in the courts of appeals, unlike respondent here, seek review of the qualified immunity rulings adverse to them. In such cases, the winning government officials can present constitutional arguments as an alternative ground of affirmance, giving this Court an opportunity to review those rulings.

D. The Fourth Amendment Ruling Should Be Left Intact

When, as here, "the controversy [in a case] ended when the losing party . . . declined to pursue its appeal," this Court dismisses the appeal for want of jurisdiction and the lower court ruling is left intact. *Karcher,* 484 U.S. at 83. Indeed, a contrary rule, which would require or allow vacatur of a constitutional ruling (favorable to a plaintiff) where the lower court found the defendant to have qualified immunity,

would completely undermine *Pearson*. Lower courts would have little reason to exercise their discretion to decide constitutional questions – at least in ways unfavorable to government defendants – before deciding qualified immunity if an immune defendant could, simply by appealing, obtain a vacatur of an unfavorable constitutional ruling from a higher court. And such a rule would open the floodgates to appeals and petitions for certiorari by victorious but still unhappy defendants.

If this Court chooses to dismiss the writ of certiorari in this case as improvidently granted, the lower court judgment likewise remains intact. *See Mincey v. Arizona*, 437 U.S. 385, 404 (1978) (Marshall, J. concurring). Dismissing the writ as improvidently granted would be consistent with this Court's decisions. *See Nike, Inc. v. Kasky*, 539 U.S. 654, 661-62, 664 (2003) (petitioner lacked "standing to bring the case to this Court," because the "judgment" it sought review of did not "cause[ ] direct, specific, and concrete injury" to it; resolution of constitutional question presented would be assisted by "development" of "full factual record" (Stevens J., concurring in dismissal of writ, for himself, Justice Ginsburg, and, in part, Justice Souter); *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 80-85 (1997) (jurisdictional defect); *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 118 (1994) ("constitutional question that may be entirely hypothetical"); *Montana v. Imlay*, 506 U.S. 5 (1992) ("no matter which party might prevail in this Court, . . . respondent's term of imprisonment will be the

same"; [both] counsel . . . are seeking "advisory opinion[s]") (Stevens, J, concurring); *Rooney*, 483 U.S. at 311 (petitioner prevailed below); *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183-84 (1959) (resolution of question as to which review had been granted appeared unlikely to have a significant impact on resolution of dispute between parties).

II. PETITIONERS VIOLATED S.G.'S FOURTH AMENDMENT RIGHTS

The court of appeals decided only a narrow question – whether an armed, uniformed sheriff's deputy and a child protective services worker violated the Fourth Amendment when they seized a nine-year-old girl, confined her in a room alone with them, and interrogated her for two hours about whether her father had sexually abused her, all without a warrant, court order, parental consent, or the presence of exigent circumstances. 588 F.3d at 1015. The court of appeals explicitly noted the involvement of the armed deputy sheriff: "The facts of this case do not require us to decide whether the 'special needs' doctrine would apply to an in-school interrogation of a child where there is no direct law enforcement purpose and no involvement of law enforcement personnel." *Id.* at 1027 n.12.

Petitioners and the United States, however, ask this Court to decide a Fourth Amendment question that is much broader than the court of appeals' ruling. They ask this Court to hold that "officials are not

categorically barred from conducting in-school interviews of suspected child-abuse victims in the absence of a warrant, . . . exigent circumstances, or parental consent." U.S. Brief 32; *see* Alford Brief 64; Camreta Brief 44. But the court of appeals did *not* hold to the contrary. Specifically, it did not consider either the constitutionality of in-school interviews that did not amount to seizures, or interviews conducted by child protective services investigators alone, without the presence of armed police officers and absent a law enforcement purpose. *See* 588 F.3d at 1022, 1027 n.12. Likewise, the court of appeals did not consider whether officials are "categorically barred from conducting in-school interviews," *id*. at 1025, but merely rejected petitioners' claim that such interviews are *always* constitutional. *Id*. at 1023.

While petitioners and the United States ask this Court to review the court of appeals' Fourth Amendment ruling, Camreta and the United States seek review of only a truncated version of the issue before the Court. They seek a ruling on the constitutionality of petitioners' seizure of S.G. only at its "inception" (Camreta Brief 10-11, 39; U.S. Brief 22 n.3), *i.e.*, without regard to its scope and duration. Yet, as respondent will demonstrate, this Court's precedents offer no support for such a truncated inquiry. And in concluding that petitioners violated S.G.'s Fourth Amendment rights, the court of appeals evaluated their conduct not merely at the "inception" of the seizure, but for the entire two-hour period that they

confined her in a room and interrogated her. 588 F.3d at 1022.

Alford modifies the issue before this Court by framing the Fourth Amendment issue as involving the custodial interrogation of a child whom he "reasonably suspect[ed] was being sexually abused by her father." Alford Brief i. But the issue of reasonable suspicion was not before the court of appeals. Nor did Alford have a reasonable suspicion, or any suspicion. Although he was present for law enforcement purposes, as part of an ongoing law enforcement investigation of S.G.'s father, Alford himself lacked personal knowledge of the facts of the investigation. *See* Camreta Brief 3; Alfred Brief 8. To compensate for that lack of knowledge, Alford claims that Camreta, rather than Alford, had a reasonable suspicion regarding S.G. (*id.* at 7). Camreta, however, does not claim to have had a reasonable suspicion. Instead, he claims that he did not need any degree of suspicion, and that "speculation and hearsay" were adequate constitutional bases for his custodial interrogation of S.G. *See id*. at 27. That issue was likewise not before the court of appeals.

A. Petitioners Seized S.G. Under the Fourth Amendment

Petitioners have conceded that they seized S.G. under the Fourth Amendment, as they must. Camreta Brief 21; Alford Brief 39. "The test for telling when a

seizure occurs is whether, in view of all circumstances surrounding the incident, a reasonable person would have believed he was not free to leave." *Brendlin v. California*, 551 U.S. 249, 255 (2007). If the person is a child, the test is whether a "reasonable child would have believed that he was free to leave." *Doe v. Heck*, 327 F.3d 492, 510 (7th Cir. 2003). There is no dispute here that a reasonable child would not have felt free to leave the room under the circumstances confronting S.G., as Alford acknowledged in his deposition. (J.A. 40)

B. The History of the Fourth Amendment Establishes That Petitioners' Seizure of S.G. Was Unreasonable

This Court has repeatedly held that, in determining whether a particular seizure is unreasonable under the Fourth Amendment, the Court is "guided by the meaning ascribed to it by the Framers of the Amendment." *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). That inquiry looks to both "the statutes and common law of the founding era. . . ." *Virginia v. Moore*, 553 U.S. 164, 168 (2008). An examination of the history shows that petitioners' seizure of S.G. would have been unlawful in 1789, when the Fourth Amendment was enacted by Congress. Accordingly, this Court should rule that the seizure was unconstitutional.

The power to compel a witness to give testimony has existed since at least 1555, when an English

statute authorized magistrates to demand recognizances from material witnesses "to ensure their appearance at trial," but, "[i]t did not expressly give him the power to jail witnesses pending trial." Ramsey, "In the Sweat Box: A Historical Perspective on the Detention of Material Witnesses," 6 OHIO STATE J. CRIM. L. 680, 690-91 (2009). Subsequent English statutes broadened the power to compel the attendance of witnesses by subpoena. Studnicki, "Material Witness Detention: Justice Served or Denied?" 40 WAYNE L. REV. 1533, 1534-36 (1994). The punishment for failing to comply with a subpoena was still a fine. *See* 3 W. Blackstone Commentaries 369 (1765) ("it must first be remembered, that there is a process to bring [witnesses] in by writ of subpoena ad testificandum: which commands them, laying aside all pretences and excuses, to appear at the trial on pain of 100£ to be forfeited to the king, to which the statute 5 Eliz. c. 9. has added a penalty of 10£ to the party aggrieved, and damages equivalent to the loss sustained by want of his evidence. . . .")

In the United States, the Judiciary Act of 1789 required witnesses to appear and testify in civil cases, and gave magistrates the power to require recognizances of material witnesses in criminal cases, "on pain of imprisonment." Act of September 24, 1789, ch. 20, §§30, 33, 1 Stat. 23, 88-91. Thus, by 1789, it was clear both that witnesses could be detained to give testimony if they refused to give a recognizance and that the determination to detain a witness had to be made by a magistrate.

Thus, at the time of the passage of the Fourth Amendment, the law provided exactly what the court of appeals required here. Under non-exigent circumstances, in order to seize S.G., petitioners were required to obtain a warrant or court order, absent consent. Police action alone, without judicial approval, was illegal. Thus, based upon history alone, the court of appeals should be affirmed.

Petitioner Camreta's claim that "[i]n the late 1700s, states had neither compulsory education nor governmental child-protection organizations" (Camreta Brief 22), omits or misstates important information about education at the time of the Founding. At that time, most states had public schools, though not every child attended them, and some had compulsory education laws. *Ingraham v. Wright*, 430 U.S. 651, 661 n.14 (1977). By 1800, seven of the 16 states explicitly provided for at least some public education in their state constitutions. Cubberly, *Public Education in the United States* 61-62 (1919). Moreover, even where there were no compulsory school attendance statutes, the common law nonetheless obligated parents to educate their children, which was the "greatest of any" parental duty. 1 W. Blackstone Commentaries 438 (1765).

At the same time, the concept of "child protection" was unknown at common law, because parents had complete control over the upbringing of their children, who were considered the property of the parents. Indeed, the notion of "protecting" children from their parents' child-rearing decisions was so

unthinkable that the first child-protectors, in 1874, had to employ animal-protection statutes. *See Nicholson v. Williams*, 203 F.Supp.2d 153, 195 (E.D.N.Y. 2002).

The significant parental obligation to educate their children coupled with the absence of legal regulation of child abuse demonstrates that at the time of our Nation's founding, parental control of their children extended to circumstances similar to this case. Parental consent for a custodial interrogation of this kind would have been essential, in the absence of the kind of warrant or court order required to compel any witness. In other words, the legal structures and assumptions at the Founding would have made petitioners' actions unthinkable. The Framers would never have countenanced what petitioners did to S.G.

C. The Traditional Fourth Amendment Requirements of a Warrant and Probable Cause Apply to Petitioners' Seizure of S.G.

The Fourth Amendment prohibits "unreasonable searches and seizures" and requires "probable cause" for the issuance of warrants. U.S. CONST. AMEND. IV. This Court has interpreted those two clauses together. "[T]he Framers of the Amendment . . . decided that a seizure is reasonable only if supported by a judicial warrant based on probable cause." *United States v. Place*, 462 U.S. 696, 722 (1983) (Blackmun, J., concurring). Neither the limited exceptions to this

principle recognized by this Court nor the policy arguments proffered by petitioners and their amici compel a departure from the Framers' wisdom here. The court of appeals correctly ruled that the warrant and probable cause requirements apply to petitioners' seizure of S.G.[22]

1. The Warrant Requirement Applies Here

As this Court explained more than half a century ago, "[t]he point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 13 (1948). This case is a prime example of why such neutral review is so important. In his Questions Presented to this Court, Camreta claims that "[t]he State received a report that a nine-year old child was being abused by

[22] The court of appeals also discussed court orders, but "follow[ed] the lead of [its] sister circuits [to] hold that in the context of the seizure of a child pursuant to a child abuse investigation, a court order permitting the seizure of the child is the equivalent of a warrant." 588 F.3d at 1030. Respondent therefore does not distinguish between warrants and court orders.

her father at home." Camreta Brief i. This is untrue. The State received a report that S.G.'s parents had made statements to Franklin and Melissa Smith, that, if true, suggested that S.G. *might* be being abused by her father. In other words, even if it were true that S.G.'s parents had said what the Smiths claimed, and even if the statements S.G.'s parents allegedly made were themselves true – evidentiary questions that petitioners ignored then and ignore now – there was *still* no report that she "was being abused." Being required to present this limited information, which Camreta concedes amounted to no more than "speculation and hearsay" (Camreta Brief 11, 27), to a neutral magistrate might well have encouraged petitioners to investigate before interrogating a nine-year-old girl.

Indeed, contrary to petitioners' and the United States' suggestion that the horrors of child abuse make the warrant requirement inappropriate, the opposite is true. Allegations of child abuse are particularly likely to lead well-intentioned officials to skip basic investigatory steps because of the strong emotional response that such allegations engender.[23] The temptation toward overzealousness in the

[23] The tragic history of false "allegations of outrageously bizarre and often ritualistic child abuse [that] spread like wildfire across the country. . . ." in the 1980s, *Friedman v. Rehal*, 618 F.3d 142, 155 (2d Cir. 2010), is a cautionary tale. *See* II.E., *infra*, for a discussion of the type of highly improper questioning of purported child victims in such cases and the terrible consequences of such shoddy investigations.

investigation of child abuse, coupled with the concrete and irreversible harm that poorly-conducted investigations can cause – such as the harm inflicted on S.G. and her family – counsel in favor of careful and deliberate action. Yet the authority that petitioners claim for making warrantless seizures of young children "devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field," precisely what the Fourth Amendment is designed to prevent. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978) ("a warrant . . . would provide assurances from a neutral officer that the [seizure] is reasonable under the Constitution. . . .")[24]

That child abuse can be a difficult crime to investigate does not change the Fourth Amendment's requirements. Many terrible crimes – such as, for example, murder, gang-related violence, and elder abuse – may be difficult to investigate. But the Constitution does not make exceptions to the Fourth Amendment because a particular type of case will be difficult to investigate. As this Court has explained,

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[24] These concerns are particularly salient in the context of child abuse and neglect for an additional reason. Unlike the police, child welfare investigators do not have the discretion to decide which allegations to investigate and which to ignore. By law, they must investigate all reports of abuse. 45 C.F.R. §1340.14(d); Or. Rev. Stat. §419B.020(1)(a). *See also* Or. Rev. Stat. §419B.005(1)(a)(G) (defining abuse to include "subjecting a child to a substantial risk of harm to the child's health or welfare"). *See* II.E., *infra*, for a more extended discussion of these concerns.

> the State points to the vital public interest in the prompt investigation of the extremely serious crime of murder. No one can doubt the importance of this goal. But the public interest in the investigation of other serious crimes is comparable. If the warrantless search of a homicide scene is reasonable, why not the warrantless search of the scene of a rape, a robbery, or a burglary? 'No consideration relevant to the Fourth Amendment suggests any point of rational limitation' of such a doctrine.

Mincey v. Arizona, 437 U.S. 385, 393 (1978), *quoting Chimel v. California,* 395 U.S. 752, 766 (1969). The Fourth Amendment may sometimes make government officials' jobs more difficult. That is the price of the liberty from potentially abusive government practices that the Framers wished to guarantee.

Moreover, petitioners have presented no evidence that requiring a warrant in non-exigent situations will *in fact* make investigating child abuse more difficult, much less that it would have done so in this case, where four days elapsed after Camreta learned of the allegations before he took any action at all. Petitioners have provided "a dearth of horribles demanding redress." *Atwater v. City of Lago Vista*, 532 U.S. 318, 353 (2001). On the contrary, for more than a decade, the Second Circuit has required court orders or exigent circumstances for the removal of children from their parents' custody. *See Tenenbaum v. Williams*, 193 F.3d 581, 604 (2d Cir. 1999). Yet the states containing 97.4% of the Second Circuit's

population, New York and Connecticut, did not sign the Brief of the States of Arizona, *et al*., in favor of petitioners.

Petitioners and the United States cannot support their claim that custodial police/CPS interrogations of schoolchildren are necessary to obtain information from children and hence protect them from abuse; they cite no evidence that such a widespread "practice" even exists.[25] To the contrary, the "practice" is highly unusual and is contrary to numerous professional standards and protocols for interviewing suspected victims of child abuse, including the Guidelines subsequently adopted by the State of Oregon itself. Oregon Interviewing Guidelines (2d ed. 2004), available at http://www.doj.state.or.us/crimev/pdf/orinterviewingguide.pdf ("Guidelines").

Petitioner Alford complains that the court of appeals' ruling would prohibit a police officer from asking a child whether she is safe "at that very moment." Alford Brief 4 n.1. There are, of course, circumstances in which police "conduct – necessarily swift action predicated upon the on-the-spot

[25] Petitioners and their amici have together provided this Court with only two concrete examples of nonconsensual police/CPS interrogations of schoolchildren: S.G. and *People v. Assad*, 189 Cal. App. 4th 187 (3d Dist. 2010). *See* Brief of the California State Association of Counties 28-32. In both cases, the interrogations yielded false results: S.G., after two hours, agreed, falsely, that her father had abused her; Assad's son falsely told the police-caseworker team that his father had *not* abused him.

observations of the officer on the beat – . . . historically has not been, and as a practical matter could not be, subjected to the warrant procedure." *Terry v. Ohio*, 392 U.S. 1, 20 (1968). But the court of appeals did not address such situations because this case does not present such a circumstance. Petitioners had days to seek a warrant.

The United States claims that because S.G. did not face "incarceration or other punishment" (U.S. Brief 26), petitioners did not need a warrant in order to seize her. The United States cites no authority for this contention, which cannot be squared with this Court's teaching that it is "anomalous to say that the individual . . . [is] fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Soldal v. Cook County, Illinois*, 506 U.S. 56, 69 (1992). *See also Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) ("If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed – who may not be punished at all – in unsafe conditions"). Indeed, in the few reported cases in which police have seized and detained witnesses without judicial approval, courts have found constitutional violations. *See*, *e.g.*, *Manzanares v. Higdon*, 575 F.3d 1135 (10th Cir. 2009) (three-hour detention of witness in his home and in a police car, while police searched for the perpetrator of a crime held unconstitutional); *Walker v. City of Orem*, 451 F.3d 1139 (10th Cir. 2006) (90-minute detention of witnesses to a police shooting held

unconstitutional); *Perkins v. Click*, 148 F.Supp.2d 1177, 1182 (D.N.M. 2001) ("blanket power to arrest any witness to a major crime, and hold them until they are interviewed at police convenience, cannot be constitutionally sustained"); *Stone v. Holzberger*, 807 F.Supp. 1325, 1338 (S.D. Ohio 1992) ("no reasonable law enforcement officer could believe that a criminal arrestee is entitled to higher constitutional protections than a material witness arrestee who has committed no crime"). Nor does *Illinois v. Lidster*, 540 U.S. 419 (2004), hold otherwise. (*See infra*, discussing *Lidster* at length.)

2. Probable Cause Is the Appropriate Standard for Evaluating the Seizure of S.G.

"The long-prevailing standard of probable cause protects 'citizens from rash and unreasonable interferences with privacy . . . ' while giving 'fair leeway for enforcing the law in the community's protection.'" *Maryland v. Pringle*, 540 U.S. 366, 370 (2003), *quoting Brinegar v. United States*, 338 U.S. 160, 176 (1949). Despite this longstanding principle, petitioner Alford and the United States argue not only that government officials should be able to seize suspected victims of child abuse for questioning without a warrant or consent, but also that they should be able to do so on the basis of either reasonable suspicion of abuse (Alford Brief 32, 35) or a vague "reasonableness" standard. U.S. Brief 27. Camreta goes even further, arguing that such actions are justified on the

basis of no more than "speculation and hearsay." Camreta Brief 11, 27. Nothing in this Court's jurisprudence justifies such a dramatic reduction in the protections the Fourth Amendment confers upon our Nation's people.

To the contrary, when individuals have been seized for interrogation, this Court has repeatedly reaffirmed the probable cause requirement. In *Dunaway v. New York*, for example, this Court made clear that the "detention for custodial interrogation – regardless of its label – intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." 442 U.S. 200, 216 (1979). *See also id.* at 214-15 ("[T]he Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions'"). Nor is *Dunaway* unique. *See, e.g., Kaupp v. Texas*, 538 U.S. 626, 630 (2003) (police act of waking individual at 3 a.m., telling him "We need to go and talk," and transporting him to police station, constituted a seizure requiring probable cause); *Hayes v. Florida*, 470 U.S. 811, 816 (1985) (police seizures of individuals and transportation to station house for questioning "for investigative purposes . . . are sufficiently like arrests to invoke the traditional rule . . . [of] probable cause"); *Florida v. Royer*, 460 U.S. 491 (1983); *Brown v. Illinois*, 422 U.S. 590, 605 (1975) (seizure without probable cause for investigation "in the hope that something might turn up" held improper); *Davis v.*

Mississippi, 394 U.S. 721, 726 (1969) ("to argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment"). The Court should decline petitioners' and the United States' invitation to overrule this long line of precedent, and, as with the warrant requirement, should decline to provide lesser constitutional protection to S.G., who was suspected of no wrongdoing, than to the individuals seized in those cases, who were. *See Soldal*, 506 U.S. at 69 ("anomalous" for innocent individual to have fewer rights than the accused).

The United States asserts that probable cause is "not necessarily required" for "seizures less intrusive than an arrest – a category that includes most seizures related to official questioning" (U.S. Brief 21, 26), but the cases which the United States cites do not support that broad proposition. In *Brown v. Texas*, 443 U.S. 47 (1979) (U.S. Brief 22), this Court invalidated a stop and subsequent arrest, when police had neither probable cause nor reasonable suspicion to conclude that Brown was engaging, or about to engage, in criminal activity. Rather than create a new exception to the probable cause requirement, *Brown* upheld existing precedents. In *United States v. Sharpe*, 470 U.S. 675, 688 (1985) (U.S. Brief 23), this Court upheld a 20-minute *Terry* stop of a vehicle, where "the police have acted diligently and a suspect's actions contribute to the added delay about which he complains." In *Michigan v. Summers*, 452 U.S. 692, 705 (1981), this Court held that "a warrant

to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." Thus, the police had the right, under the Fourth Amendment, to detain Summers when they found him leaving his home just as they were arriving to execute the search warrant. Here, petitioners had no warrant, and S.G. had no contraband. Both *United States v. Montoya de Hernandez*, 473 U.S. 531, 540 (1985), and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (U.S. Brief 23), concern border searches and seizures, where the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is "struck much more favorably to the Government" and the individual's "expectation of privacy is less. . . ." *Montoya de Hernandez*, at 539. Finally, in *United States v. Hensley*, 469 U.S. 221 (1985) (U.S. Brief 23), this Court ruled that the *Terry* standard applied to individuals whom the police reasonably suspected of having already committed a felony, as well as those who were about to commit one. Thus, none of the cases cited by the United States undermine the probable cause requirement for a seizure of an individual for the purpose of a protracted interrogation.

To the contrary, this Court has created exceptions to the probable cause requirement only for seizures that are brief stops, lasting at most a few minutes. *See*, *e.g., Terry v. Ohio*, 392 U.S. 1 (1968) ("reasonable suspicion" standard for brief stops of individuals and

searches for weapons); *Lidster*, 540 U.S. 419 (2004) (balancing test to evaluate brief stops of possible eyewitnesses to hit-and-run accident). Those exceptions, however, do not apply to evaluations of "the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation." *Terry*, 392 U.S. at 20 n.16. Here, petitioners knew before the seizure began that they intended to interrogate S.G. at length. They were not responding to their observations of suspicious behavior on the street, as in *Terry*, and they did not face the prospect of being unable to investigate at all if they could not seek the assistance of potential witnesses to a hit-and-run accident, as in *Lidster*. The justifications for a standard other than probable cause that the Court accepted in those cases do not apply to the premeditated custodial interrogation of S.G. at issue here.[26]

As with the warrant requirement, "there may be circumstances in which the law of warrant and probable cause established in the criminal setting does not work effectively in the child removal . . . context." *Tenenbaum*, 193 F.3d at 604. But, as in *Tenenbaum,* "[t]his is not such a case."[27] *Id*. Moreover, despite their

[26] Probable cause is the appropriate standard for other reasons as well. A proliferation of standards for different types of seizures can sow confusion. *Dunaway,* 442 U.S. at 213-14.

[27] As the United States correctly notes, not all police questioning of individuals are seizures. U.S. Brief 21. However, here, petitioners have conceded that they seized S.G., and there can be no dispute that they did. In contrast to the United States'

(Continued on following page)

alarmist rhetoric about how difficult it may be to establish probable cause in the context of child abuse, particularly sexual abuse, petitioners and the United States offer nothing more than speculation on this point. There are no barriers to the investigators seeking information from a child's teachers, from neighbors, from other family members, and from whomever made the original report. In fact, such interviews are a routine and mandatory part of child abuse investigation. 45 C.F.R. §1340.14(d). In fact, as discussed *infra*, parental consent is the rule, not the exception.

Nonetheless, petitioners and the United States raise the frightening, albeit rare, specter of the child about whom the government has reasonable suspicion of abuse but is unable to obtain either probable cause or parental consent. But that rare circumstance cannot define the constitutional limitations of government action with respect to *all* allegations of abuse or neglect made to state child abuse authorities, particularly when more than three quarters of those allegations turn out to be supported by no evidence whatsoever. *See Greene*, 588 F.3d at 1017. As this Court held in *Ferguson v. City of Charleston,* 532 U.S. 67 (2001), even the ability to reliably identify pregnant women who were taking illegal drugs,

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hypothetical fact patterns (U.S. Brief 22 n.3), S.G. was not "asked to come to the interview voluntarily," and it is undisputed that she justifiably did not "feel free to terminate" it. (*See* J.A. 39-40)

which are highly likely to cause serious health problems for their babies, did not justify a relatively non-intrusive urine test. The harms to innocent families here from overzealous abuse investigations counsel even more strongly against a reduction in the Fourth Amendment's requirements.[28]

3. *Illinois v. Lidster* Does Not Apply to the Seizure of S.G.

Petitioners and the United States dramatically overread *Lidster* when they argue that it abandons the warrant and probable cause requirements whenever law enforcement officials detain *witnesses* rather than suspects. *See* Alford Brief 15, 23-24; Camreta Brief 10, 20, 37; U.S. Brief 26. Even a cursory review of *Lidster* demonstrates that this reading is inaccurate.

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[28] Alford's suggestion that a police officer should be able to escort a child to a "safe place" for questioning, based on no more than reasonable suspicion (Alford Brief 52), exemplifies the risks of reducing those requirements. Virtually every parent has had the mortifying experience of their child publicly throwing a tantrum, loudly crying or screaming, or simply going limp in a precocious exercise of civil disobedience that requires the parent to carry or drag her. Alford effectively claims the right to separate the child from the parent in such a situation on the basis of a police officer's disapproval of the parent's efforts to handle the situation, which might arguably be reasonable suspicion of abuse. That possibility should alarm any parent – and is particularly terrifying for parents whose children have developmental delays or behavioral or neurological disorders.

In *Lidster*, the police set up a traffic stop in the hopes of locating witnesses to a fatal hit-and-run accident that occurred about one week earlier at that location. The Court described the circumstances of the traffic stop in detail:

> Police cars with flashing lights partially blocked the eastbound lanes of the highway. The blockage forced traffic to slow down, leading to lines of up to 15 cars in each lane. As each vehicle drew up to the checkpoint, an officer would stop it for 10 to 15 seconds, ask the occupants whether they had seen anything happen there the previous weekend, and hand each driver a flyer, [asking for assistance in identifying the vehicle and driver from the accident].

540 U.S. at 422. Those factual circumstances were critical to the Court's decision to apply a reasonableness analysis rather than impose a "presumptive rule of unconstitutionality." *Id.* at 427. A comparison of those circumstances to the facts of petitioners' seizure of S.G. demonstrates that petitioners' and the United States' reading of *Lidster* is remarkably wide of the mark.

First, in ruling that something less than traditional Fourth Amendment requirements applied, the *Lidster* court emphasized that the police activity was essentially the equivalent of "approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions. . . ." *Id.* at 425 (internal quotation marks and citations omitted).

S.G., in contrast, was brought to a secluded room, where she was confined with a police officer and another government official. No one ever asked her if she was willing to answer questions or gave her the option of saying no.

Second, *Lidster* expressly relied on the brevity of the stops in question – all of 10 to 15 seconds, *id.* at 422, 425, and noted that "[a]ny accompanying traffic delay should prove no more onerous than many that typically accompany normal traffic congestion." *Id.* at 426. Nor is *Lidster* the only case to consider the importance of the length of a detention. *See, e.g., United States v. Place*, 462 U.S. 696, 709 (1983) (the Court has "never approved a seizure of the person for the prolonged 90-minute period involved here and cannot do so on the facts presented by this case"). S.G. was held for two hours. And being removed from her classroom for a two-hour interrogation by two men she had never seen before is not the sort of experience that "typically accompan[ies]" fourth grade.

Third, *Lidster* reasoned that brief "information-seeking highway stops are less likely to provoke anxiety or to prove intrusive." *Id.* at 424. Spending two hours repeatedly asking a nine-year-old girl whether her father touches her in a "bad" way, continuing even after she denies it, is quite "likely to

provoke anxiety and to prove intrusive," as indeed it did for S.G.[29]

Fourth, *Lidster* involved cars, and as the Court noted, "[t]he Fourth Amendment does not treat a motorist's car as his castle." *Id.* at 424. "[A]utomobiles occupy a special category in Fourth Amendment case law . . . due, among other factors, to the quick mobility of a car, the registration requirements of both the car and the driver, and the more available opportunity for plain-view observations of a car's contents." *Marshall*, 436 U.S. at 315 n.10. With a car, "the opportunity to search is fleeting since a car is readily movable." *Chambers v. Maroney,* 399 U.S. 42, 51 (1970). None of these factors apply here. Petitioners knew that they could find S.G. at her home outside of school hours, as indeed they did, or where she would be during school hours, if they obtained a court order or a warrant.

It is true, of course, that in addition to the factors just discussed, when the *Lidster* court held that something less than traditional Fourth Amendment requirements should apply, it also relied on the fact that the police were looking for witnesses, not suspects. 540 U.S. at 423. But petitioners and the United States mention *only that factor* when arguing that this Court should apply a balancing test to determine

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[29] Alford's contention that this "Court has never held that the act of posing questions to individuals, by itself, intensifies the intrusiveness of the seizure" (Alford Brief 55), simply cannot withstand even a cursory reading of *Lidster*.

the constitutionality of petitioners' actions. *Lidster* emphatically did not rely on that factor alone; before concluding that it could apply the balancing test, the Court evaluated a host of aspects of the traffic stop at issue. Petitioners and the United States thus misstate the holding of *Lidster* and misrepresent its analysis.

4. Family Privacy Concerns of Constitutional Significance Counsel in Favor of the Warrant and Probable Cause Requirements

Beyond all of the traditional Fourth Amendment considerations already discussed, this case involves additional interests of constitutional significance. The "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). The constitutional rights of parents include not only the right to custody of their children, but the right of control over their children. Thus, a parent has the right to decide whether to educate her child in a public school or a private school, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to make decisions about her child's medical treatment, *Parham v. J.R.*, 442 U.S. 584 (1979); and to determine which adults her child will associate with. *Troxel*, 530 U.S. at 57. The parent's right to decide whether her child will be subjected to a protracted custodial interrogation, in the absence of a warrant and probable cause or exigent circumstances,

falls within that spectrum, especially where, as here, the subject of the interrogation itself intruded on family privacy.

Here, petitioners summarily dismiss Sarah Greene's right to decide whether her young daughter would be subjected to such an interrogation, claiming that "seeking parental consent is simply not a safe or viable option when the suspected abuser is a parent." Camreta Brief 27. *See also* Alford Brief 41 ("[w]here 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. . . ."). [30] U.S. Brief 30. But this Court has rejected that type of speculation: "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." *Parham*, 442 U.S. at 603. *See also id.*, at 602 ("[H]istorically, [the law] has recognized that natural bonds of affection lead parents

[30] Petitioners' contention that parents (including non-accused parents) will not consent to interviews of their children in child abuse investigations, when those interviews are conducted in non-threatening, age-appropriate ways in appropriate locations, is reminiscent of similar complaints by police officials decades ago that, if they were required to give warnings to arrestees, no one would ever confess to a crime. *See*, *Miranda v. Arizona*, 384 U.S. 436 (1966). That dire prediction has proven untrue. After being given *Miranda* warnings, "lots of defendants go ahead and confess. . . ." *Brown v. Texas*, 443 U.S. 47, 54 (1979).

to act in the best interest of their children."), citing 1 W. Blackstone Commentaries 447 (1765). Nor should this Court discard its many decisions affirming the constitutional primacy of parental decision-making because some parents may make bad decisions. "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." *Parham*, 442 U.S. at 603 (emphasis in original). In the absence of a showing that a parent is unfit, her fitness should be presumed and her parental rights should be respected.

Moreover, petitioners and the United States are wrong on the facts with respect to both this case in particular and the broader experience in the child welfare field. Petitioners ignore the factual record here when they suggest that Sarah Greene would either not have given her consent to interview S.G. or that she would have tried to protect her husband (the alleged abuser) by "influencing" (Alford Brief 41) S.G. to lie. Sarah Greene (and her husband) not only consented to petitioners' entry into their home on February 24, 2003, and voluntarily participated in an interview with them (J.A. 65) but Sarah also agreed to produce her daughters to be interviewed in a professional, age-appropriate manner at the KIDS

Center – even before she knew that petitioners had already interrogated S.G. (J.A. 49-50)[31]

As a statistical matter, the overwhelming majority of parents – more than 90 percent – consent to the interviews between child welfare investigators and their children. Coleman, "Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment," 47 WM. & MARY L. REV. 413, 430 (2005). Petitioners and their amici have not provided any evidence whatsoever to the contrary. Specifically, they have not "brought to this Court's attention any widespread pattern of refusal." *Marshall*, 436 U.S. at 316. Absent such evidence, this Court may properly assume that the "great majority" of parents "can be expected in normal course to consent. . . ." *Id.*

Congress itself has made such a presumption. Federal law encourages "strategies to promote collaboration with the families" who are under investigation. 42 U.S.C. §5106a(a)(6)(A). In fact, the United States' proposal that officials investigating child abuse not even tell the children's parents about the existence of the investigation, much less ask for their consent (U.S. Brief 30), is contrary to federal law, which requires that states notify parents about the

[31] Sarah Greene would never have consented to the coercive, age-inappropriate, custodial police interrogation to which petitioners subjected S.G.

existence of a child protective investigation at the initial contact. 42 U.S.C. §5106a(b)(2)(A)(xviii).

In short, the traditional Fourth Amendment protections of a warrant and probable cause have special resonance in this context; they respect and support the constitutionally-protected rights of parents. That the government seeks to intrude on such intimate family relationships argues *for*, not against, requiring some measure of reliable evidence, reviewed by a neutral magistrate.

D. The "Special Needs" Doctrine Does Not Apply Here

This Court has, on occasion, approved of searches and seizures on less than probable cause and without a warrant, based on "special needs, divorced from the state's general interest in law enforcement." *Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001). The special needs doctrine does not apply to the seizure of S.G. because that seizure was performed for law-enforcement-related reasons. In addition, other features of the special needs cases do not apply here: the seizure was in no way consensual, and petitioners' conduct undermined, rather than supported, the particular school-based rationales for the doctrine.

1. The Substantial Law Enforcement Involvement in the Seizure of S.G. Renders the "Special Needs" Doctrine Inapplicable

The "special needs" doctrine, by its own terms, has been used to uphold only those searches which are "performed for reasons unrelated to law enforcement." *Ferguson,* at 81 n.5. Entanglement with law enforcement thus makes the special needs doctrine inapplicable. Law enforcement was intimately involved in every aspect of the seizure of S.G., with Alford present, in uniform and armed, for law enforcement purposes. (J.A. 37-38) Where a "child abuse investigation cannot be sufficiently disentangled from general law enforcement purposes, . . . the 'special needs' analysis is simply inapplicable and traditional Fourth Amendment limits would apply." 5 W. LaFave, *Search and Seizure* §10.3(a), p. 106 (4th ed. 2004).

In *Ferguson,* in holding a program for drug-testing pregnant women unconstitutional, this Court focused on its law enforcement component: "the purpose actually served by the MUSC searches 'is ultimately indistinguishable from the general interest in crime control.'" 532 U.S. at 81, *quoting Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000). The Court further noted that "[i]n none of our previous special needs cases have we upheld the collection of evidence for criminal law enforcement purposes. Our essential point is . . . the extensive entanglement of law enforcement cannot be justified by reference to legitimate needs." *Ferguson,* 532 U.S. at 84 n.20.

Here as well, law enforcement was extensively entangled. First, petitioner Alford, a deputy sheriff who was armed and in uniform, conducted the seizure of S.G., along with Camreta. Alford acknowledged that he was present for law enforcement purposes. (J.A. 37-38) Contrary to petitioners' arguments that S.G. was seized solely for child welfare purposes (Alford Brief 30-31; Camreta Brief 36-38), Alford's participation converted the seizure of S.G. into a law enforcement matter. Moreover, S.G.'s interrogation was one part of a larger police investigation of S.G.'s father based on accusations made against him by another family. The child welfare component of the investigation began later.

The nature of the interrogation of S.G. also showed that the law enforcement component was pervasive. That relentless interrogation – using leading questions, repeating those leading questions when the child gave negative answers, telling the child "No, that's not right," when the child gave answers that contradicted the interrogators' preconceived notions of the facts, detaining the child for a lengthy time period – was contrary to well-known effective questioning techniques for child welfare investigations (*see* II.E.3, *infra*), though not uncommon in police interrogations of criminal suspects. Finally, the State used the misinformation that petitioners obtained from S.G. to arrest and prosecute her father, including having Camreta testify before the grand jury (Doc. #44, Exh. 4), in order to secure an indictment.

Petitioner Camreta claims that he was acting for child welfare purposes, to protect S.G. (Camreta Brief 3, 28), and that his "motive was benign rather than punitive," *Ferguson*, 532 U.S. at 85. But Camreta did not seek to remove S.G. and her sister from their home until after their father had been indicted, arrested, and ensconced in jail, at which point he would have been completely unable to abuse his daughters. Thus, here, as in *Ferguson,* the seizure and interrogation of S.G. had "a penal character with a far greater connection to law enforcement than other searches sustained under [this Court's] special needs rationale." 532 U.S. at 89 (Kennedy, J., concurring).

The drug-testing program in *Ferguson* also had a "benign purpose" analogous to one of the purposes in this case – to prevent parents from inflicting harm on their children. Even such a laudable goal did not rescue the program in *Ferguson*, where law enforcement was "as a systemic matter, . . . a part of the implementation." *Id.* at 88 (Kennedy, J., concurring in the judgment) (noting the importance of the state's interest in the health of mothers and children but finding the drug tests unconstitutional). *Ferguson* therefore applied traditional Fourth Amendment jurisprudence to a situation in which, as in this case, the criminal justice system was entwined with a policy having an ostensibly benevolent, non-criminal purpose. In contrast, when this Court has upheld drug testing pursuant to the special needs doctrine, the results of those tests were not provided to law enforcement. *See, e.g.*, *Skinner v. Railway*

Labor Executives' Association, 489 U.S. 602, 621 n.5 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 663 (1989); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995); *Board of Education of Independent School District No. 92 of Pottawattamie County v. Earls*, 536 U.S. 822, 833 (2002).

Camreta attempts to avoid this body of law by claiming that entanglement with law enforcement is irrelevant to the special needs doctrine where "the potential for self-incrimination is minimal or unlikely." Camreta Brief 37. Camreta cites no authority for this proposition, because there is none. Instead, Camreta relies, again, on *Lidster*. But as respondent has already established, *Lidster's* holding that the traditional Fourth Amendment requirements did not apply rested on far more than that the police in that case sought witnesses, not suspects. This Court should reject Camreta's attempt to bootstrap onto *Lidster*'s inapposite language the irrelevance of individualized suspicion to an "information-seeking stop," because its approval of the stop in *Lidster* was grounded on a multiplicity of factors; that the police there were seeking only "information" was just one.

2. The Lack of Implicit Consent to the Seizure of S.G. Rendered the "Special Needs" Doctrine Inapplicable

A second "essential, distinguishing feature of the special needs cases is that the person searched has

consented. . . ." *Ferguson,* 532 U.S. 67 at 90 (Kennedy, J., concurring). Specifically, in those cases the individual could avoid the search by choosing to avoid the activity which entailed the search. *See Earls*, 536 U.S. at 841 (Breyer, J., concurring) (avoid drug testing by not participating in extracurricular activities); *Acton,* 515 U.S. at 657 (eschew participation in interscholastic sports); *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989) (avoid jobs that require drug testing); *Skinner v. Railway Labor Executives' Association,* 489 U.S. 602 (1989) (same); *Wyman v. James*, 400 U.S. 309 (1971) (forego government cash benefits). In this case, S.G. and Sarah Greene had no such option. The seizure was, in short, completely nonconsensual.[32]

Petitioners imply that merely by sending her daughter to a public school Sarah Greene consented to a broad waiver of her daughter's constitutional rights. Alford Brief, 50-53; Camreta Brief 30-33. This

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[32] The cases approving searches of the homes of probationers and parolees, although sometimes included in the special needs category, also do not support petitioners' actions here. *See*, *Griffin v. Wisconsin,* 483 U.S. 868 (1987); *United States v. Knights*, 534 U.S. 112 (2001); *Samson v. California*, 547 U.S. 843 (2006). Probationers and parolees "and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration." *Ingraham v. Wright*, 430 U.S. 651, 669 (1977). "Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." *Knights*, 534 U.S. at 119.

Court has held to the contrary. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (First Amendment rights); *Ingraham v. Wright*, 430 U.S. 651 (1977) (Fourteenth Amendment right to be free of infliction of severe physical injury). This Court has never held that a school building is a rights-free zone in which law-enforcement-officials who are not connected with the school can enter and take whatever actions they choose, free of constitutional constraints, and nothing in the case law suggests that such shockingly broad parental consent can be presumed. (*See* II.E.2, *infra*, for a further discussion of the rights retained by schoolchildren.)

3. The Rationales for the "Special Needs" Doctrine in the School Context Are Inapplicable Here

Petitioners and the United States entirely ignore the central rationales for the special needs doctrine in the schools context when they argue that S.G.'s presence in a public school eliminated her Fourth Amendment rights to be free of a seizure by non-school government officials. As this Court has emphasized, in order to provide education to schoolchildren, education officials must "maintain an environment in which learning can take place." *T.L.O.*, 469 U.S. at 343. To provide that environment, therefore, "school officials retain broad authority to protect students and preserve 'order and a proper educational environment,'" *Safford Unified School Dist. No. 1 v.*

Redding, 129 S. Ct. 2633, 2647 (2009), which "sometimes requires that students be subjected to greater controls than those appropriate for adults." *Earls*, 536 U.S. at 831.

In this case, however, the seizure of S.G. had nothing whatsoever to do with her education or discipline, or with any other student's, for that matter. Indeed, in both their conduct with S.G. and their arguments to this Court, the school setting is relevant to petitioners only as a convenience. Rather than advancing the school's goals of maintaining order, promoting education, and protecting the students, petitioners undermined those goals when they appeared at S.G.'s school and seized her. Petitioners, two non-educators, disrupted the normal educational activity by removing S.G. from her classroom for two hours.[33] The Fourth Amendment's education jurisprudence does not, and should not, protect non-educators who come into schools for law-enforcement, non-educational purposes. (J.A. 37-38) Indeed, this Court has expressly declined to find that such behavior is governed by its school jurisprudence: "[t]his case does not present the question of the appropriate standard for assessing the legality of searches conducted by

[33] Petitioners' actions were thus the antithesis of the examples upon which they rely – in which public officials address students and health practitioners conduct routine vision and hearing screening, generally at the invitation of school officials or in order to ensure that students' physiological barriers to learning are addressed. Camreta Brief 31-32.

school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question."[34] *T.L.O.*, at 342 n.7.

Moreover, petitioners undermined the school's responsibility for protecting its students' safety when they excluded school staff from the interrogation. Normally, when a child is at school, she is "rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment." *Ingraham v. Wright*, 430 U.S. 651, 670 (1977). By excluding school staff from their custodial interrogation of S.G., petitioners ensured that no one was present to witness or protest their coercive and abusive interrogation tactics, or the protracted detention itself.[35]

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[34] The lower federal courts have categorically rejected the notion that *T.L.O.* should apply when police officers and child welfare workers come to a school to investigate possible child abuse which allegedly occurred off of school premises. "Because the case before us does not involve efforts by school administrators to preserve order on school property, it does not implicate the policy concerns addressed in *T.L.O.* and therefore does not merit application of the *T.L.O.* standard." *Jones v. Hunt*, 410 F.3d 1221, 1228 (10th Cir. 2005). A child "unquestionably has a reasonable expectation of privacy in the premises of the [private] school he attends vis-á-vis government officials." *Doe v. Heck*, 327 F.3d 492, 512 (7th Cir. 2003).

[35] Alford's claim that petitioners "obtained consent" from the school (Alford Brief, p. 53) to seize and interrogate S.G. for two hours is contrary to fact. Camreta did not ask; he "told schools officials that he and Alford were there to interview S.G." 588 F.3d at 1017.

Finally, when a school official is faced with a student who may be violating school rules by, for example, possessing contraband, questions of warrants and probable cause are impracticable, as the official lacks time to obtain a warrant and expertise for understanding probable cause. *T.L.O.*, 469 U.S. at 353. No such arguments apply to petitioners, who had plenty of time – days – to obtain a warrant, and whose jobs required them to understand probable cause.

E. Even If a Lower Standard Applied Here, the Seizure of S.G. Was Unreasonable and Unconstitutional

Regardless of the doctrinal paths they take to get there, petitioners and the United States all argue that the seizure of S.G. should be evaluated for "reasonableness," using the balancing test most recently articulated in *Lidster*. The *Lidster* court looked to 1) "the gravity of the public concerns served by the seizure," 2) "the degree to which the seizure advances the public interest," and 3) "the severity of the interference with individual liberty." 540 U.S. at 426-27, *quoting Brown v. Texas*, 443 U.S. 47, 51 (1979). Respondent submits that the traditional requirements of probable cause and a warrant apply here. But even were this Court to apply the *Lidster* balancing test, petitioners' conduct would not pass constitutional muster, as their custodial police interrogation of S.G. about whether her father had sexually

abused her was *unreasonable* under this test.[36] Camreta himself, along with the United States, appears to agree, for he *offers no defense whatsoever of his conduct during the seizure.* Nor does the United States. Indeed, Camreta asks this Court *not* to examine the conduct of the very seizure whose constitutionality is the subject of this case, even under the legal standard that he promotes, and the United States offers only a lukewarm suggestion about how this Court might weigh some of the facts should it choose to evaluate the interrogation's reasonableness, without actually defending it. U.S. Brief 31-32.

1. There Are Multiple Public Concerns at Issue

While petitioners contend that there is an "epidemic" of child abuse, and thereby suggest that, for this reason, well-established constitutional guarantees should be relaxed, the statistics they rely on do not support their plea. Most child welfare investigations address alleged *neglect*, not abuse. Of the 693,000 children for whom reports of abuse or neglect were "substantiated" in 2009, 78.3% involved neglect,

[36] Camreta mischaracterizes the court of appeals' opinion in saying that court found the reasonableness of the seizure to be a "close question." Camreta Brief 39, 40. In fact, the lower court said that the only "close question" was whether petitioners were entitled to qualified immunity. 588 F.3d at 1032.

while only 9.5% involved sexual abuse.[37] Finkelhor, "Updated Trends in Child Maltreatment 2009," Table 3-13, at 46-47, http://www.unh.edu/ccrc/pdf/Updated_Trends_in_Child_Maltreatment_2009.pdf. Child abuse in general has declined, and child sexual abuse has declined even more, a total of 61% from 1990 to 2009. Moreover, in an extraordinary percentage of cases – about 79% in 2008 – an investigation produced no evidence of either abuse or neglect. Alford Brief 29.

Further, not all the remaining 21% of allegations represent actual maltreatment. Rather, those allegations have met whatever standard of evidence investigators use to determine that an allegation is "substantiated" or "indicated," which frequently is less than a preponderance, and which varies from state to state.[38] *See, e.g.,* Or. Rev. Stat. §419B.030(1) ("reasonable cause to believe that a child's condition was the result of abuse"); *Valmonte v. Bane*, 18 F.3d 992, 997 (2d Cir. 1994) ("some credible evidence" in New York). Those initial determinations, which are not made by neutral magistrates, are not conclusive.

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[37] Respondent in no way means to minimize the harm that befalls child sexual abuse victims or to suggest that the state interest in protecting those children is insignificant. Respondent offers these statistics only to show that the claim of rampant and epidemic child sexual abuse intimated by petitioners is inaccurate.

[38] Further evidence of the vagueness of the standard is shown by the fact that, in 2008, child protective agencies commenced court proceedings in only 19.7% of the substantiated cases. http://www.acf.hhs.gov/programs/cb/pubs/cm08/table6_8.htm.

When parents challenge those determinations at administrative hearings, about 75% are reversed. *Valmonte v. Bane*, 19 F.3d 994, 1003-04 (2d Cir. 1994). Consistent with that experience, allegations that Nimrod Greene abused his own daughters were dismissed by both the juvenile court and by the district attorney.

In addition, as the purpose of the child welfare system is to protect children, there is a public interest in ensuring that the system itself does not create unnecessary trauma. Congress itself has found that, in cases of alleged child abuse, "too often the system does not pay sufficient attention to the needs and welfare of the [alleged] child victim, aggravating the trauma that the child victim has already experienced. . . ." 42 U.S.C. §13001(4). Here, for example, the seizure and subsequent events inflicted significant damage on S.G. and her family, thus entirely failing to protect S.G. from traumatic harm, the precise opposite of the state's interest.

Finally, there is a public interest in protecting families and not breaking them apart unnecessarily. "[S]ociety's interest in the protection of children is . . . multifaceted, composed not only with concerns about the safety and welfare of children from the community's point of view, but also with the child's psychological well-being, autonomy, and relationship to the family or caretaker setting." *Franz v. Lytle*, 997 F.2d 784, 792-93 (10th Cir. 1993); *accord*, *Tenenbaum*, 193 F.3d at 595. As this Court has noted, "[t]he State registers no gains toward its declared goals when it

separates children from the custody of fit parents." *Stanley v. Illinois*, 405 U.S. 645, 652 (1972).

2. The Interference with Individual Liberty Was Severe

To a nine-year-old girl, being confined behind closed doors for two hours with two male strangers, one of whom is armed, while being grilled repeatedly about intimate details of her relationship with her father, without explanation of the reason for the interrogation or when it will end, is a severe intrusion on her liberty, whether it happens at school or elsewhere. S.G. did not even know if she would be allowed to leave when the school day ended, and she ultimately lied in order to get out of the room. (J.A. 57) She suffered significant emotional trauma as a result of the interview.

The seizure here thus could not be more different than the seizure this Court approved in *Lidster*, where, in evaluating the traffic stops for reasonableness, the Court said:

> *Most importantly*, the stops interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect. Viewed objectively, each stop required only a brief wait in line – a very few minutes at most. Contact with the police lasted only a few seconds. . . . Police contact consisted of a request for information and the distribution of a flyer. . . . Viewed subjectively, the contact provided little

> reason for anxiety or alarm. The police stopped all vehicles systematically.

540 U.S. at 427-28 (emphasis added).

Here, in contrast, the detention was traumatic and lengthy, and it created enormous "reason for anxiety or alarm." Unlike the general traffic stop in *Lidster*, S.G. was singled out and taken from her classroom with no explanation. As a result, she felt sick even before the questioning began. Providing no explanation of who he was or why he was there, Camreta asked her – over and over – if her father touched her in "bad" ways, refusing to accept her repeated denials. It is difficult to imagine a scenario *more* calculated to create "anxiety or alarm" for a young child, or, indeed, for most adults. "Being . . . held by the police, even if for a few hours, is for most persons, awesome and frightening. . . . [A]n arrest abruptly subjects a person to constraints, and removes him to unfamiliar and threatening surroundings." ALI Model Code of Pre-arraignment Procedure, Commentary 290-91 (1975). It is completely unlike a few seconds of contact with a police officer who is seeking information – from all drivers – about an accident that occurred a week earlier.[39]

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[39] Petitioners' and the United States' adamant refusal to acknowledge that the content of the interview is relevant to a reasonableness analysis reaches its apex when Camreta argues that the frightening, two-on-one, two-hour interview behind closed doors about S.G.'s family life is comparable to a school assembly with the mayor. Camreta Brief 31.

The intrusion is more significant than in *Lidster* for another reason. Here the intrusion was into not only S.G.'s Fourth Amendment right to be free of unreasonable seizure but also her own and her mother's Fourteenth Amendment-protected interest in family privacy and her mother's Fourteenth Amendment-protected interest in controlling what happens to her child. Respondent has already described Sarah Greene's constitutionally-protected interest in making the decisions she believes are in her daughters' best interest. *See* II.F., *infra*. But S.G. herself has an interest of constitutional significance "in preventing erroneous termination of the [family] relationship," *Santosky v. Kramer*, 455 U.S. 745, 760 (1982), and thus in not having her family life become the object of intrusive inquiry at the whim of a government official she had never even met. Here, the intrusion into those interests was significant and brutal, both in the room, where petitioners coerced S.G. into falsely accusing her father of abuse, and in the aftermath, when she and her sister were forcibly separated from their parents.

Petitioners and the United States, however, argue that the intrusion on S.G.'s liberty was *de minimis*, relying on the location of the custodial interrogation: at school. Petitioners and the United States even hint that, by sending S.G. to school, Sarah Greene somehow consented to all subsequent seizures of her daughter. Camreta Brief 33; Alford Brief 50-53; U.S. Brief 36. But, as discussed in II.D.2, *supra*, a school building is not a rights-free

zone. To the contrary, even in schools, despite some physical restrictions on student movements and despite school officials' legitimate need to keep order and discipline, students retain Fourth Amendment rights. This Court very recently reaffirmed those rights in *Safford Unified School District #1 v. Redding*, 129 S. Ct. 2633 (2009), holding that a school official violated a student's Fourth Amendment rights by strip-searching her to look for contraband.

Schoolchildren likewise retain their Fourth Amendment rights to be free of unreasonable seizures, notwithstanding petitioners' and the United States' claims that, as a schoolchild, S.G. was already in the "custody" or "control" of the government. Camreta Brief 10; Alford Brief 50-52; U.S. Brief 36. Children in schools have much greater freedom of movement than, for example, prisoners and mental hospital patients, who themselves retain some degree of freedom. *See Vitek v. Jones*, 445 U.S. 480 (1980) (transfer from prison to mental hospital). The former are in a lesser degree of custody than the latter, who are in a stricter form of custody that "give[s] rise to a constitutional 'duty to protect. . . .'" *Acton*, 515 U.S. at 655 (1995), *quoting Deshaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 200 (1989).[40] Thus, schoolchildren are legally as well as physically capable of being seized.

[40] Lower courts agree that schoolchildren are not in state custody to the same extent as prisoners. *Wyke v. Polk County*

(Continued on following page)

Schoolchildren, for example, can leave their classrooms to go to the bathroom or get a drink of water. They are generally free to move about at lunchtime, and they are free to leave the building at the end of the school day, a freedom which S.G. feared that petitioners would deny her. (J.A. 43) When government officials deprive the children of their residual liberty, the Fourth Amendment is implicated. Thus, it is inaccurate to say that "the liberty restrictions in [petitioners' custodial] interview [of S.G.] arise primarily from the custodial aspects of public schooling. . . ." U.S. Brief 26. To the contrary, the liberty restrictions upon S.G. arose specifically from petitioners, who held her against her will for two hours under circumstances completely unlike anything she normally experienced at school.[41]

School Board, 129 F.3d 560, 569 (11th Cir. 1997) ("the state simply does not restrict a student's liberty in the same sense that it does when it incarcerates prisoners . . ."); *Dorothy J. v. Little Rock School District*, 7 F.3d 729, 932 (8th Cir. 1993) ("school attendance does not entail so restrictive a custodial relationship . . . "); *Doe v. Claiborne County*, 103 F.3d 495, 510 (6th Cir. 1996) ("state's compulsory attendance laws do not sufficiently 'restrain' students . . ."); *Doe v. Hillsboro Independent School District*, 113 F.3d 1412, 1415 (5th Cir. 1997); *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364, 1370 (3d Cir. 1992).

[41] Petitioners' and the United States' arguments to the contrary suggest buyers' remorse about petitioners' concession that the interrogation of S.G. was a seizure under the Fourth Amendment. Petitioners long ago conceded the point. 588 F.3d at 1022. They should not be heard to contend otherwise at this late date.

The United States contends that petitioners' interrogation of her did "not involve physical restraint" and so somehow was not custodial. U.S. Brief 27. It is impossible to square this contention with the United States' own description (U.S. Brief 27) of *Florida v. Royer*, 460 U.S. 491, 502-03 (1983), as finding a "functional arrest where police in airport seized ticket, identification, and luggage of suspect waiting to board plane and took him to private room for interrogation," or its description of *Dunaway,* 442 U.S. at 212, as involving a "functional arrest where suspect was taken to police station and would have been restrained had he tried to leave." S.G. was no more able to leave the room where petitioners sequestered her than were the seized individuals in those cases.

3. The Seizure of S.G. Disserved the Public Interest

Finally, *Lidster* requires an analysis of the "degree to which the seizure advances the public interest." Petitioners and the United States address this question *only* by reference to the challenges of investigating child abuse. That is, they speak only about the ways in which being unable to undertake seizures like this one might impede investigations of child abuse. Such arguments, of course, can be made about the investigation of any crime – as the United States

concedes. U.S. Brief 28 n.5. If accepted, therefore, those arguments would become an engine of destruction of the Fourth Amendment.

More specifically, petitioners and the United States entirely overlook the significant ways in which interrogations of the sort petitioners engaged in actually *impede* the detection of child abuse, because they produce unreliable information.[42] And petitioners fail entirely to consider the public interests in not creating unnecessary trauma for the child and in not unnecessarily breaking families apart. Moreover, better options were available to petitioners. The evaluation of reasonableness cannot be made in a vacuum.

The child welfare field has, for many years, had protocols designed to elicit accurate and reliable information and to do so with a minimum of trauma to the child, protocols to be carried out at child advocacy centers, with specially trained staff.[43] One such child advocacy center is the KIDS Center, where S.G. eventually was evaluated. The KIDS Center was

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[42] Although the court of appeals did not explicitly consider this issue, "[r]espondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted." *Smith v. Phillips*, 455 U.S. 209, 215, n.6 (1982).

[43] Pursuant to Congressional authorization, 42 U.S.C. §13002(a), the United States awarded grants of more than $10,000,000 to child advocacy centers in 2010. http://www.nationalchildrensalliance.org/index.php?s=71&item=13.

available to petitioners from the beginning of the investigation, and they have never offered any explanation for why they did not seek to have S.G.'s initial interview there.[44]

Petitioners repeatedly argue that because coordination between child welfare investigators and law enforcement is encouraged, even required, the seizure here was reasonable. Alford Brief 30, 42; Camreta Brief 29. That argument entirely misconstrues the nature of appropriate coordination, which includes creating child advocacy centers, reviewing their practices, and developing protocols for handling child abuse investigations. *See* Or. Rev. Stat. §418.747. That such coordination is required does *not* mean that any time a child welfare investigator and a police officer act together, they engage in appropriate or sanctioned "coordination." Indeed, coordination is required precisely in order to create and enforce protocols that will *prevent* the kind of freelancing that petitioners engaged in.

Oregon's own guidelines for interviewing suspected child abuse victims exemplify such protocols, and in fact rely on a raft of academic research, most

[44] Petitioners' failure to do so is particularly unaccountable because they asked Sarah Greene, in their first meeting with her, to take her daughters to the KIDS Center, which she agreed to do. (J.A. 49, 51) Moreover, Camreta actually delayed the girls' appointments, preventing a timely evaluation.

of which dates to the 1990s.[45] Those Guidelines, and the professional and academic consensus they reflect are – like the availability of the child advocacy center – relevant to any evaluation of reasonableness, and directly undermine petitioners' contentions that the type of seizure at issue here is necessary or even helpful for detecting child abuse. Petitioners' seizure of S.G. violated those Guidelines in numerous and significant ways, undermining the very public interest petitioners claim to be serving.

The relevant guidelines can be broken out into two related categories: making the child comfortable, and ensuring that the interview results are reliable and untainted. As to the first category, petitioners did nothing to make S.G. comfortable. In violation of numerous guidelines and recommendations, she was singled out from her classroom; petitioners never introduced themselves; they did not tell her how long the interview might last. *See* Oregon Guidelines at 61-62. There was nothing child-friendly about the room she was in, which was an adult conference room. *Id.* at 42; *see also* Annon, *supra* ("avoid extremes, such as . . . a bare stark room with only adult furniture . . . "). Alford was in uniform and visibly armed. Oregon Guidelines at 43; Annon, *supra* (do not "dress in . . . a law enforcement . . . uniform"); "The Role of Law

[45] The Oregon Guidelines discussed here were adopted in 2004. Obviously, those particular Guidelines were unavailable when petitioners seized S.G., but the research on which the Guidelines are based predates S.G.'s seizure.

Enforcement in the Response to Child Abuse and Neglect," (n.6, *supra*) ("In all child interviews the officer should remove and secure his/her weapon so that it is out of sight"). And despite Camreta's referral of S.G. to the KIDS Center, he interrogated her in detail and at length about the allegations of abuse, violating recommendations both that the number of people and the number of interviews should be minimized, Guidelines at 25, 26, and, more specifically that "only minimal information should be gathered during the initial contact with the child" if "she is to be evaluated at a [child advocacy] center." *Id.* at 25.

Making the child comfortable, of course, is important to avoid traumatizing her, an important public interest in its own right. But it is also directly relevant to the second category: obtaining accurate and reliable information. Reliable evidence is important not only to avoid false accusations of abuse and the family tragedies that may ensue, but also to ensure that, when a child actually has been abused, the information she provides can be effectively used to protect her and, where appropriate, to prosecute the perpetrator. Put bluntly, the evidence needs to hold up in court. If it does not, the very public interest that petitioners claim to promote is undermined.

Petitioners' conduct could not have been more calculated to produce unreliable information. They failed to do any investigation prior to the interrogation, so they knew nothing about S.G.'s special language needs and did not accommodate them. As a

result, petitioners both increased S.G.'s discomfort *and* undermined the reliability of the interview. Guidelines at 60, 187-95. Camreta refused to accept S.G.'s denial of any abuse, although "interview bias is consistently associated with high rates of false reports among nonabused children." *Id.* at 38. He asked the same questions "over and over," he asked leading questions, and led S.G. to believe she could not leave until she told them what they wanted to hear. All of these are "unacceptable tactics," Guidelines at 168, long discredited in the child welfare field because they are likely to lead children to assent to false accusations of abuse. Guidelines at 26, 27, 131, 168, 191; Lamb, *supra*; Wakefield. And such overbearing tactics may well traumatize the child. Oregon Guidelines at 76. Here, those tactics did both things – produced not just unreliable, but outright false, information and contributed to the damage to S.G.'s mental health.

The unreliability of petitioners' tactics is well-established in the law as well as in the academic literature. The case law is replete with instances in which children have made false statements after prolonged coercive, leading questioning. *See, e.g., Friedman v. Rehal*, 618 F.3d 142, 156-57 (2d Cir. 2010) (collecting cases); *State v. Michaels*, 136 N.J. 299 (1994). Indeed, 20 years ago, this Court reviewed an interview of a purported sex abuse victim, in which the interviewer "failed to record the interview

on videotape, asked leading questions, and questioned the child with a preconceived idea of what she should be disclosing." *Idaho v. Wright*, 497 U.S. 805, 818 (1990). Because of those interviewing deficiencies, this Court ruled that the child's out-of-court statements were inadmissible at a criminal trial as lacking sufficient indicia of reliability. *Id*.

Petitioners' seizure of S.G. for questioning did not advance *any* public interest. The State of Oregon itself recognizes that coercive custodial interviews, like petitioners' detention and interrogation of S.G., are neither necessary nor helpful to protecting children from abuse. The State's own Guidelines could not be clearer. Petitioners' actions were thus not reasonable and therefore are unjustified by the Fourth Amendment, even under the reasonableness standard they argue for.

F. This Court Cannot Evaluate the Seizure by Reference to Its Inception Only

Petitioner Camreta asks this Court to decide *only* whether petitioners' seizure of S.G. was constitutional at its inception, and to disregard the scope of the detention and interrogation; the United States echoes that request. Camreta Brief 39; United States Brief 22 n.3, 31. This request for a truncated analysis is both bizarre in the context of this case and at odds with this Court's approach to evaluating the

reasonableness of searches and seizures. Moreover, this request is inconsistent with the analyses of both the district court and the court of appeals, and it is a limitation on the question before this Court that Camreta failed to articulate in his petition for certiorari.[46]

There is no support in this Court's jurisprudence for a division of petitioners' seizure of S.G. into two pieces, an "inception" and a "scope." Neither the United States nor Camreta has cited a single case in which this Court, when asked to evaluate the constitutionality of a search or seizure, has looked at only a portion of the incident, ignoring the remainder. When the specific facts of a case permit it, this Court has distinguished between the "inception" of a search and the continuation of that search. But that approach is for analytical clarity. *See, e.g., Terry,* 392 U.S. at 19-20 ("in determining whether the seizure and search were 'unreasonable' our inquiry is a dual one – whether the officer's action was justified at its inception, *and* whether it was reasonably related in scope to the circumstances which justified the interference in the first place") (emphasis added). *Terry* itself analyzed the conduct of the officer during the seizure.

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[46] Camreta now claims that the "precise 'limitations which the Fourth Amendment places upon' a custodial suspected victim of child abuse 'will have to be developed in the concrete factual circumstances of individual cases.'" Camreta Brief 40. But this is such an individual case with concrete facts.

Moreover, *Terry* explicitly did not apply to the issue of "the constitutional propriety of an investigative 'seizure' upon less than probable cause *for purposes of* 'detention' and/or interrogation." *Id.* at 20 n.16 (emphasis added). Yet here, petitioners seized S.G. for the purpose of interrogating her, a purpose that they had in mind before the seizure and that they kept throughout the seizure. They even concede that they knew they might well detain her for a protracted period of time, claiming that child welfare interviews may "take longer than interviews in other contexts." Camreta Brief 40. Nothing happened to separate petitioners' conduct during the seizure from their purpose at its inception.

This situation thus is unlike *T.L.O.*, in which a principal's search of student's purse for cigarettes mutated into a search for marijuana. There, this Court held that a search of a student's purse is "'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 either the law or the rules of the school" and is "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." 469 U.S. at 342. The *T.L.O.* court easily distinguished between the inception and the scope in that case because the "case actually involved two separate searches, with the first – the search for cigarettes – providing the suspicion that gave rise to the second

the search for marihuana." *Id.* at 343-44. No such dividing line exists here. Even before petitioners seized S.G., their plan was to remove her from her class, take her to an isolated location, and question her.

Camreta and the United States also fail to explain their division between "inception" and "scope." When did the "inception" become the "scope" – when the school employee, acting at petitioners' instructions, removed S.G. from her class? When the school employee walked out of the room, leaving S.G. behind closed doors with two adult male strangers, one of whom was in uniform, with a gun? When Camreta began asking S.G. questions about her pet cats? When he began asking her questions about sexual abuse by her father? When Camreta responded to her answers by saying, "No, that's not right"? Petitioners do not and cannot explain. The interview was one event, not a series of events, for purposes of Fourth Amendment analysis.

Camreta likely asks this Court to ignore the interrogation because petitioners' actions, throughout the interrogation, were constitutionally indefensible, even when evaluated under the reasonableness standard they tout. Indeed, Camreta's actions were so indefensible that neither he nor the United States even offer a defense of them, not even as an argument

in the alternative.[47] But neither does Camreta nor the United States make any particularized defense of his conduct at the "inception." Instead, Camreta makes the stunning claim that, because the government has an important interest in investigating and combating child abuse, all "seizures to investigate an allegation of child abuse by talking with a child at her school are constitutional at their inception."[48] Camreta Brief 34. He places no limitations whatsoever on this statement, not even a requirement of some particularized suspicion of abuse, but argues that investigators should be permitted to initiate such seizures based upon mere "speculation and hearsay." Camreta Brief 27, 37. This Court should reject that suggestion. First, such other seizures, if they exist (the record is devoid of evidence concerning other seizures), are not the subject of this case; only petitioners' seizure of

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[47] This remarkable feature of Camreta's presentation bears repetition: *he offers no defense of the constitutionality of his conduct after the interview's "inception."*

[48] Alford makes similarly overbroad claims. He argues that as long as his actions were "driven by a legitimate concern about a problem of broad, general significance," he need not "demonstrate that [his] conduct was motivated by a public concern closely related to the specific facts of a particular search or seizure." Alford Brief 37. In other words, like Camreta, Alford argues that the state's interest in protecting children's well-being should insulate officials from any judicial scrutiny of how they conduct themselves. *Id.* 40, 43 (arguing that the Court should not review the means used to promote a state interest). But the best of intentions do not in fact justify any conduct a particular government official decides to undertake. The Constitution still applies.

S.G. is before this Court. More importantly, "speculation and hearsay" is a lower threshold than even the "reasonable suspicion" standard which this Court employs for *Terry* stops. Nothing in this Court's Fourth Amendment jurisprudence permits such a profound deprivation of liberty on such an ephemeral basis.

Camreta's claims are also inconsistent with *Lidster*. The *Lidster* court held that individualized suspicion was not directly relevant to the traffic stops it found constitutional. 540 U.S. at 424. But nothing in *Lidster* suggests that *every* traffic stop searching for witnesses would be constitutional. *Lidster* still required an individualized evaluation of the circumstances of the particular police actions. The reasoning of *Lidster* does not suggest, for example, that the police could set up such traffic stops anywhere. Rather, the location and time of day were selected to maximize the chance of identifying some witness to a particular accident.[49] *Lidster* emphatically did not hold that any time the police seek witnesses, instead of suspects, a traffic stop is necessarily – or even presumptively – constitutional. Moreover, *Lidster*, like *Terry* and *T.L.O.,* evaluated what happened

[49] Implicit in *Lidster*'s analysis was the fact that the police had no reason to think that any particular driver might have information. *Lidster* would have been a different case altogether if the police had set up a dragnet in order to track down and then interrogate at length a particular driver whom they thought had information – even if that particular driver was not himself a suspect.

during the seizure as well as its "inception." In *Lidster*, the brevity of the detention and the non-intrusive nature of its content were key factors in this Court's conclusion that the traffic stops were constitutional.

Camreta may make his stunningly overbroad claim – that *all* school-based child welfare interviews are constitutional at their inception – because, even under the reasonableness standard he touts and even looking only at his conduct *before* he spoke a word to S.G. about her father, the seizure was unreasonable. The seizure was unreasonable *looking at that stage alone* because:

> (1) Camreta knew nothing about the details of the third-hand allegations he was supposed to investigate – who made them, what specifically they said, whether they had any motive to lie;
>
> (2) Camreta failed completely to prepare for the interview by determining whether S.G. had any special needs that needed to be accommodated;
>
> (3) Camreta arranged to be accompanied by an armed, uniformed police officer;[50]

[50] It is true that S.G. testified that she did not find Alford frightening and did not feel threatened by him, but she also said that Alford "just sat there." (J.A. 60) Moreover, she was frightened by the interrogation. (J.A. 55) And there was no way for petitioners to know ahead of time how she would react to Alford. That is why the Oregon Guidelines and other expert protocols

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(4) Camreta did not make appropriate efforts to make S.G. comfortable: she was removed from class and brought to an adult conference room; he and Alford never introduced themselves, explained why they were there, or gave her an estimate of how long the interview might last;

(5) Camreta expected the interview to be lengthy;

(6) Most significantly, Camreta and Alford unaccountably undertook the initial interview of S.G. themselves, rather than refer her to the available child advocacy center – even though later that same day they asked her mother to take her there.

For all those reasons, even at the earliest stages of the encounter – even before Camreta asked S.G. a single question – the seizure was unreasonable as unnecessarily intrusive and not calculated to serve the public interests in protecting children from trauma, keeping families intact, or (the only public interest that Camreta acknowledges) detecting and protecting children from abuse.

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recommend *against* law enforcement wearing uniforms or carrying weapons during such interviews.

CONCLUSION

This Court should decline to review the court of appeals' Fourth Amendment ruling. Alternatively, it should dismiss the writ as improvidently granted as to the Fourth Amendment question presented. Under either alternative, the Fourth Amendment ruling should be left intact. If this Court does review the Fourth Amendment ruling, it should affirm that ruling.

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