Nos. 09-1454 and 09-1478 (Consolidated)

In the Supreme Court of the United States

BOB CAMRETA,

Petitioner,

v.

SARAH GREENE, Personally and as Next Friend for S.G., a Minor, and K.G., a Minor,

Respondent.

JAMES ALFORD, DESCHUTES COUNTY DEPUTY SHERIFF,

Petitioner,

v.

SARAH GREENE, Personally and as Next Friend for S.G., a Minor, and K.G., a Minor,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

These consolidated cases present three questions, with two essentially mirroring each other to phrase the merits question and one raised only in No. 09-1454, but essentially common to both cases.

1. Does the Fourth Amendment require a warrant, a court order, parental consent, or exigent circumstances before law enforcement and child welfare officials may conduct a temporary seizure and interview at a public school of a child whom they reasonably suspect was being sexually abused by her father? (No. 09-1478)
2. The state received a report that a nine-year-old child was being abused by her father at home. A child-protection caseworker and law-enforcement officer went to the child's school to interview her. To assess the constitutionality of that interview, the Ninth Circuit applied the traditional warrant/warrant-exception requirements that apply to seizures of suspected criminals. Should the Ninth Circuit, as other circuits have done, instead have applied the balancing standard that this Court has identified as the appropriate standard when a witness is temporarily detained? (No. 09-1454)
3. The Ninth Circuit addressed the constitutionality of the interview in order to provide "guidance to those charged with the difficult task of protecting child welfare within the confines of the Fourth Amendment[,]" and it thus articulated a rule that will apply to all future child-abuse investigations. Is the Ninth

Circuit's constitutional ruling reviewable, notwithstanding that it ruled in petitioner's favor on qualified immunity grounds? (No. 09-1454)

In this brief, *amicus curiae* Eagle Forum answers Questions 1 and 2, which essentially cover the same merits issues.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum")[1] is a nonprofit

[1] *Amicus* Eagle Forum files this brief with the consent of all parties; Petitioners' and Respondent's written letters of consent have been lodged with the

(Footnote cont'd on next page)

organization founded in 1981 and headquartered in Saint Louis, Missouri. Eagle Forum has repeatedly defended parents and families against governmental encroachment on parental rights and family autonomy. For the foregoing reasons, Eagle Forum has a direct and vital interest in the issues presented before this Court.

CONSTITUTIONAL BACKGROUND

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. By its terms the Fourth Amendment applies only to the federal government, but the Fourteenth Amendment incorporates it to apply to the States. *Mapp v. Ohio,* 367 U.S. 643, 655 (1961).

The Fifth Amendment's Due Process Clause provides that "No person shall … deprived of life, liberty, or property, without due process of law." U.S.

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Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

CONST. amend. V cl. 4. The Fourteenth Amendment's Due Process Clause applies this same protection of the people to State government. U.S. CONST. amend. XIV, §1, cl. 3. This liberty interest provides the procedural and substantive due-process protections for parents' control over the raising of their children, including – of course – custody over their children. *See, e.g., Pierce v. Society of Sisters,* 268 U.S. 510, 534-35 (1925) (striking state law requiring children to attend public schools as "interfer[ing] with the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Wisconsin v. Yoder,* 406 U.S. 205, 213-36 (1972) (exempting Amish children from compulsory school-attendance law because *inter alia* it impinges on the fundamental rights of parents with respect to religious upbringing of their children); *Lassiter v. Dep't of Social Services,* 452 U.S. 18, 31-32 (1981) (parents have procedural due-process rights in state-initiated proceeding to terminate parental rights); *Santosky v. Kramer,* 455 U.S. 745, 754 (1982) (same).

STATEMENT OF FACTS

Respondent Greene prevailed in establishing that Petitioners Alford and Camreta (collectively, "Petitioners") violated the Fourth Amendment when they conducted a two-hour interview of Greene's nine-year-old daughter, S.G., in a closed conference room at S.G.'s public elementary school. Because Alford is a deputy sheriff and Camreta is a social worker in child-protective services, they argued their qualified immunity from damage claims. Viewing the Fourth Amendment's protections as insufficiently

established when Petitioners seized S.G., the Ninth Circuit found qualified immunity to apply.[2]

The facts here – and this Court's resolution of this case – fit within the larger societal context of the legal and administrative regimes that identify and prosecute child abuse. As the Ninth Circuit explained, only a quarter of the investigations conducted by state and local agencies concluded that the children in question were indeed victims of abuse. *Greene v. Camreta,* 588 F.3d 1011, 1015 (9th Cir. 2009) (*citing* U.S. Dep't of Health & Human Services, Admin. on Children, Youth & Families, *Child Maltreatment 2007* (2009)). This 3:1 discrepancy does not occur in a vacuum.

These investigations can have devastating stigmatic consequences for the children and parents. Here, the Greene family – which would have suffered financially from having Mr. Greene stay outside the home while Petitioners pursued their investigation – has been burdened by a criminal trial, as well as a civil claim brought all the way to this Court. As the Ninth Circuit explained, the 3:1 "discrepancy creates the risk that 'in the name of saving children from the harm that their parents and guardians are thought to pose, states ultimately cause more harm to many more children than they ever help.'" *Greene,* 588 F.3d at 1016 (*quoting* Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic*

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[2] Petitioner Camreta's challenged post-seizure conduct is not at issue in this appeal.

Costs of a Child Welfare Exception to the Fourth Amendment, 47 WM. & MARY L. REV. 413, 417 (2005)).

Professor Coleman's immense and "ironic" costs – like the costs that Petitioners visited on the Greenes – trace back to the first child-protection organizations, chapters of the Society for the Prevention of Cruelty to Children ("SPCC"). The poor and immigrant communities that the SPCCs policed knew the SPCCs as "the Cruelty," because of their agents' reputations for engineering the removal of children from homes and families deemed undesirable, Timothy J. Gilfoyle, *The Moral Origins of Political Surveillance: The Preventive Society in New York City, 1867-1918,* 38 AMERICAN QUARTERLY 637-52 (1986), and, incidentally, tending to institutionalize them, rather than find new and better homes. JANE WALDFOGEL, THE FUTURE OF CHILD PROTECTION: HOW TO BREAK THE CYCLE OF ABUSE AND NEGLECT, at 71 (Harvard University Press 1998). From their inception, then, these child-protection services have presented an overzealous and unfair dark side that detracts from the good that they can accomplish. This case requires reconciling these issues with the Fourth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments.

SUMMARY OF ARGUMENT

The Fourth Amendment provides sufficient flexibility for Petitioners to accomplish their important functions, without violating the Fourth, Fifth, and Fourteenth Amendment rights of families through in-school seizures of minors in criminal

investigations. (Section I.A.) Moreover, the two-hour, closed-door hearing here cannot qualify as a *"Terry* stop" because it was too long, too custodial, and too intrusive, even for an adult and *a fortiorari* for a nine-year-old child. (Section I.B.) In any event, whether the Court analyzes seizure of S.G. under the traditional warrant exception in *Terry v. Ohio* or under Petitioners' proposals, the ultimate issue is the reasonableness of the seizure. A two-hour session behind closed doors in which the State – backed by a uniformed office with a visible firearm – repeatedly asks a nine-year-old child the same questions until she breaks down and gives the desired answers is unreasonable. (Sections I.B, II.D.)

Petitioners' attempt to extend general language from *Illinois v. Lidster,* 540 U.S. 419 (2004), to allow seizure of witnesses (*i.e.,* as distinct from suspects) misapplies the law of generalized police fact-finding of the public at large to the targeted, individualized seizure of S.G. For that reason, this Court must reject Petitioners' suggestion for a *per se* exception from traditional Fourth Amendment protections for the targeted seizure of witnesses. (Section II.B.) Similarly, and although it is certainly true that parents and their children have lower expectations of privacy at school than in the home, that does not mean that non-school branches of State government can invite themselves into schools to sidestep the public's protections from those non-school branches of the States. For that reason, this Court must reject Petitioners' suggestion for a *per se* exception to traditional Fourth Amendment protections for seizing minors in public schools. (Section II.C.)

ARGUMENT

I. THE FOURTH AMENDMENT REQUIRES A WARRANT OR WARRANT EXCEPTION TO SEIZE A MINOR CHILD IN A CRIMINAL INVESTIGATION

In "safeguard[ing] the privacy and security of individuals against arbitrary invasions by governmental officials," the Fourth Amendment is "basic to a free society" and inherent in ordered liberty. *Camara v. Municipal Court of City & County of San Francisco,* 387 U.S. 523, 528 (1967) (emphasis added, interior quotations omitted).

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

Terry v. Ohio, 392 U.S. 1, 9 (1968) (internal quotations omitted). At the outset, therefore, it is clear that "[t]he Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." *U.S. v. Brignoni-Ponce,* 422 U.S. 873, 878 (1975) (citing cases). The question is not *whether* the Fourth Amendment applies here, but *how* it applies on the facts of this case.

Even without competing constitutional interests, the Fourth Amendment's application presents difficult questions: "translation of the abstract prohibition against 'unreasonable searches and seizures' into workable guidelines for the decision of particular cases is a difficult task which has for

many years divided the members of this Court." *Camara,* 387 U.S. at 528. Here, however, the Court must address not only the Fourth Amendment's competing interests but also the degree to which the State's interests under the Fourth Amendment impede families' and parents' interests under the Due Process Clauses of the Fifth and Fourteenth Amendments. However true that may be when constitutional interests compete, it is especially true here where the State's involvement is more than three times more likely to harm than to help in any given intervention and seizure.

By way of background, the Fourth Amendment's last clause requires "probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized" in two types of government actions: (1) searches and seizures, and (2) warrants. U.S. CONST. amend. IV. The first type of action includes a "reasonableness" limitation on the "right of the people to be secure in their persons … searches and seizures," whereas the second type is not limited by the constitutional text. *Id.* No one disputes that Petitioners seized S.G. without "probable cause," much less "probable cause, supported by Oath or affirmation." Therefore, Petitioners violated the Fourth Amendment unless (1) their actions fit into one of the existing Court-recognized exceptions, (2) the seizure was "reasonable" under *Terry v. Ohio,* 392 U.S. 1, 20 (1968), or (3) Petitioners convince this Court to create or expand an exception to apply here. As explained in Sections I.B and II.D, *infra,* the second and third options collapse into each other to

the extent that they rely on the same test for "reasonableness."

A. Existing Fourth-Amendment Flexibility Suffices for Seizing Minor Children in Criminal Investigations

This Court has recognized significant flexibility in the Fourth Amendment, including some criteria that potentially apply to child-abuse investigations in schools and some that do not.[3] Obviously, the Fourth Amendment would have allowed Petitioners to have proceeded with a warrant had they obtained one, with parental consent had they sought and received it, and in exigent circumstances if present. U.S. CONST. amend. IV; *Brigham City, Utah v. Stuart,* 547 U.S. 398, 403-04 (2006) (discussing exigent-circumstance exceptions); *New Jersey v. T.L.O.,* 469 U.S. 325, 336-37 (1985) (parents, but not school officials, may consent to searches involving their children). Petitioners did not attempt to avail themselves of any of these courses.

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[3] *See, e.g., U.S. v. Dionisio,* 410 U.S. 1, 9 (1973) (court-issued subpoena for witness to appeal before grand jury in criminal investigation); *New York v. Burger,* 482 U.S. 691, 716 & n.27 (1987) (administrative searches not used as pretext to enable law-enforcement officers to gather evidence of criminal violations); *Colorado v. Bertine,* 479 U.S. 367, 372 (1987) (standard administrative search of impounded vehicle's contents without bad faith or sole purpose of investigation).

Because Petitioners acted in a law-enforcement context, and because seizing S.G. far exceeded the *Terry* test for reasonableness, *see* Section I.B, *infra,* that would end the matter, even if this particular law-enforcement context did not involve something so harmful both to the children of *guilty* parents when the government is objectively right and to the *innocent* parents' Due Process rights when government is wrong. As indicated by the Ninth Circuit and in the Statement of the Facts, *supra,* the government is wrong far more often than it is right.

Rather than follow the three-part test that Petitioners propose, *see* Section II.D, *infra, amicus* Eagle Forum respectfully submits that the high false-positive error rate and the significant damage that those errors cause commend at least considering the three-part test from *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976), which *Lassiter* imported for due process in parental-rights *termination* proceedings:

> [1] the private interests affected by the proceeding; [2] the risk of error created by the State's chosen procedure; and [3] the countervailing governmental interest supporting use of the challenged procedure.

Santosky v. Kramer, 455 U.S. 745, 754 (1982) (*citing Mathews* and *Lassiter).* Significantly, unlike Petitioners' proposed balancing test, the *Mathews-Lassiter* test expressly includes consideration of the government's abject failure rate in this context. Before this Court even considers excepting the Fourth Amendment's protections of minor children from seizure in criminal investigations, the child-welfare industry needs to perform much better.

Given Petitioners' weak factual showing and the procedural setting here (namely, Petitioners have moved for summary judgment), this case does not present an opportunity for the Court to expand the rights of the government at the expense of parents.

B. The Petitioners' Seizure of S.G. Was Not Reasonable under *Terry*

In *Terry,* this Court determined that the Fourth Amendment allows an officer who has mere "reasonable suspicion" to detain someone briefly to confirm or alleviate the officer's suspicion. *Terry,* 392 U.S. at 16-19. When the *Terry* analysis applies, courts assess reasonableness under a three-part test: (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." *Brown v. Texas,* 443 U.S. 47, 51 (1979). The *Mathews-Lassiter* "risk-of-error" criterion fits squarely within both the second and third prongs this test. Whether this Court uses a balancing test or not, the framework that the Court adopts for seizures in the child-abuse context must fully consider the very real – indeed *likely* – prospect that the very act of Petitioners' intervening will cause more harm than good.[4]

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[4] By its terms, the Fourth Amendment applies even when the risk of error is zero. The risk of error's relevance here is that Petitioners seek an exemption from the Fourth Amendment, based on factors that they attribute to the child-abuse context. If it

(Footnote cont'd on next page)

But the Court need not conduct the balancing here because Petitioners' two-hour, closed-door interrogation of a nine-year-old child, with a uniformed police officer's firearm visible, simply does not meet the contours of a *Terry* stop. Although this Court has "decline[d] to adopt any outside limitation for a permissible *Terry* stop," the Court has "never approved a seizure of the person for [a] prolonged 90-minute period." *U.S. v. Place,* 462 U.S. 696, 709-10 (1981). Here, Petitioners browbeat S.G. with the same questions, over and over again, until she told them what they wanted to hear.

Finally, because courts analyze Fourth Amendment issues under an objective standard, *City of Indianapolis v. Edmond,* 531 U.S. 32, 47 (2000), it is irrelevant that S.G. indicated that Deputy Alford made her feel comfortable. The relevant issue is that Petitioners (including an armed, uniformed policeman) detained S.G. for two hours of repeated questioning until she relented and gave them what they wanted to hear.

(Footnote cont'd from previous page.)

considers Petitioners' contextual arguments, the Court must consider the entire context. But even if the risk of error were zero in this context, law enforcement would have less intrusive means to accomplish its goals.

II. THE PETITIONERS' PROPOSED TESTS FOR "REASONABLENESS" CANNOT AND DO NOT JUSTIFY THE SEIZURE OF S.G.

Petitioners propose several alternate mechanisms for this Court to use in evaluating the seizure of minor children from school in criminal investigations of child abuse, outside the Fourth Amendment's traditional warrant and warrant-exception analysis. Although none of these alternate mechanisms are appropriate, all of them lead to essentially the same reasonableness test. *See* Alford Br. at 13-14; Camreta Br. at 17. As indicated in Section I.B, *supra,* Petitioners fail the *Terry* reasonableness test, which Petitioners acknowledge is comparable to the tests that they propose. *See* Section II.D, *infra.* Whether under the Constitution itself or the Constitution as they ask this Court to re-write it, therefore, Petitioners must fail.

A. The "Special Needs" Exceptions Do Not Apply to Criminal Investigations

Petitioners ask this Court to extend its "special needs" analysis from its historic non-criminal context to this criminal investigation. That is unprecedented:

> Only in those exceptional circumstances in which special needs, *beyond the normal need for law enforcement,* make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.

T.L.O., 469 U.S. at 351 (Blackmun, J., concurring in the judgment). By definition, "special needs" are "beyond the normal need for law enforcement," *id.,* or even "divorced from the State's general interest in

law enforcement." *Ferguson v. City of Charleston,* 532 U.S. 67, 79 (2001); *see also T.L.O.,* 469 U.S. at 341, n.7 (distinguishing between searches "carried out by school authorities acting alone and on their own authority" and those conducted "in conjunction with or at the behest of law enforcement agencies").[5] This Court should reject Petitioners' invitation to extend special-needs analysis to searches and seizures in conjunction with criminal investigations.

B. *Lidster* Did Not – and this Court Should Not – Create a *Per Se* Fourth-Amendment Exception for Seizing Witnesses

In a tactic defeated by the very authority on which they rely, Petitioners ask this Court to allow their searches and seizures of witnesses – as distinct from suspects – based on general language in this Court's decision in *Illinois v. Lidster,* 540 U.S. 419 (2004). Because Petitioners' proposed *per se* "Witness Exception" does not comport with *Lidster* and offends the Fourth Amendment, this Court must reject it.

Lidster upheld the constitutionality of a police checkpoint established to enable police to ask motorists whether they had information about a fatal hit-and-run accident that had occurred around the same time roughly a week before. *Lidster,* 540 U.S. at 421-22. As a result of stopping Mr. Lidster's vehicle at this checkpoint, the police determined that

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[5] Justice Blackmun's *T.L.O.* concurrence coined the term "special needs." *Ferguson,* 532 U.S. at 74.

Mr. Lidster was driving under the influence of alcohol and arrested him. *Lidster,* 540 U.S. at 422.

Petitioners rely on *Lidster* to suggest that the Fourth Amendment does not apply when the police seize witnesses to third-party wrongdoing:

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

Lidster, 540 U.S. at 423 (emphasis in original). "[A]n information-seeking stop is not the kind of event that involves suspicion, or lack of suspicion, of *the relevant individual*." *Lidster,* 540 U.S. at 424-25 (emphasis added). Despite its general language distinguishing witnesses from suspects, *Lidster* cannot carry the weight that Petitioners would place on it.

Lidster distinguished a prior checkpoint decision, *City of Indianapolis v. Edmond,* 531 U.S. 32, 41 (2000), which held that stops made "without individualized suspicion" for "crime control" purposes violate the Fourth Amendment. In doing so, the Court explained that courts cannot read general language in decisions to cover situations unlike the situation in the case underlying the decision:

> We must read this and related general language in *Edmond* as we often read general language in judicial opinions – as referring in context to circumstances similar

> to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering.

Lidster, 540 U.S. at 424. The same general-language caution that *Lidster* used to distinguish *Edmond* easily distinguishes *Lidster* here. Petitioners' cannot extend general language from cases about checkpoints that stopped all passers-by indiscriminately to a case involving the targeted seizure of a single material witness.

In any event, the Fourth Amendment does not limit the scope of its protections only to suspects. U.S. CONST. amend. IV. To extend the preposterous analogy that Petitioner Camreta makes to guest lectures by non-school officials, Camreta Br. at 31, the *Lidster*-style exception could apply if Camreta gave a lecture on abuse to an auditorium full of students and, as part of that lecture, asked the students whether anyone had suffered abuse. But that is entirely different from the State's singling out a single student for confined questioning.

C. *T.L.O.* Did Not – and this Court Should Not – Create a *Per Se* Fourth-Amendment Exception for Seizing Minors in Public Schools

In a tactic analogous to the Central Intelligence Agency's alleged "extraordinary rendition" program, *see generally Mohamed v. Jeppesen Dataplan, Inc.,*

614 F.3d 1070, 1073-75 (9th Cir. 2010),[6] Petitioners argue that this Court should allow their criminal investigations to proceed *carte blanche* in public schools on the theory that the Fourth Amendment does not apply to schools under *T.L.O.* Because this argument does not comport with *T.L.O.* and offends the Fourth Amendment, this Court must reject it.

Schools exercise a "power [that] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." *Vernonia Sch. Dist. 47J v. Acton,* 515 U.S. 646, 655 (1995). "Thus, while children assuredly do not 'shed their constitutional rights ... at the schoolhouse gate,' the nature of those rights is what is appropriate for *children in school*." *Vernonia Sch. Dist.,* 515 U.S. at 655-56 (*quoting Tinker v. Des Moines Independent Community Sch. Dist.,* 393 U.S. 503, 506 (1969), alteration in original, emphasis added). That students "have been committed to the temporary custody of the State *as schoolmaster,*" *Vernonia Sch. Dist.,* 515 U.S. at 654 (emphasis added), simply does not mean that students have been committed to that custody for all purposes.

In *T.L.O.,* a school administrator disciplining two students allegedly caught smoking in a lavatory found marijuana (as well as tobacco cigarettes) in

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[6] Under the alleged rendition program, the Agency allegedly transfers foreign nationals from U.S. custody to the custody of governments for interrogation outside the Constitution's reach. *Id.*

one student's purse after she denied "smok[ing] at all." *T.L.O.,* 469 U.S. at 328. In determining that the warrant requirement did not apply, the Court balanced "the schoolchild's legitimate expectations of privacy" versus "the school's equally legitimate need to maintain an environment in which learning can take place." *T.L.O.,* 469 U.S. at 340. Nowhere did the Court sanction outside law-enforcement personnel to come on campus for targeted searches (much less seizures) in criminal investigations. Instead, the Court was concerned with the warrant requirement's "undu[e] interfere[nce] with the maintenance of the *swift and informal disciplinary procedures needed in the schools. Id.* (emphasis added). Accordingly, the "School Exception" under *T.L.O.* extends only to "search[s] of a student *by a teacher or other school official*" and, even then, only "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." *T.L.O.,* 469 U.S. at 341-42 (emphasis added). Neither situation applies here.

This Court should not sanction Petitioners' efforts to compel those who cannot afford private education to surrender their constitutional rights as a condition to receiving a free – albeit compulsory – public education:

> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under

> the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold.

Frost v. Railroad Comm'n of State of California, 271 U.S. 583, 593-94 (1926).[7] Under *Frost,* the States cannot do indirectly what they cannot do directly.

D. The Seizure of S.G. Cannot Survive *Any* Framework Consistent with the Fourth Amendment

Even assuming *arguendo* that Petitioners can convince this Court to go beyond the probable-cause standard of the Fourth Amendment's warrant and warrant-exception analysis, Petitioners still cannot show that their seizing S.G. was reasonable: "What is reasonable, of course, depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *Skinner v. Railway Labor Executives' Ass'n.,* 489 U.S. 602, 619 (1989) (interior quotations omitted). Whichever test the Court uses to analyze the question, the bottom line will be the same answer reached under *Terry* in Section I.B, *supra.* By seizing S.G., Petitioners coerced a nine-year-old girl until she capitulated, telling the officers whatever they wanted to hear.

Petitioners propose the *Lidster* three-part test for assessing reasonableness: (1) "the gravity of the

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[7] *Frost* prohibited the States' conditioning use of public roads on a private carrier's voluntarily submitting to otherwise-inapplicable regulation. 271 U.S. at 592-94.

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." Camreta Br. at 20 (*quoting Lidster,* 540 U.S. at 427 (*quoting Brown,* 443 U.S. at 51)); Alford Br. at 33 (same).[8] As indicated in Sections I.A and I.B, the Court's decisional framework must address the fact that the child-protection industry gets it wrong far more often than they get it right, with devastating consequences. If the Court uses the *Lidster* three-part test, it can and must consider these profound social costs in the second or third factors. Put simply, these seizures do not truly advance the public interest, and they interfere with far more than the individual liberty negated during the period of the seizure. Even under Petitioners' view of the law, then, Petitioners cannot prevail.

CONCLUSION

For the foregoing reasons and those argued by the Respondent, this Court should affirm the Ninth Circuit's decision with respect to the constitutional merits.

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[8] The three-part test is the same under the *Terry* and special-needs modes of analysis.

Dated: January 31, 2011 Respectfully submitted,

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