No. 09-1454 MAY 27 2010

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.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

JOHN R. KROGER
Attorney General of Oregon
MARY H. WILLIAMS
Deputy Attorney General
***DAVID B. THOMPSON**
Acting Solicitor General
ANNA JOYCE
Assistant Attorney General
400 Justice Building
Salem, Oregon 97301-4096
Phone: (503) 378-4402
david.b.thompson@doj.state.or.us
Counsel for Petitioner

***Counsel of Record**

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QUESTIONS PRESENTED

(1) 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?

(2) 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?

PARTIES TO THE PROCEEDING

Petitioner is a State of Oregon Department of Human Services caseworker. Other interested parties include Deschutes County and James Alford (Deschutes County Deputy Sheriff), the Bend LaPine School District, and Terry Friesen, a school district employee. Respondent is the mother of a child on whose behalf the lawsuit was brought.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Bob Camreta asks this Court to review the Ninth Circuit's decision in this case. A child-protection caseworker and a law-enforcement officer learned that a nine-year-old child was possibly being sexually abused, in her home, by her father. Because the suspected perpetrator was a parent living in the home, the caseworker and officer went to the child's public school—a safe location away from her father—to talk with her about the allegations and determine whether further steps were necessary to protect her. The Ninth Circuit accepted the district court's conclusion that the interview effected a "seizure" of the child, and that the seizure could be constitutional only if it was supported by a warrant, a court order, exigent circumstances, or parental consent. The Ninth Circuit thus imported the standard used to evaluate the constitutionality of seizures of suspected criminals and imposed it on interviews of potential victims or witnesses.

Review is warranted for the following reasons:

(1) The Ninth Circuit's decision conflicts with decisions from this Court, and does so in a way that eviscerates state officials' ability to investigate allegations of child abuse. Because child abuse, and child sexual abuse in particular, most frequently occurs only with the knowledge of the perpetrator and the victim, state officials often will not have enough information to rise to the level of probable cause justifying a warrant *before* interviewing the victim. And yet the Ninth Circuit has required just that: absent exigent circumstances or parental consent (unfeasible

when one of the suspected perpetrators is a parent), child-protection workers and law-enforcement officers must obtain a warrant based on probable cause before interviewing a child who may be the victim of sexual abuse.

The Ninth Circuit's decision thus delays child-abuse investigations and leaves possible victims of child abuse at further risk of going unprotected. And that result is not, as the Ninth Circuit held, compelled by the Fourth Amendment. As this Court has made clear in other contexts, the Fourth Amendment's traditional probable cause/warrant requirements do not apply when state officials have temporarily detained an individual who is not suspected of wrongdoing. Stated another way, although those traditional Fourth Amendment requirements apply when officials seize a suspected criminal, when a potential witness is temporarily detained, it need not be justified by individualized suspicion. *See, e.g.*, *Illinois v. Lidster*, 540 U.S. 419, 424 (2004). This Court has, in those cases, instead applied a balancing test that takes into account the level of intrusion on the individual's privacy, the liberty interests of the person seized, and the government's competing interests. That same test is equally applicable when interviewing a child believed to be a victim of sexual abuse. The Ninth Circuit's decision to the contrary conflicts with this Court's caselaw, and thus warrants review.

(2) The Ninth Circuit's decision also adds to a growing division among the circuits as to the appropriate constitutional standard to apply to seizures of children, in public schools, for purposes of confirming

whether they are victims of child abuse. Some circuits apply the test identified in *Lidster*, and others apply the traditional Fourth Amendment test of probable cause and a warrant. This Court should resolve which standard applies to these types of child-abuse investigatory interviews.

Opinions Below

The memorandum decision of the Ninth Circuit—reported at *Greene v. Camreta*, 588 F.3d 1011 (9th Cir. 2009)—is in the appendix to this petition. (Pet. App. 1-54). The unreported district court's opinion also is in the appendix. (Pet. App. 55-75).

Jurisdiction

Jurisdiction to review the judgment by writ of certiorari is conferred on the Court by 28 U.S.C. § 1254(1). The Ninth Circuit filed its opinion on December 10, 2009. The Ninth Circuit denied rehearing by order dated March 1, 2010. This petition is timely filed.

Statutory and Constitutional Provisions Involved

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

42 U.S.C. § 1983 (2006) provides, in pertinent part, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

Statement of the Case

Respondent, the parent of the child who state officials suspected might be the victim of sexual abuse, brought a lawsuit under 42 U.S.C. § 1983 for alleged violations of the Fourth and Fourteenth Amendments after state officials interviewed the child about the allegations of sexual abuse. The Ninth Circuit concluded that the child-protection caseworker and law-enforcement officer had violated the child's rights, but that they were entitled to qualified immunity. Petitioner seeks certiorari of that decision.

A. After receiving information that S.G. might be the victim of sexual abuse, an officer and a child-protection services caseworker went to S.G.'s school to interview her.

For purposes of this Court's review, petitioner recites the following facts, as recounted by the Ninth

Circuit.[1] Police arrested Nimrod Greene (Nimrod) on February 12, 2003, based on suspicion that he sexually abused F.S., a seven-year-old boy. *Greene*, 588 F.3d at 1016. F.S. reported to his parents that Nimrod had touched his penis over his jeans when Nimrod was intoxicated, and that Nimrod had done that once before as well. *Id.* F.S.'s mother told police officers that Nimrod's wife, Sarah, had talked about how she did not like the fact that Nimrod made their daughters, S.G. and K.G., sleep in his bed when he is intoxicated. *Id.* F.S.'s father told officers that Nimrod himself had commented that his wife Sarah had accused him of sexually abusing his daughters and that she did not like S.G. and K.G. lying in Sarah and Nimrod's bed when Nimrod was drunk. *Id.*

The Oregon Department of Human Services (DHS) learned of those allegations about a week after police arrested Nimrod. *Greene*, 588 F.3d at 1016. The following day, Bob Camreta, a caseworker for DHS, learned that Nimrod had been released from jail and was having unsupervised contact with K.G. and S.G. DHS assigned Camreta to assess the children's safety. *Id.* Based on his training and experience, Camreta was "aware that child sex offenders often act on impulse and often direct those impulses against their own children, among others. For this reason, [he

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[1] Because petitioner Camreta appealed a grant of summary judgment to respondent, the court drew all reasonable inferences in respondent's favor. *Greene*, 588 F.3d at 1021.

was] concerned about the safety and well-being of Nimrod Greene's own small children." *Id.*

The following Monday, Camreta and Deputy Sheriff Alford went to S.G.'s elementary school to interview her. *Greene*, 588 F.3d at 1016. Camreta chose to interview her at her school because schools are "a place where children feel safe and would allow him to conduct the interview away from the potential influence of suspects, including parents." *Id.* According to Camreta, "[i]nterviews of this nature, on school premises, are a regular part of [child-protective services] practice and are consistent with DHS rules and training." *Id.* DHS did not inform S.G.'s mother, Sarah, about the interview. *Id.* at 1016-17. Camreta also did not obtain a warrant or other court order before the interview. *Id.* at 1017.

When caseworker Camreta and Deputy Alford arrived at S.G.'s school, Camreta told school officials that he and Alford were there to interview S.G., and he requested use of a private office. *Greene*, 588 F.3d at 1017. Terry Friesen, an elementary school counselor, went to S.G.'s classroom and told her that someone was there to talk with her. *Id.* Friesen took S.G. to the room where Camreta and Deputy Alford were waiting, and she then left. *Id.* Camreta interviewed S.G. for two hours in Deputy Alford's presence. *Id.* The interview was not recorded. *Id.* Alford, who had a visible firearm, did not ask any questions during the interview. *Id.*

According to Camreta, S.G.—during the interview—disclosed several incidents of sexual abuse by Nimrod. In contrast, S.G. later recounted that she felt

pressured by Camreta and "just started saying yes to whatever he said." *Greene*, 588 F.3d at 1017.

Nimrod was indicted on six counts of felony sexual assault involving S.G. and F.S. *Id.* at 1018. A jury could not reach a verdict on the charges. *Id.* at 1020. Facing a retrial, Nimrod accepted an *Alford* plea with respect to the charges involving F.S. *Id.* In exchange, the charges related to S.G. were dismissed. *Id.*

B. Respondent filed a § 1983 action, and the district court granted summary judgment in favor of petitioner.

On behalf of herself and her minor children (S.G. and K.G.), respondent Sarah Greene sued Camreta under 42 U.S.C. § 1983 for alleged violations of the Fourth and Fourteenth Amendments. *Greene*, 588 F.3d at 1020. Greene alleged that Camreta violated S.G.'s Fourth Amendment right to be free from unreasonable seizures when he, along with Deputy Alford, had S.G. removed from her classroom, taken to another room, and subjected to an interview about possible sexual abuse by her father. *Id.*

The district court granted Camreta summary judgment. *Id.* The court ruled that S.G. had been seized for purposes of the Fourth Amendment, but that no constitutional violation occurred. *Id.* The court extended the analysis of *Doe v. Bagan*, 41 F.3d 571 (10th Cir. 1994), to the facts of this case. (Pet. App. 52-53). In *Bagan*, the Tenth Circuit considered whether the in-school seizure of a nine-year-old boy by a social-services caseworker, to interview him about his possible sexual abuse of another child, vio-

lated the Fourth Amendment. *Bagan*, 41 F.3d at 573-74. Applying the balancing test from *Terry v. Ohio*, 392 U.S. 1 (1968), as incorporated in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)[2], the *Bagan* court held that no constitutional violation occurred. 41 F. 3d at 574 n.3. It reasoned that the seizure "was justified at its inception because a victim of child abuse had identified [the boy] as her abuser[,] [and because] a ten minute interview with a social services caseworker was reasonably related in scope to determining [the boy]'s role in the incident." *Id.*

The district court concluded that, under the *Bagan/Terry* analysis, the seizure of S.G. was reasonable at its inception (supported by a reasonable suspicion that S.G. had been sexually abused by her father) and was reasonable in scope (the interview's length was justified under the circumstances). (Pet. App. 62-64). The court ruled alternatively that, even if the seizure was unconstitutional, qualified immunity protected Camreta from liability. (Pet. App. at 70-71).

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[2] In *T.L.O.*, the Court held that a school official's warrantless, in-school search of a student's purse, based on a reasonable suspicion that it contained evidence of a violation of the law or a school rule, did not violate the Fourth Amendment. 469 U.S. at 340-41.

C. The Ninth Circuit concluded that the caseworker and deputy sheriff violated the Fourth Amendment when—without a warrant, court order, exigent circumstances, or parental consent—they jointly interviewed S.G. at her school about suspected sexual abuse.

On appeal, the Ninth Circuit rejected the district court's conclusion that the in-school interview of S.G. was constitutional. As a preliminary matter, the Ninth Circuit explained that although the court was no longer required to undergo the two-step sequential inquiry established in *Saucier v. Katz*, 533 U.S. 194 (2001), it opted to do so in this case, because "the constitutional standards governing the in-school seizure of a student who may have been abused by her parents are of great importance." *Greene*, 588 F.3d at 1021. The court noted that although other circuits have addressed the issue, thereby providing guidance to law enforcement, school officials, and social workers, the Ninth Circuit had not yet addressed the issue. *Id.* Therefore, the court "address[ed] both prongs of the qualified immunity inquiry in this case, to provide guidance to those charged with the difficult task of protecting child welfare within the confines of the Fourth Amendment." *Id.* at 1022.

On the merits, the Ninth Circuit concluded that its decision in *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999), went "a fair way" towards resolving the issue presented. *Greene*, 588 F.3d at 1022. That case involved a social worker and a police officer visiting the family home, entering without consent, and in-

terviewing and examining the children. The Ninth Circuit held that traditional Fourth Amendment protections—that is, the "general law of search warrants"—applied to child-abuse investigations. *Id.* at 1030 (quoting *Calabretta*, 189 F.3d at 814).

Extending its reasoning in *Calabretta,* which involved an in-home seizure, to the facts of this case—involving a seizure of a child victim while she was at public school—the Ninth Circuit concluded that before the deputy sheriff or caseworker "seized" S.G., they were required to obtain a warrant, court order or parental consent, or demonstrate that they acted with probable cause and under exigent circumstances. *Greene*, 588 F.3d at 1030. The Ninth Circuit did not specifically address petitioner's argument that *Terry*, 392 U.S. 1, did not require either probable cause or a warrant in this case. Instead, the court determined that *T.L.O.* did not apply, because the seizure at issue was not conducted by school officials. *Id.* at 1024-25. It then rejected the idea that the "special needs" doctrine[3] applied, concluded that the involvement of law enforcement in the interview warranted the extension of "traditional" Fourth Amendment protections, and held that petitioner had violated the Fourth Amendment by interviewing S.G. *Id.* at 1026-27.

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[3] "Special needs" cases are those in which the government has identified some need, "'beyond the normal need for law enforcement,'" to justify departure from the traditional Fourth Amendment standards. *See e.g., Ferguson v. Charleston*, 532 U.S. 67 (2001).

At the same time, the Ninth Circuit agreed with the district court's ruling that because the constitutional right at issue was not clearly established, Camreta was protected by qualified immunity. *Id.* at 1033. The Ninth Circuit nevertheless made explicit that "government officials investigating allegations of child abuse should cease operating on the assumption that a 'special need' automatically justifies dispensing with traditional Fourth Amendment protections in this context." *Id.*

Petitioner petitioned the Ninth Circuit for rehearing. (Pet. App. 79-96). Petitioner argued that the Ninth Circuit should apply the standard this court articulated in *Lidster*. (Pet. App. at 89-91). The Ninth Circuit denied the petition for rehearing. (Pet. App. 66-67).

REASONS FOR GRANTING THE WRIT

This case presents a scenario that occurs daily across the country: a child-protection caseworker and law-enforcement officer learn of an allegation of possible child abuse perpetrated by a parent living in the child's home. Rather than going to the child's home, where the suspected perpetrator is present, the caseworker and officer go to the child's school to investigate the allegation. The caseworker and officer jointly interview the child, because conducting a single interview minimizes both trauma to the possible victim and potential contamination of the victim's statements.

The dual purposes of the interview are to protect the child and, if the investigation turns up evidence of

a crime, to pursue criminal charges against the perpetrator. Depending on the particular circumstances of an interview, interviewing a child may effect a Fourth Amendment seizure.[4] But the lawfulness of that seizure should not necessarily be measured by applying the same standard that applies to a seizure of a suspected criminal. To the contrary, this Court—in assessing the legality of other warrantless seizures that are minimally intrusive, *Terry*, 392 U.S. 1, or that involve a potential witness, *Lidster*, 540 U.S. 419—has applied a reasonableness balancing test. That balancing test weighs the seriousness of the governmental intrusion on the privacy and liberty interests of the person seized against the government's competing interests—here, its substantial interest in the prompt and effective investigation of conduct that seriously endangers the welfare of children. Rather than apply that balancing test to assess seizures of potential witnesses, the Ninth Circuit instead applied the standard that traditionally applies in evaluating seizures of suspected *criminals*.

By doing so, the Ninth Circuit has created a nearly insurmountable hurdle for those charged with investigating child abuse. Because child abuse—and sexual abuse in particular—most often occurs behind closed doors, developing probable cause to obtain a warrant *before* interviewing the victim will almost

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[4] Because on review from summary judgment, courts review the facts most favorable to the non-moving party—here, respondent—petitioner did not challenge the district court's conclusion that the child had been "seized."

never be possible. The Ninth Circuit's decision thus creates the very real risk that children will go unprotected because child-protection workers and law-enforcement officers cannot interview them about allegations of child sexual abuse.

And the Ninth Circuit's opinion will impact *all* child-abuse investigations, not only those in which the circumstances of an interview make it difficult to dispute that the child has been "seized." Admittedly, not every interview of a potential child-abuse victim will amount to a constitutional seizure. But determining whether a seizure has occurred involves considering a totality of factors and is not readily or easily discernible in every circumstance. *See, e.g.*, *United States v. Drayton*, 536 U.S. 194, 204 (2002) (No seizure when there was "no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authoritative tone of voice."). The Ninth Circuit's decision will cause child-protection workers investigating allegations of child abuse to be wary of *any* interview of a possible child-abuse victim, even if that interview may fall short of a seizure. Officials will not want to risk a court determination that their warrantless actions in fact amounted to a seizure, and will not want to risk the further conclusion that necessarily will follow under the Ninth Circuit's decision—that the seizure was unconstitutional, and that they are thus liable for the conduct.

This Court should thus grant certiorari to decide whether the Fourth Amendment's probable

cause/warrant requirement applies to child-abuse investigations in a school setting or whether—as this Court has suggested in other contexts—interviews of possible child-abuse victims should be assessed under the balancing test. Granting certiorari in this case also will resolve the growing conflict among circuits over the constitutional standard that applies to interviews of potential child-abuse victims.

A. The Ninth Circuit's decision runs contrary to this Court's precedent and, in the process, significantly impairs investigating allegations of child abuse.

1. By imposing a Fourth Amendment standard that this Court has never required in similar cases, the Ninth Circuit's decision prevents state officials from investigating claims of child sexual abuse.

Protecting children is one of society's most important roles. *Wyman v. James*, 400 U.S. 309, 318 (1971) ("There is no more worthy object [that of caring for the young] of the public's concern."); *Santosky v. Kramer*, 455 U.S. 745 (1982) (finding and preventing child abuse is a compelling government interest). Because child sex-abuse is a crime that takes place behind closed doors, not out in the open, the opportunity to develop proof independent of the victim is remote. Investigative interviews of suspected child-abuse victims almost always occur before government officials have "probable cause" to believe the abuse has occurred. Thus, in most cases investigators would be unable to get a warrant for an in-school interview like that which occurred here. Requiring social work-

ers and law-enforcement officers to first develop probable cause that the child has been abused and then obtain a warrant will cause an inevitable delay in the investigation and often will result in an inability to protect the child at all. Those considerations help demonstrate why a warrantless interview that effects a seizure in a case like this nevertheless should be deemed "reasonable" and thus constitutional.

And the Ninth Circuit's decision reaches beyond those cases in which a child has been "seized" at some point during a child-abuse investigation. The Ninth Circuit clearly announced—and made explicit—that its decision should be used as a guide for those who investigate child-abuse allegations in future cases. Its decision is triggered only if, at some point during the interview of the potential child-abuse victim, state officials "seize" that child. Given the difficulties inherent in determining whether and when a seizure has occurred, *see United States v. Mendenhall*, 446 U.S. 544 (1980), and because virtually any warrantless seizure under those circumstances will—under the Ninth Circuit's decision—necessarily be deemed unconstitutional, officials likely will attempt to limit their liability exposure by avoiding *any* situation in which a court *could* find that they "seized" a child during a child-abuse investigation. That, in turn, creates a significant risk that state officials will forgo efforts to timely interview the potential victim—who often is, aside from the perpetrator, the only one with information about the abuse. That will further impair state officials' ability to protect the victims.

The Ninth Circuit's decision also hampers state officials from investigating child abuse in the most effective and safest way possible. The Ninth Circuit was particularly troubled by the fact that a law-enforcement officer joined the social worker in interviewing the child. *Greene*, 588 F.3d at 1027. But that practice is in fact widespread and, in many states, mandated by law. Jointly interviewing a child-abuse victim is widely viewed as the "best practice" for investigating allegations of child abuse and preventing greater trauma to the child. *See* Catherine Dixon, *Best Practices in the Response to Child Abuse*, 25 Miss. C. L. Rev. 73, 82 (Fall 2005) ("Within a very short time, the child could be questioned about a very traumatic incident by eight different professionals. For a child who is injured and also traumatized, this is an additional system-induced trauma."). Reducing the number of interviews not only minimizes the amount of trauma to the child, but also lowers the risk that the child's statements will be contaminated by multiple interviews. *Id.* at 83 ("Ultimately, children who are interviewed multiple times may begin to recant, if only to stop the frightening, overwhelming process of the investigation. By coordinating the multi-agency response to child abuse, and by designating a forensic interviewer, children are spared additional stress and better information is obtained, inevitably leading to better decision-making.").

In accordance with those "best practices," most states either require or permit multidisciplinary investigations. *See, e.g.*, Or. Rev. Stat. § 419B.020(2)(a) ("The department [of Human Services] and the law enforcement agency shall jointly determine the roles

and responsibilities of the department and the agency in their respective investigations[.]"); N.Y. Exec. Law § 642-A(1), (criminal agencies shall use multidisciplinary teams to investigate and prosecute child abuse cases, in part to "minimize the number of times the child is called upon to recite the events * * *."); Conn. Gen. Stat. § 17a-101h (investigatory activities to be coordinated "in order to minimize the number of interviews of any child"). The Ninth Circuit's decision not only impairs social workers' ability to carry out their responsibilities to protect children, but it also prevents these multidisciplinary teams from carrying out their investigations in the safest and most effective manner.

Petitioner recognizes that difficulty in investigating child abuse is not a reason to grant review, if that difficulty is created out of adherence to the Fourth Amendment. But—as explained in greater detail below—the Fourth Amendment does not impose that standard, and thus the Ninth Circuit's decision unnecessarily creates obstacles to investigating child abuse. As this Court has held on several different occasions, the Fourth Amendment standard for determining the reasonableness of seizures of suspected criminals does not apply when evaluating seizures that are minimally intrusive or that involve potential witnesses.

2. By applying the standard used to assess the constitutionality of seizures of suspected criminals to the interview of a possible child sexual-abuse victim, the Ninth Circuit disregarded this Court's decisions applying a Fourth Amendment balancing test to interviews of potential witnesses.

To effect a lawful seizure under the Fourth Amendment, state actors generally require either (1) probable cause to believe that the individual has engaged in or is engaging in criminal conduct or (2) a warrant based upon probable cause. *Dunaway v. New York*, 442 U.S. 200, 208-09 (1979). But as this Court has noted, sometimes the individualized suspicion requirement—in the form of probable cause—"has little role to play." *Lidster*, 540 U.S. at 424. This case presents such an instance: the traditional probable cause/warrant standard used to evaluate the constitutionality of seizures of suspected criminals has "little role to play" when child-protective caseworkers and law-enforcement officers, while investigating child-abuse allegations, interview children who are potential witnesses or victims at the hands of their parents. Instead of applying the standards used to assess the constitutionality of seizures of suspected criminals, the Ninth Circuit should have weighed the gravity of the public concerns served by the seizure effected in this case, the degree to which the seizure advanced the public interest, and the severity of the interference on the individual's liberty.

a. This Court has held that the Fourth Amendment requires only a reasonableness balancing test for less-intrusive seizures or for seizures of potential witnesses.

The ultimate touchstone of the Fourth Amendment is "'reasonableness.'" *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). Traditionally, "the Fourth Amendment's guarantee against unreasonable seizures of persons was analyzed in terms of arrest, probable cause for arrest, and warrants based on such probable cause." *Dunaway*, 442 U.S. at 208. But this Court also has held that the Fourth Amendment does not impose an "irreducible requirement" of individualized suspicion. *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561 (1976). This Court has thus defined "a special category of Fourth Amendment 'seizures' so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment 'seizures' reasonable could be replaced by a balancing test." *Dunaway*, 442 U.S. at 210.

For instance, when evaluating a "stop and frisk"—an intrusion less severe than a traditional arrest—courts balance "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Terry*, 392 U.S. 1; *Brown v. Texas*, 443 U.S. 47, 51 (1979). That balancing is part of the overall reasonableness inquiry, which asks "whether the officer's action was justified at its inception, and whether it was reasonably re-

lated in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20.

Similarly, this Court has applied *Terry*'s twofold, reasonable-at-its-inception/reasonable-in-scope inquiry to determine the constitutionality of a search that took place at a public school. In doing so, this court noted that "students within the school environment have a lesser expectation of privacy than members of the population generally." *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring); *see also Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 655-57 (1995) (noting reasons why students have lesser expectation of privacy in public school). Citing *Terry* and its progeny, this Court observed that "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, [this Court] ha[s] not hesitated to adopt such a standard." *T.L.O.*, 469 U.S. at 341.

Both *Terry* and *T.L.O.* involved less-intrusive seizures of individuals suspected of wrongdoing. This Court applied that same reasonableness balancing standard when state officials have seized an individual who is not suspected of wrongdoing. In *Lidster*, this Court considered whether the brief, suspicionless detention of motorists at a police checkpoint, to determine if they had witnessed a recent hit-and-run accident in the area, was constitutional. 540 U.S. at 421-22. Recognizing that the stop's "primary law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime," but

rather to solicit assistance in gathering information about a crime that someone else committed, this Court applied the *Terry* balancing test to determine the reasonableness of the information-gathering checkpoint at issue. *Id.* at 423. In doing so, this Court emphasized that when officers seize a potential witness, "by definition, the concept of individualized suspicion has little role to play." *Id.* at 424. Thus, when a seizure is designed not to determine whether an individual has committed a crime but rather to determine whether the individual was a witness to a crime, the Fourth Amendment requires not probable cause or a warrant, but application of the balancing test.

b. The Ninth Circuit's application of traditional Fourth Amendment principles is contrary to this Court's recognition that a different constitutional standard applies when interviewing potential witnesses or victims.

By applying traditional Fourth Amendment probable cause/warrant requirements to interviews of a child who is a possible sexual-abuse victim or witness to sexual abuse, the Ninth Circuit overlooked how both *T.L.O.* and *Lidster* inform the constitutional analysis of seizures like the one here. In this case, a student was seized at a public school for the purpose of gathering information from her about suspected sexual abuse (a crime) inflicted upon her by her father. Inasmuch as that seizure had a law-enforcement purpose, this case is similar to *Lidster*: the child has the same status—a potential witness—

as the motorists in *Lidster*.[5] As a result, the *Lidster* balancing standard would seem to apply. And because *T.L.O.* demonstrates that *Terry*'s balancing test applies to the public-school setting, that case provides the framework for the balancing of interests that must be conducted in assessing the constitutionality of the child's in-school seizure in this case.

This Court, by granting certiorari, can clarify that when considering an in-school interview of a child who may be an abuse victim, the *Lidster* reasonableness standard is the appropriate constitutional standard. And as discussed below, addressing that issue will resolve an increasing conflict among the circuits as to what constitutional standard to apply in such instances.

B. The Circuit Courts of Appeal are divided about the constitutional standard that applies to in-school seizures of possible child-abuse victims.

As the Ninth Circuit noted, the Circuit Courts of Appeal are divided over the appropriate constitutional standard to apply to seizures of children, in public schools, for the purposes of confirming if they are the victims and/or witnesses of child abuse. *Greene*, 588 F.3d at 1026 n.11. But before describing

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[5] And because protecting children from abuse is one of society's most important roles, *Wyman*, 400 U.S. 309 (1971), the state's interest in finding witnesses or victims of abuse is even stronger than the state's interest described in *Lidster*.

the division among the circuits, one analytical point bears note. The Ninth Circuit's decision was driven by its categorization of the seizure in this case as failing to qualify as a "special needs" case. In doing so, the Ninth Circuit conflated the balancing inquiry under *Lidster* with that of the special needs cases. *See Ferguson v. City of Charleston*, 532 U.S. 67, 83 n.21 (2001) (distinguishing "special needs" cases from those cases in which this Court has applied "a balancing test to determine Fourth Amendment reasonableness."). To be sure, as the Ninth Circuit noted, this Court has explained that "special needs" cases are those in which the government has identified some need, "'beyond the normal need for law enforcement,'" to justify departure from the traditional Fourth Amendment standards. *Greene*, 588 F.3d at 1026-27 (quoting *Nat'l Treasury Employees Union v. Von Rabb*, 489 U.S. 656, 665 (1989)). Accordingly, to qualify as a special-needs seizure, the state must demonstrate "'little, if any, entanglement with law enforcement'" in conducting searches and seizures. *Id.* at 1027 (quoting *Ferguson*, 532 U.S. at 79 n.15). But that same requirement is obviously not present when considering seizures of the type in *Lidster*, a case in which the seizure was effected by law-enforcement officers. The defining inquiry for purposes of the *Lidster* analysis is not *who* is conducting the seizure, but rather *the purpose* for which the seizure is conducted.

The Ninth Circuit, however, is not alone in conflating the special-needs doctrine with the balancing inquiry in *Terry*, *T.L.O*, and *Lidster*, or in ignoring the import of those decisions on child-abuse investi-

gations. Both the Second and Fifth Circuits, like the Ninth, have rejected application of the special-needs doctrine to in-school interviews of possible child-abuse victims. *Tenenbaum v. Williams*, 193 F.3d 581 (2d Cir. 1999); *Gates v. Tex. Dept. Of Protective and Regulatory Services*, 537 F.3d 404 (5th Cir. 2008); *Greene*, 588 F.3d 1011. The Second Circuit, after characterizing *T.L.O.* as a "special needs" case, went on to apply the traditional Fourth Amendment requirement of probable cause or a warrant. *Tenenbaum*, 193 F.3d at 604 (holding that it saw "no basis upon which to depart from the probable cause standard" in the particular instances of the case). In contrast, after the Fifth Circuit rejected the application of the special-needs doctrine, it found guidance in *Terry* and adopted the constitutional balancing standard therein. *Gates*, 537 F.3d at 432-33.

In contrast to the Second, Fifth, and Ninth Circuits, the Seventh Circuit did not address the special-needs doctrine at all. Instead, in determining the appropriate constitutional standard for a visual inspection, at the child's public school, of a child's body for evidence of abuse, the Seventh Circuit concluded that "the strictures of the probable cause or the warrant requirement" were inapplicable, and applied a *Lidster*-like test instead. *Darryl H. v. Coler*, 801 F.2d 893, 901 (7th Cir. 1986).

The Tenth Circuit applied that same test in *Doe v. Bagan*, 41 F.3d 571 (10th Cir. 1994). That court noted that, even assuming that a ten-minute interview of a child at a public school—conducted by a caseworker in the principal's office to determine whether the

child had sexually abused another child—was a "seizure," the seizure was reasonable. The seizure was "justified at its inception," and "reasonably related in scope to determining Doe's role in the incident." *Bagan*, 41 F.3d at 575 n.3 (internal quotations omitted).

Those various decisions describe a range of disparate legal analyses that have been applied to similar but not identical fact patterns. They demonstrate that, as the Ninth Circuit correctly recognizes, lower courts are strongly divided over the question of what Fourth Amendment standard applies to child-abuse investigations. That division is unlikely to be resolved without this Court's intervention. This Court should resolve whether the traditional standards governing seizures of those suspected of criminal activity govern in-school child abuse investigations, or whether—as petitioner believes—the applicable constitutional standard is the same standard that this Court applied to the seizure of potential witnesses in *Lidster*.

C. This Court should grant certiorari, notwithstanding that the Ninth Circuit held that petitioners were protected by qualified immunity.

Petitioner recognizes that, because the Ninth Circuit ruled that petitioner is protected by qualified immunity, petitioner received a favorable judgment. Petitioner also recognizes that, with few exceptions, this Court will not grant certiorari when the petitioner prevailed in the court below. *Bunting v. Mellen*, 541 U.S. 1019, 1023-24 (2004). But the judgment in favor of petitioner on qualified immunity grounds should not preclude review of the court's constitu-

tional ruling. That holds particularly true when, as in this instance, the Ninth Circuit was not compelled to reach the constitutional issue but nevertheless did so to provide "guidance to those charged with the difficult task of protecting child welfare within the confines of the Fourth Amendment." *Greene*, 588 F.3d at 1022. That decision now stands as precedent that governs how government officials may conduct child-abuse investigations in the nation's largest circuit. The State of Oregon—which appears on Camreta's behalf here[6]—is bound by the Ninth Circuit's constitutional ruling in future cases. Absent the ability to seek further review in this case, it must either comply with what it believes to be an erroneous decision or continue interviewing potential child-abuse victims and incurring significant liability in the process.

This Court recently relieved lower courts of the obligation to adhere rigidly to the *Saucier v. Katz*, 533 U.S. 194 (2001), rule. Under *Saucier*, courts first had to decide whether a plaintiff's allegations made out a constitutional violation, and only then were permitted to decide whether the right was nonetheless not "clearly established" and whether qualified immunity thus protected the defendant. *Pearson v. Callahan*, __U.S.__, 129 S. Ct. 808, 815-16 (2009) (describing

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[6] Oregon law requires public bodies—including the State—to indemnify their officers, employees and agents against tort and other claims arising out of the individual's performance of duty. Or. Rev. Stat. § 30.285 (2009). This duty to indemnify extends to claims based on 42 U.S.C. § 1983 (2006). 44 Op. Att'y Gen. 416, 423-27 (Or. 1985).

the *Saucier* standard). But in *Pearson*, this Court recognized that adherence to that rule

> may make it hard for affected parties to obtain appellate review of constitutional decisions that may have a serious prospective effect on their operations. 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.

Id. at 820 (internal citations omitted); *see also Bunting*, 541 U.S. at 1023-24 ("qualified-immunity would deprive a party of an opportunity to appeal the unfavorable (and often more significant) determination. That constitutional determination is not mere dictum in the ordinary sense, since the whole reason we require it to be set forth (despite the availability of qualified immunity) is to clarify the law and thus make available repeated claims of qualified immunity in future cases."). This Court then recognized the "unenviable choice" that "prevailing" parties in those circumstances face:

> In cases like *Bunting*, the "prevailing" defendant faces an unenviable choice: "compl[y] with the lower court's advisory dictum without opportunity to seek appellate [or certiorari review," or "def[y] the views of the lower court, adher[e] to practices that have been declared illegal, and thus invit[e] new suits" and potential "punitive damages."

Pearson, 129 S. Ct. at 820 (citing *Horne v. Coughlin*, 191 F.3d 244, 247-48 (2d Cir. 1999)).

In an attempt to remedy that difficulty, this Court in *Pearson* determined that lower courts "should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* at 818. This Court nevertheless "continue[d] to recognize that [the *Saucier* protocol] is often beneficial." *Id.*

Under *Pearson*, the Ninth Circuit thus did not have to address the constitutional issue because it ultimately ruled in petitioners' favor on qualified immunity grounds. But the Ninth Circuit nevertheless took care to note this Court's advice that the *Saucier* two-step process often "promotes the development of constitutional precedent" and—because it had never ruled on the constitutional question presented in this case—it chose to do so to provide guidance "to those charged with the difficult task of protecting child welfare within the confines of the Fourth Amendment." *Greene*, 588 F.3d. at 1021-22. In other words, the Ninth Circuit expressly ruled on the constitutional question to create constitutional precedent and to guide social workers and law-enforcement officers in a broad range of future cases involving efforts to interview victims of alleged child sexual abuse.

So framed, the Ninth Circuit's Fourth Amendment declaration is not "mere dicta" unreviewable by this court. *See Bunting*, 541 U.S. at 1023 ("We sit, after all, not to correct errors in dicta."). The Ninth Circuit's opinion simply cannot be read as anything less

than an unambiguous constitutional ruling that is binding in future cases. The State of Oregon—which is responsible for defending child-protection caseworkers and law-enforcement officers who are named as defendants in lawsuits like this one—is faced with an untenable choice absent the ability to seek review before this Court. The state must choose either to continue the practice of interviewing potential victims of child abuse absent probable cause and a warrant (in which case it will lose its ability to claim qualified immunity and will be liable for damages) or it can alter its best practices to comply with the Ninth Circuit's decision (a decision that is at odds with this Court's caselaw).

In sum, petitioner should be entitled to seek review of that ruling, to avoid being forced to "def[y] the views of the lower court, adher[e] to practices that have been declared illegal, and thus invit[e] new suits" and potential punitive damages. *Pearson*, 129 S.Ct. at 820; *see also Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 334 (1980) ("In 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, so long as that party retains a stake in the appeal satisfying the requirements of Article III."). Here, the Ninth Circuit's decision—if left undisturbed—will create continuing adverse consequences for the State of Oregon (and for its child-protection caseworkers, including petitioner Camreta). The Ninth Circuit's qualified immunity ruling thus should not preclude review of its Fourth Amendment holding.

CONCLUSION

The Ninth Circuit's decision hampers the ability of those charged with protecting children from doing so, and in a way that conflicts with decisions from this Court. This Court should therefore grant the petition for a writ of certiorari.

Respectfully submitted,

JOHN R. KROGER
Attorney General of Oregon
MARY H. WILLIAMS
Deputy Attorney General
DAVID B. THOMPSON
Acting Solicitor General
ANNA JOYCE
Assistant Attorney General
Counsel for Petitioner

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