No. 09-1454

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.

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

BRIEF OF THE STATES OF ARIZONA, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, IDAHO, IOWA, KANSAS, LOUISIANA, MAINE, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONER BOB CAMRETA

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INTEREST OF THE *AMICI CURIAE* STATES

Amici Curiae States share a compelling *parens patriae* interest in protecting children.[1] *Santosky v. Kramer*, 455 U.S. 745, 766, 102 S. Ct. 1388, 1401 (1982). In furtherance of that interest, many States have enacted statutes or adopted policies designed to encourage child welfare agencies and law enforcement departments to cooperate in investigating and prosecuting child abuse.

In this case, the Ninth Circuit held that because "law enforcement personnel and purposes" were involved in Bob Camreta (Petitioner)'s warrantless in-school interview of a child who had allegedly been abused, the interview violated the Fourth Amendment's guarantee against unreasonable searches and seizures.[2] *Greene v. Camreta*, 588 F.3d 1011, 1027 (9th Cir. 2009). In so holding, the Ninth Circuit mandated that the traditional Fourth Amendment warrant

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[1] Counsel of record for all parties received notice at least ten days prior to the due date of the *amici curiae*'s intention to file this brief.

[2] Given that Petitioner "[did] not contest the district court's holding that the two-hour interview of S.G. at her school was a seizure," *Greene*, 588 F.3d 1011, 1022 (9th Cir. 2009), *Amici* address the Fourth Amendment seizure considerations without conceding that social worker or law enforcement personnel interviews of alleged child-abuse victims in the public school setting invariably implicate Fourth Amendment interests.

requirement[3] applies any time that law enforcement is implicated in a child-abuse investigation. The Ninth Circuit's holding was far stricter than necessary to protect the various interests involved, was not in keeping with this Court's precedents, and will further divide the circuits. Moreover, it will hamper States' ability to effectively and sensitively investigate child-abuse allegations by preventing child protective services workers who are cooperating with law enforcement from interviewing suspected abuse victims at school in the absence of a warrant, a court order, parental consent, or exigent circumstances.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Decision Unnecessarily Imposes the Traditional Fourth Amendment Warrant Requirement on Child-Abuse Investigations that Involve Cooperation Between Child Welfare Services and Law Enforcement.

In its ruling in the instant case, the Ninth Circuit reiterated its earlier holding that "'the general law of search warrants applie[s] to child abuse investigations.'" *Greene*, 588 F.3d at 1030 (quoting *Calabretta v. Floyd*, 189 F.3d 808, 814 (9th

[3] References to the traditional Fourth Amendment warrant requirement encompass the traditional exceptions to the warrant requirement as well.

Cir. 1999)). Rejecting the "special needs" exception to the traditional warrant requirement and finding that law enforcement purposes were too entangled in the investigation of the possible sexual abuse of S.G., the court held that "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.* Because (1) the traditional Fourth Amendment warrant requirement unreasonably hampers States' ability to protect children from abuse and to investigate child-abuse claims and (2) the reasonableness balancing test that this Court has applied in similar circumstances would adequately protect the various interests involved, the Ninth Circuit's rule is unworkable and unnecessary.

A. The Traditional Fourth Amendment Warrant Requirement Frustrates Child-Abuse Investigations Because the Very Nature of Such Investigations Makes It Impractical to Obtain a Warrant, a Court Order, or Parental Consent or to Identify Exigent Circumstances Before Interviewing a Suspected Child-Abuse Victim.

1. Because Initial Child-Abuse Reports Are Often Hearsay Statements that Will Not Support Probable Cause, the Requirement of Obtaining a Warrant Prior to Interviewing Alleged Child-Abuse Victims Would Seriously Impede Child-Abuse Investigations.

Obtaining a warrant or a court order to authorize an interview of a child necessarily requires the entity seeking the warrant or the court order to demonstrate that there is probable cause to believe that the child has been or will be subjected to abuse or neglect. *See* U.S. Const. amend. IV. Demonstrating that probable cause exists is particularly difficult in child-abuse situations because often only the abuser and the victim know about the offense. For the same reason, investigative agencies are often unable to determine the validity of an initial abuse report until they interview the alleged child victim. *See R.S. v. State*, 459 N.W.2d 680, 686 (Minn. 1990) (acknowledging the State's argument that "[b]ecause so often only the child victim and perpetrator have actual

specific knowledge of the abuse, . . . the assessment interview is the best means of assessing the truth or falsity of a report of abuse"). The prohibition against basing probable cause on untested hearsay statements, such as those that often form the basis for initial child-abuse investigations, exacerbates this conundrum. *See Wong Sun v. United States*, 371 U.S. 471, 479-80, 83 S. Ct. 407, 413 (1963) (stating that untested informant information is insufficient to support probable cause); *Henry v. United States*, 361 U.S. 98, 101, 80 S. Ct. 168, 170-71 (1959) (stating that rumor, report, and suspicion are inadequate to provide probable cause); *see also Draper v. United States*, 358 U.S. 307, 314-25, 79 S. Ct. 329, 333-39 (1959) (Douglas, J., dissenting) (discussing the basis for probable cause).

Many States do have some procedure for obtaining a warrant or a court order to conduct a search or seizure incident to a child-abuse investigation.[4] However, States have also recognized the difficulties inherent in such procedures. Alabama's courts have noted that requiring the Department of Human Resources to obtain a court order before conducting

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[4] Ala. Code § 26-14-7(c); Colo. Rev. Stat. § 19-3-308(3)(b); Ky. Rev. Stat. Ann. § 620.040(5); Minn. Stat. Ann. § 626.556 subd. 10(c); N.H. Rev. Stat. Ann. § 169-C:34, IV, VI; N.Y. Soc. Serv. Law § 424; N.Y. Fam. Ct. Act § 1022; Ohio Rev. Code Ann. § 2151.31; Okla. Stat. tit. 10A, § 1-2-105(B)(2); Or. Rev. Stat. Ann. § 419B.150; S.C. Code Ann. § 63-7-920(B); Utah Code Ann. § 78A-6-106(1); Vt. Stat. Ann. tit. 33, § 5302(b); Wis. Stat. Ann. § 48.981; Wyo. Stat. Ann. § 14-3-405.

an interview sometimes "impedes the intent of the child abuse statute and in emergency instances may render it inoperable and ineffective." *Decatur City Bd. of Educ. v. Aycock*, 562 So. 2d 1331, 1335 (Ala. App. 1990). And when the investigation itself may result in criminal proceedings or in the removal of the child, establishing the probable cause necessary to obtain a court order may be difficult if the only source of information regarding the abuse or neglect allegations is the "unsworn hearsay" of a child-abuse hotline report. *H.R. v. State Dep't of Human Res.*, 612 So. 2d 477, 479-80 (Ala. Civ. App. 1992). Recognizing the problems inherent in obtaining the information necessary to support further investigation of child-abuse claims, many of the same States that have a warrant or a court order procedure for child-abuse cases also permit interviews of children without a warrant, a court order, or parental approval in certain circumstances.[5]

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[5] *See, e.g.*, Minn. Stat. Ann. § 626.556 subd. 10(c); N.H. Rev. Stat. Ann. § 169-C:38, IV; S.C. Code Ann. § 63-7-920(C); Wis. Stat. Ann. § 48.981(3)(c)(1)(b).

2. Given that the Majority of Child Abusers Are Parents or Other Members of an Abused Child's Household, Requiring Parental Consent Before Interviewing a Suspected Victim May Sabotage the Goals of Protecting Children and Prosecuting Abusers.

Parental consent is not an absolute measure of the reasonableness of a child's seizure, particularly when the seizure occurs outside the family home. *See Safford Unified Sch. Dist. v. Redding*, ___ U.S. ___, ___, 129 S. Ct. 2633, 2652 n.4 (2009) (Thomas, J., dissenting in part) (noting that a school district was not constitutionally obligated to notify a student's parents before conducting a search of her person). The frequency with which children are abused by a parent or by another household member demonstrates why child welfare workers and law enforcement personnel often have a compelling need to interview suspected abuse victims in a neutral setting away from and without notice to their parents or other household members. The most recent U.S. Department of Health and Human Services Administration for Children and Families *Child Maltreatment Report*, which the Department issued in 2008, states that in 75% of the cases, one or both parents inflicted the abuse that the child victims suffered,[6]

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[6] *See* http://www.acf.hhs.gov/programs/cb/pubs/cm08/chapter3.htm (reflecting that approximately 39% of the victims were

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that stepparents inflicted the abuse in 4.4% of the cases, that parents' unmarried partners inflicted the abuse in another 4.4% of the cases, and that other relatives inflicted the abuse in 6.5% of the cases.[7] Parents or other members of the children's households therefore inflicted the abuse in at least 83.8% of these cases. The percentage may be even higher because some of the abusers in the "other relatives" category may also have lived in the children's households.

Although a parent has a significant interest in protecting his or her child from the intrusion of an abuse investigation, in no other context would a court countenance requiring a state agent to obtain a criminal suspect's advance consent to collect evidence from the alleged victim, especially when the victim is one who is particularly susceptible to the alleged perpetrator's influence or coercion. When, as in the present case, the alleged abuser is a member of the child's household, requiring a parent's consent to interview the child provides the parent with an opportunity to deliberately or inadvertently influence the child's statements regarding any abuse that may have occurred. Even a parent who is not the alleged perpetrator will often have an emotional and/or a financial interest in maintaining an intact family

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maltreated by their mother, 18% by their father, and 18% by both parents) (last visited June 28, 2010).

[7] *See* http://www.acf.hhs.gov/programs/cb/pubs/cm08/chapter5.htm (last visited June 28, 2010).

unit. For example, there was some suggestion in the present case that removing the allegedly abusive father from the home would have caused the family financial hardship. *See Greene*, 588 F.3d at 1018.

Giving parents and other household members the opportunity to taint the evidence that only the child victim can provide frustrates the objectives of both child protective services and law enforcement personnel:

> The purpose of an . . . interview outside the presence of parents, guardians, or other persons responsible for the care of the child is so that welfare officials and police officers may obtain an untainted interview. The reasons for interviewing without parental consent when a parent is the alleged abuser are obvious.

R.S. v. State, 459 N.W.2d 680, 687 (Minn. 1990). In the interest of protecting children and of obtaining untainted evidence of abuse, many States have codified the circumstances under which children suspected of being abuse victims may be interviewed without parental permission.[8] Given the interests

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[8] *See, e.g.*, Alaska Stat. § 47.17.027(a) (authorizing an interview without parental permission); Minn. Stat. Ann. § 626.556 subd. 10(c) (same); N.H. Rev. Stat. Ann. § 169-C:38, IV (same); N.D. Cent. Code Ann. § 50-25.1-05(2)(b) (same); S.C. Code Ann. § 63-7-920(C) (same); S.D. Codified Laws § 26-8A-9 (same); *see also* Conn. Gen. Stat. Ann. § 17a-101h (authorizing an interview without parental consent if a parent or member of the child's household is the suspected abuser); Mo. Ann. Stat. § 210.145(5)

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that requiring parental consent may jeopardize, authorizing such interviews does not violate the Fourth Amendment's reasonableness requirement.

3. If a Child Welfare Agency Can Determine that Exigent Circumstances Exist Before It Interviews a Child, It Can Simply Take the Child into Temporary Custody and Interview the Child Under the Auspices of that Custody.

A requirement of demonstrating that exigent circumstances justify interviewing a child at school in the absence of a warrant or parental consent is similarly problematic. The Ninth Circuit concluded that exigent circumstances exist when "the caseworker has 'reasonable cause to believe that the child is likely to experience serious bodily harm in the time that would be required to obtain a warrant.'"[9] *Greene*,

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(requiring parental permission only if a parent is not the suspected abuser); Utah Code Ann. § 62A-4a-409(9) (authorizing an interview without parental consent if a parent, stepparent, or parent's paramour is the alleged abuser and authorizing a "minimal interview" of less than fifteen minutes if the perpetrator is unknown); Vt. Stat. Ann. tit. 33, § 4915b(a)(2) (authorizing an interview without parental permission provided that an identified "disinterested adult" is present); Wash. Rev. Code Ann. § 26.44.030(12)(a) (permitting parents to be notified of an interview when it will not jeopardize the safety of the child or the course of the investigation).

[9] The Ninth Circuit concluded that Camreta's interview of S.G. three days after receipt of the report that she may have

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588 F.3d at 1030 n.17 (quoting *Rogers v. County of San Joaquin*, 487 F.3d 1288, 1296 (9th Cir. 2007)). If the child welfare agent is able to determine prior to speaking with the child that the child will suffer harm before a warrant or permission can be obtained, the State – either through the child welfare agency or law enforcement – can simply take temporary custody of the child and conduct the interview under the auspices of its custody.[10]

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been the victim of abuse rendered the "exigent circumstances" exception inapplicable. *Greene*, 588 F.3d at 1030 n.17. The court failed to recognize, however, the staggering workloads under which most child protective services caseworkers operate. According to the U.S. Department of Health and Human Services Administration for Children and Families *Child Maltreatment Report* for 2008, approximately 3.3 million child-abuse referrals involving approximately 6 million children were investigated in fiscal year 2008, with an average response time between report and investigation of 3.3 days. *See* http://www.acf.hhs.gov/programs/cb/pubs/cm08/chapter2.htm (last visited June 28, 2010). With current economic conditions deteriorating rapidly, state resources for investigating child-abuse and neglect reports are likewise evaporating. The time that elapses between a report and an investigation may therefore reflect a lack of resources rather than a determination that no exigent circumstances exist.

[10] See the following statutes providing for emergency removal of children at risk of imminent harm: Ala. Code § 26-14-6; Alaska Stat. § 47.10.142(a)(2) to (3); Ariz. Rev. Stat. § 8-821(B); Ark. Code Ann. § 12-18-1008(a); Colo. Rev. Stat. Ann. § 19-3-401; Conn. Gen. Stat. Ann. § 17a-101g(e); Del. Code Ann. tit. 16, § 907(a), (e); Fla. Stat. Ann. § 39.401(1)(b); Ga. Code Ann. § 15-11-45(a)(4); Haw. Rev. Stat. § 571-31(a); Idaho Code Ann. § 16-1608(1)(a); Ind. Code Ann. § 31-34-2-3(a); Iowa Code Ann. § 232.79(1); Kan. Stat. Ann. § 38-2231(b)(1); Ky. Rev. Stat. Ann.

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B. A Reasonableness Test Similar to the One that This Court Articulated in *New Jersey v. T.L.O.* Would Adequately Protect the Privacy Interests of Affected Children and Families While Preserving the States' Ability to Protect Children and Encourage Cooperation Between Child Welfare Services and Law Enforcement.

States have recognized that the best way to achieve safety for children and to minimize trauma to child victims is to require the state agencies charged with investigating and prosecuting child abuse to cooperate. As demonstrated above, however, the most effective means for doing so render traditional requirements for safeguarding Fourth Amendment

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§ 620.040(5); La. Child. Code Ann. art. 621(A); Me. Rev. Stat. Ann. tit. 15, § 3501(1)(a); Mass. Gen. Laws Ann. ch. 119, § 51B(c); Md. Code Ann., Cts. & Jud. Proc. § 3-8A-14(a)(3); Mich. Comp. Laws Ann. § 712A.14(1); Minn. Stat. Ann. § 260C.175(2)(ii); Mo. Ann. Stat. § 210.125(2); Mont. Code Ann. § 41-3-301(1); Neb. Rev. Stat. Ann. § 43-248; Nev. Rev. Stat. § 432B.390; N.H. Rev. Stat. Ann. § 169-C:6(I); N.J. Stat. Ann. § 9:6-8.29(a); N.M. Stat. Ann. § 32A-3B-3(A); N.Y. Fam. Ct. Act § 1024(a); N.C. Gen. Stat. Ann. § 7B-500(a); N.D. Cent. Code Ann. § 27-20-13(1)(c); Ohio Rev. Code Ann. § 2151.31(A)(3); Okla. Stat. Ann. tit. 10A, § 1-4-201(A)(1); Or. Rev. Stat. Ann. § 419B.150(1)(a); 42 Pa. Cons. Stat. Ann. § 6324(3); R.I. Gen. Laws § 40-11-5; S.C. Code Ann. §§ 16-3-85, -95, 63-5-70, -80, 63-7-620(A); S.D. Codified Laws § 26-7A-12; Tenn. Code Ann. §§ 37-1-113 to -114; Tex. Fam. Code Ann. § 262.104(a); Utah Code Ann. § 78A-6-106(2)(a); Vt. Stat. Ann. tit. 33, § 5301; Va. Code Ann. § 16.1-246(B); Wash. Rev. Code Ann. § 26.44.050; W. Va. Code § 49-6-9(a); Wis. Stat. Ann. § 48.19(1)(d)(5); Wyo. Stat. Ann. § 14-3-405(a)(i).

rights impractical. A reasonableness standard like the one that this Court articulated in *New Jersey v. T.L.O.*, 469 U.S. 325, 340-41, 105 S. Ct. 733, 742 (1985), is an appropriate and workable alternative means of safeguarding the child's and the family's interest in being free from unreasonable searches and seizures, the child's need to be free from abuse, and the State's responsibility for investigating and prosecuting child abuse.

"The fundamental command of the Fourth Amendment is that searches and seizures be reasonable . . . ." *Id.* at 340, 105 S. Ct. at 742. Although warrantless searches are presumptively unreasonable, this Court has recognized that certain situations justify a departure from the traditional Fourth Amendment warrant requirement. *See, e.g., id.* at 340, 105 S. Ct. at 742; *Terry v. Ohio*, 392 U.S. 1, 30-31, 88 S. Ct. 1868, 1884-85 (1968); *Bd. of Ed. v. Earls*, 536 U.S. 822, 826, 837-38, 122 S. Ct. 2559, 2562-63, 2569 (2002). As this Court has explained,

> [i]n assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.

Camara v. Mun. Court, 387 U.S. 523, 533, 87 S. Ct. 1727, 1733 (1967).

Child-abuse investigations necessarily implicate law enforcement issues.[11] Moreover, they are inherently difficult for the children and the families involved. Many States therefore encourage or require cooperation between child welfare agencies and law

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[11] All fifty States have laws criminalizing child abuse. *See* Ala. Code § 26-15-3.1; Alaska Stat. §§ 11.51.100 to .110; Ariz. Rev. Stat. §§ 13-705, -3623; Ark. Code Ann. §§ 5-27-205 to -207; Cal. Penal Code §§ 273a, 273ab; Colo. Rev. Stat. § 18-6-401; Conn. Gen. Stat. Ann. § 53-20; Del. Code Ann. tit. 11, §§ 612, 1102, 1107; Fla. Stat. Ann. §§ 784.085, 827.03; Ga. Code Ann. § 16-5-70; Haw. Rev. Stat. §§ 709-903.5, 709-904; Idaho Code Ann. § 18-1501; 720 Ill. Comp. Stat. 5/12-4.3; Ind. Code Ann. §§ 31-34-1-1, 31-34-1-2, 35-42-2-1; Iowa Code Ann. § 726.6; Kan. Stat. Ann. §§ 21-3608 to -3609; Ky. Rev. Stat. Ann. §§ 508.100 to .120, 530.060; La. Rev. Stat. Ann. §§ 14:93, 14:93.2.3; Me. Rev. Stat. Ann. tit. 17-A, §§ 207(1), 554; Md. Code Ann., Crim. Law § 3-601; Mass. Gen. Laws Ann. ch. 265, §§ 13J, 13L; Mich. Comp. Laws Ann. § 750.136b; Minn. Stat. Ann. §§ 609.377 to .378; Miss. Code Ann. § 97-5-39; Mo. Ann. Stat. §§ 568.045, .050, .060; Mont. Code Ann. § 45-5-622; Neb. Rev. Stat. Ann. § 28-707; Nev. Rev. Stat. § 200.508; N.H. Rev. Stat. Ann. § 639:3; N.J. Stat. Ann. §§ 9:6-1, 9:6-8.9; N.M. Stat. Ann. § 30-6-1; N.Y. Penal Law §§ 120.02, .12; N.C. Gen. Stat. Ann. §§ 14-318.2, -318.4; N.D. Cent. Code Ann. § 12.1-17-01.1; Ohio Rev. Code Ann. § 2919.22; Okla. Stat. Ann. tit. 21, § 843.5; Or. Rev. Stat. Ann. §§ 163.545, .547, .575; 18 Pa. Cons. Stat. Ann. § 4304, 23 Pa. Cons. Stat. Ann. § 6102(a); R.I. Gen. Laws §§ 11-5-14.2, 11-9-5, 11-9-5.3; S.C. Code Ann. § 63-7-20; S.D. Codified Laws § 26-10-1; Tenn. Code Ann. §§ 39-15-401 to -402; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Vt. Stat. Ann. tit. 13, §§ 1303, 1304; Va. Code Ann. § 18.2-371.1; Wash. Rev. Code Ann. §§ 9A.36.120 to .140; W. Va. Code §§ 49-1-3, 61-8D-3, 4; Wis. Stat. Ann. § 948.03; Wyo. Stat. Ann. § 6-2-503.

enforcement departments because as the Ninth Circuit acknowledged, "[i]t may well be that fostering coordination and collaboration between caseworkers and law enforcement officers is an effective way both to protect children and to arrest and prosecute child abusers – each, of course, governmental activity of the highest importance." *Greene*, 588 F.3d at 1029. Indeed, "[s]ome of the measures which seem to have the greatest impact on lowering instances of child sexual abuse are joint protocols with law enforcement and forensic evaluations – teams with individuals from various fields . . . ." Linda Spears, "The Role of the Child Welfare League of America," in *Preventing Child Sexual Abuse: A National Resource Directory and Handbook* (2005).

Nevertheless, the Ninth Circuit found that law enforcement's direct involvement in the *Greene* investigation necessitated the application of "'the general law of search warrants.'" *Greene*, 588 F.3d at 1030 (quoting *Calabretta*, 189 F.3d at 814). It did so even though there was no indication that the law enforcement officer did anything other than observe Petitioner's interview of S.G. while simultaneously engaging in an ongoing investigation into criminal charges against S.G.'s father. *See id.* at 1017. What the Ninth Circuit failed to recognize, however, is that state agencies for protecting children and for prosecuting crimes against children are often required to collaborate under state law and under best-practices principles in both the social work and the law enforcement fields.

Beginning with the passage of the Child Abuse Prevention and Treatment Act (CAPTA) in 1974, Pub. L. No. 93-247, 88 Stat. 4 (Jan. 31, 1974) (codified as amended at 42 U.S.C. §§ 5101 to 5119c), the federal government has demonstrated an interest in improving child-abuse prevention efforts, specifically by "creating and improving the use of multi-disciplinary teams and interagency protocols to enhance investigations," 42 U.S.C. § 5106a(a)(2)(A). States eligible for federal grants to support the development of these multidisciplinary teams may face losing those funds if they are unable to continue using information that was collaboratively collected in cases in which there was law enforcement involvement. *See* 42 U.S.C. § 5106a(b)(2)(A)(xi) (stating that to be eligible for a grant under CAPTA, a State must submit a state plan that includes an assurance that it has in place a state law or a statewide program relating to child abuse and neglect that includes "the cooperation of State law enforcement officials, courts of competent jurisdiction, and appropriate State agencies providing human services in the investigation, assessment, prosecution, and treatment of child abuse or neglect").

Following CAPTA's enactment, the States quickly adopted joint-investigation protocols. New Hampshire's supreme court, for example, recognized that the purpose of the child-abuse reporting and investigating statutes was to "use information obtained from reports of child abuse or neglect as a basis for criminal prosecution of the underlying abuse or

neglect." *State v. Howland*, 125 N.H. 497, 502, 484 A.2d 1076, 1078 (1984). Missouri identifies the following ways that joint-investigation protocols can potentially benefit the victim and the state agencies involved: reducing the number of interviews for child victims, avoiding duplication of efforts, enhancing the quality of evidence, smoothing transitions between investigation and intervention, facilitating direct communication between team members, improving team members' skills by "sharing different perspectives," enhancing efficiency, and expediting treatment. Mo. Dep't of Soc. Servs., *Child Welfare Manual*, sec. 2, ch. 4, subsec. 2 (2008).[12]

The fact that information gleaned from a cooperative investigation between child welfare services and law enforcement may ultimately be used to pursue criminal charges against an abuser should not negate the collaborative child-interview processes that many state statutes contemplate. For example, Arizona's Legislature required Arizona's Department of Economic Security to develop and implement protocols with law enforcement for investigating and sharing information regarding reports of abuse that implicate certain Arizona criminal statutes. Ariz. Rev. Stat. §§ 8-304(B), -801(2), -807(B), -817.

Multidisciplinary investigation of allegations of sexual abuse or serious physical abuse are also

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[12] Accessible at http://dss.mo.gov/cd/info/cwmanual/section2/ch4/sec2ch4sub2.htm (last visited June 28, 2010).

required in Oklahoma "when appropriate and possible," Okla. Stat. tit. 10A, § 1-2-105(B)(5), to "ensure coordination and cooperation between all agencies involved so as to increase the efficiency in handling such cases and to minimize the stress created for the allegedly abused child by the legal and investigatory process," Okla. Stat. tit. 10A, § 1-9-102. New Hampshire's child welfare and justice departments are required to develop protocols for interviewing victims and investigating child-abuse allegations to minimize the impact on the victim. N.H. Rev. Stat. Ann. § 169-C:38-a. Vermont permits collaboration to, among other things, "evaluate risk to a child." Vt. Stat. Ann. tit. 33, § 4915(f). At least seventeen other States have similar statutes in effect that mandate or encourage collaboration between child welfare departments and law enforcement agencies investigating child-abuse allegations.[13]

In *Illinois v. Lidster*, 540 U.S. 419, 423, 124 S. Ct. 885, 889 (2004), this Court noted that traditional Fourth Amendment protections may be unnecessary

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[13] *See* Ala. Code §§ 26-16-13, -50; Alaska Stat. §§ 47.14.300(a), .17.033(j); Cal. Penal Code § 11166(a), (j), (k); 12 Colo. Code Regs. § 2509-3:7.202.51(A); Colo. Rev. Stat. § 19-3-308(4)(a); Del. Code Ann. tit. 16, § 906(b)(15); Haw. Rev. Stat. § 588-1(b)(5); Idaho Code Ann. § 16-1617; Idaho Admin. Code r. 16.06.01.570; 352 Ill. Comp. Stat. Ann. 5/7.1(a), 5/7.3; Ky. Rev. Stat. Ann. § 620.040(7); Mo. Ann. Stat. § 210.145(10); N.Y. Soc. Serv. Law §§ 423(6), 424(5-a); N.D. Cent. Code §§ 50-25.1-05(2), -12; S.C. Code Ann. § 63-7-980; Tenn. Code Ann. §§ 37-1-607, -611(a)(3); Utah Code Ann. § 62A-4a-202.3(8); Wash. Rev. Code Ann. § 26.44.180(2); Wis. Stat. Ann. § 48.981(3)(a)(4).

when the "primary law enforcement purpose" of a search or seizure is "*not* to determine whether [the person seized was] committing a crime," but is rather to obtain information regarding a crime that someone else has committed. This Court further noted that requests for information from and interviews of potential witnesses "play a vital role in police investigatory work" and are "'essential tool[s] in effective law enforcement.'" *Id.* at 425, 124 S. Ct. at 890 (quoting *Haynes v. Washington*, 373 U.S. 503, 515, 83 S. Ct. 1336, 1344 (1963)). The Ninth Circuit did not address in the present case the distinction between possible perpetrators of crime and possible witnesses (including victims) of crime that this Court recognized in *Lidster*.

As evidence of the States' understanding that interviews of child-abuse victims are different from interviews of suspected criminals – even when law enforcement is involved in the investigation – many States have enacted laws and promulgated policies to minimize the traumatic impact of an investigation on a child victim. They require cooperation and coordination between child welfare workers and law enforcement personnel precisely to "avoid a duplication of fact-finding efforts and multiple interviews," Minn. Stat. Ann. § 626.556, subd. 10(a), and to "consider the needs of the child victim and . . . do whatever is necessary to prevent psychological harm to the child victim," Cal. Penal Code § 11164(b).

One way to minimize the harm to the child victim is to conduct interviews in a safe, familiar

environment away from the site of the abuse and outside the perpetrator's presence. Several States encourage just such an approach.[14] States have also recognized the importance of interviewing children in a safe place by explicitly authorizing interviewing children at school. *See, e.g.,* Cal. Penal Code § 11174.3; N.H. Rev. Stat. Ann. § 169-C:38, IV; N.D. Cent. Code Ann. §§ 50-25.1-05(2)(c), -05.05; Okla. Stat. tit. 10A, § 1-2-105(B)(1); Wash. Rev. Code Ann. § 26.44.030(12)(a); 89 Op. Att'y Gen. 049 (Utah 1990); *see also* Mo. Dep't of Soc. Servs., *Guidelines for Mandated Reporters of Child Abuse and Neglect* at 26.[15]

Another safeguard that States have adopted is to specifically limit the number of times that state entities may interview a child-abuse victim or to encourage that interviews be kept to a minimum to "minimize[ ] the trauma to the children and their

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[14] *See* Ariz. Dep't of Econ. Sec. Policy Manual ch. 2:1 (accessible at https://app.azdes.gov/DCYF/CMDPS/CPS/policy/servicemanual.htm) (follow "Chapter 2" hyperlink; then follow "2:1" hyperlink) (last visited June 28, 2010); Tenn. Dep't of Children's Servs. Admin. Policies & Procedures: 14.6(B)(4) (accessible at http://tn.gov/youth/dcsguide/policies/chap14/14.6.pdf) (last visited June 28, 2010); Utah Dep't of Human Servs. Policy Manual 203.1a(A)(4) (accessible at http://www.hspolicy.utah.gov/dcfs/) (follow "200: Child Protective Services" hyperlink; then follow "203.1a" hyperlink) (last visited June 28, 2010); *see also* N.H. Att'y Gen. *Task Force on Child Abuse and Neglect* at 51 (accessible at http://doj.nh.gov/victim/documents/lawenforcement.pdf) (last visited June 28, 2010).

[15] Accessible at http://www.dss.mo.gov/cd/pdf/guidelines_can_reports.pdf (last visited June 28, 2010).

non-offending family members" during investigations. N.Y. Soc. Serv. Law § 423-a(1), (2)(f); *see also* Ala. Code § 15-1-2(a); Alaska Stat. § 47.17.033(c); Cal. Penal Code § 13517(a); Colo. Rev. Stat. § 19-3-308.5(1)(a); Conn. Gen. Stat. Ann. § 17a-101h; Fla. Stat. Ann. § 914.16; Haw. Rev. Stat. § 588-1(b)(3); Idaho Admin. Code r. 16.06.01.559(01); N.H. Rev. Stat. Ann. § 169-C:38, II; N.D. Cent. Code § 12.1-35-04; S.C. Code Ann. § 63-7-920(C); Tenn. Code Ann. § 37-1-607(b)(3)(B); Utah Code Ann. § 77-37-4; W. Va. Code §§ 61-8B-14, -8C-5(a). Utah allows child welfare workers to rely on written reports of interviews that law enforcement personnel have previously conducted if an additional interview is not in the child's best interests. Utah Code Ann. § 62A-4a-202.3(3).

States have also mandated that anyone responsible for conducting the interviews possess specialized training to maximize the effectiveness of the interview while minimizing the trauma to the child. *See* Ariz. Rev. Stat. § 8-802(E) (requiring forensic interviewing training for investigators); Haw. Rev. Stat. § 588-1(b)(6) (providing for training and continuing education for skilled professional child-abuse interviewers); Idaho Code Ann. § 16-1617(3) (requiring that members of multidisciplinary teams tasked with investigating child-abuse allegations be "trained in risk assessment, dynamics of child abuse and interviewing and investigatory techniques"); 12 Colo. Code Regs. § 2509-3:7.202.52(B) (requiring specialized training for investigators); Okla. Stat. Ann. tit. 10A, § 1-9-102(C)(1)(b), (g) (requiring efforts

to minimize the impact of interviews on victims and requiring training for investigators and interviewers).

As these examples demonstrate, many States have enacted laws and adopted policies that recognize that interviews of suspected child-abuse victims differ from interviews of suspected criminals – even when law enforcement personnel are involved in the child-abuse investigations. The standard applied to determine whether interviews of suspected child-abuse victims comply with Fourth Amendment requirements should also take those differences into account. The reasonableness balancing test that this Court has applied in similar circumstances would be able to account for the differences while ensuring that the Fourth Amendment's requirements were met. The Ninth Circuit's ruling, in contrast, imposes an unwieldy burden on the States that disrupts their vital goals of protecting children and prosecuting abusers and that is not necessary to protect the Fourth Amendment rights involved. It is therefore erroneous, and this Court should reverse it.

II. Despite the Ruling in Petitioner's Favor on the Qualified-Immunity Issue, the Ninth Circuit's Fourth Amendment Ruling Created Clear Constitutional Precedent that Petitioner Should Be Permitted to Challenge.

At one point, this Court required courts deciding claims under 42 U.S.C. § 1983 to determine whether a constitutional question existed before reaching the

issue of the state actor's qualified immunity from suit. *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151 (2001). The Court later acknowledged problems with requiring rigid adherence to that framework and allowed courts to determine the constitutional-issue and the qualified-immunity questions in whatever order was most expeditious, while recognizing that the *Saucier* order might well be the best vehicle for developing constitutional precedent. *Pearson v. Callahan,* ___ U.S. ___, ___, 129 S. Ct. 808, 818 (2009). In doing so, this Court acknowledged that *Saucier*'s two-part test "may make it hard for affected parties to obtain appellate review of constitutional decisions that may have a serious prospective effect on their operations," but provided no clear-cut remedy for cases in which the lower court elected to follow the *Saucier* protocol. *Id.* at ___, 129 S. Ct. at 820.

Dissenting from the denial of certiorari in *Bunting v. Mellen*, 541 U.S. 1019, 1022-23, 124 S. Ct. 1750, 1753-54 (2004), Justices Scalia and Rehnquist noted the problem with requiring courts to first address whether a constitutional question exists. While *Pearson* resolved some of the issues that Justices Scalia and Rehnquist raised, the question whether a lower court's constitutionality ruling is reviewable when the respondent prevails on the qualified-immunity issue remains. As Justices Scalia and Rehnquist noted, this Court's "practice reflects a 'settled refusal' to entertain an appeal by a party on an issue as to which he prevailed." *Id.* at 1023, 124 S. Ct. at 1754 (quoting Robert L. Stern, et al.,

Supreme Court Practice 79 (8th ed. 2002)). Justices Scalia and Rehnquist nevertheless believed that this "general rule should not apply where a favorable judgment on qualified-immunity grounds would deprive a party of an opportunity to appeal the unfavorable (and often more significant) constitutional determination." *Id.*

As Petitioner noted, the Ninth Circuit's decision is "an unambiguous constitutional ruling that is binding in future cases." (Petition at 29.) The Ninth Circuit acknowledged that the state of the law was unclear when Petitioner interviewed S.G. *Greene*, 588 F.3d at 1031, 1033. Recognizing that addressing constitutional issues even when qualified immunity applies "'promotes the development of constitutional precedent'" and attempting to clarify Fourth Amendment issues in future child-abuse investigations, *see id.* at 1021 (quoting *Pearson*, ___ U.S. at ___, 129 S. Ct. at 818), the Ninth Circuit promulgated a constitutional standard that conflicts with this Court's prior rulings, further divides the circuits, and unreasonably hampers States' ability to effectively investigate child-abuse allegations.

Permitting Petitioner to challenge the Ninth Circuit's constitutional holding despite his qualified immunity in this case furthers the goal of developing *correct* constitutional precedent, while adhering to this Court's policy against reviewing mere dicta. *Pearson,* ___ U.S. at ___, 129 S. Ct. at 820; *Bunting*, 541 U.S. at 1023-24, 124 S. Ct. at 1754 (Scalia, J., dissenting). The only other way for Petitioner or

Amici States to obtain review of the Ninth Circuit's ruling would be to defy it, await a challenge, and then petition this Court for review. That process, however, could seriously burden the individual children and families involved, who could be forced to endure a lengthy legal proceeding because of a procedural technicality. In this case, however, Petitioner has already been found to be immune from suit. Although S.G. and her family certainly have an interest in the outcome of these proceedings, they have not sought review of the Ninth Circuit's grant of qualified immunity to Petitioner and this Court's ruling therefore will not practically impact their rights. The same might not be true in a future case.

Under the present state of the law and despite the removal of the *Saucier* two-part test, because Petitioner "prevailed" when he was granted qualified immunity, his ability to seek review of the ruling is inhibited. Because the Ninth Circuit's erroneous ruling on the constitutional issue is one of nationwide importance, however, this Court should grant certiorari notwithstanding Petitioner's "success" on the merits.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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