Nos. 09-1454, 09-1478

In The

SUPREME COURT OF THE UNITED STATES

BOB CAMRETA,

Petitioner,

v.

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

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

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BRIEF OF THE CENTER FOR INDIVIDUAL RIGHTS AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

Petitioners, government officials who had interrogated respondent's nine-year old daughter about possible abuse from respondent's husband, successfully moved for summary judgment in the district court. On review, the Ninth Circuit rejected one of the government officials' claimed bases for summary judgment: their contention that, even with all disputed facts and factual inferences resolved in favor of respondent, they had not violated the Fourth and Fourteenth Amendments to the U.S. Constitution. It nonetheless ruled that the government officials had qualified immunity, were not liable for any damages, and thus affirmed the district court's dismissal of respondent's Fourth Amendment claim. Despite this favorable result, the government officials filed a petition for a writ of certiorari and have asked this Court to review the Ninth Circuit's summary judgment analysis. Respondent did not appeal.

1. Does this Court have jurisdiction to determine petitioners' appeal, and, if so, should it exercise that jurisdiction?

2. Does a two-hour custodial interrogation of a nine-year old girl without a warrant, probable cause, or the consent of either parent violate the Fourth Amendment of the U.S. Constitution as incorporated through the Fourteenth?

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INTEREST OF AMICUS CURIAE[1]

The Center for Individual Rights ("CIR") is a public interest law firm based in Washington, D.C. It has litigated constitutional issues in the federal courts and has a special interest in the rights of families.

Here, petitioners and their amici have asserted that this Court should create a new exception to the general probable cause requirement of the Fourth Amendment for investigations related to intrafamily child abuse. Because this argument would diminish substantially the protections provided by both the Fourth Amendment and the liberty interest in family and parental rights, CIR submits this amicus brief.

SUMMARY OF ARGUMENT

The court below affirmed a judgment dismissing the two individual petitioners. Since this Court reviews judgments, and not opinions, those two individuals cannot appeal that favorable judgment. The fact that the court below said

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

things that petitioners did not like – *viz.*, that they violated the U.S. Constitution – does not change that fact. Had the court below skipped the part of the analysis in which it found that petitioners violated the Constitution, petitioners would not have prevailed in the case more than they have.

In another way, too, an appeal here is burdened by the absence of a party who truly has something at stake in the controversy. The Ninth Circuit did not issue any declaratory or injunctive relief and, even if it had, petitioners do not contend that they personally wish to engage in the conduct in question in the future. (Indeed, they do not even state that they are still employed in positions that would allow them to do so.) Having failed to appeal, respondent, in turn, cannot win any damages against petitioners, not even nominal damages, and her loss in the lower court precludes any claim for attorneys' fees against the petitioners. An affirmance of the Ninth Circuit's analysis of the constitutionality of petitioners' conduct would provide her with only a moral victory.

As to the Fourth Amendment analysis itself, should the Court choose to reach it, the Ninth Circuit was correct. This Court has repeatedly stated that the Fourth Amendment "reasonableness" requirement is generally tantamount to a requirement of "probable cause." It has identified only a few exceptions, and, with respect to *seizures of the person* outside of border

searches by customs officials, only one: a brief, fleeting, seizure of a person is subject to a balancing test weighing the state's and seized persons' respective interests. This Court has primarily applied this balancing test for fleeting personal seizures in one context, *viz.*, car stops. *Ferguson v. City of Charleston*, 532 U.S. 67, 83 n.21 (2001) (noting that "the handful of seizure cases in which we have applied a balancing test to determine Fourth Amendment reasonableness . . . involved roadblock seizures"). It has *never* applied it to anything *even remotely approaching* a two-hour interrogation of a nine-year old child in her school, regardless of the reason. To the contrary, this Court has rejected soundly any departure from the "probable cause" standard in anything analogous to the facts here.

Thus, petitioners and their amici, in a case in which no party has any substantial stake riding on the outcome, ask this Court to create a brand new, and quite broad, exception to the general "probable cause" requirement of the Fourth Amendment. They provide no justification for that new exception. Crime is frequently difficult to solve, and the Fourth Amendment is often an impediment to solving crime. Nothing about child or intrafamily abuse is particularly unique in that regard, and nothing about it suggests we should disregard the standard tradeoff between individual liberty and societal needs reflected in the probable cause requirement.

To the contrary. The fact that the seized person here was a nine-year old girl requires, as a matter of constitutional law, *more* vigilance about protecting individual liberty from *state* abuse. Children's "consent" to being seized would be questionable under any circumstances, much less the circumstances here, and they have a basic fundamental right to the advice and direction of their parents. By seizing this child without parental consent or judicial oversight, petitioners violated that basic right, and as a result, the life of a family was disrupted.

In short, petitioners ask for the wrong result in the wrong case.

ARGUMENT

Petitioners lack standing to raise the Fourth Amendment issue here and, even if they had standing, it would be a poor exercise of this Court's discretionary jurisdiction to address that issue. Further, the question of whether petitioners were entitled to summary judgment even given the respondent's evidence is controlled by this Court's precedents.

I. THIS COURT LACKS JURISDICTION TO REVIEW THE FOURTH AMENDMENT CONCLUSIONS OF THE NINTH CIRCUIT'S OPINION; EVEN IF IT HAD SUCH JURISDICTION, IT SHOULD DECLINE TO EXERCISE IT

It is a fundamental precept that this Court (and other federal appellate courts) reviews judgments, and not statements in opinions. *Fed'l Communications Comm'n v. Pacifica Foundation*, 438 U.S. 726, 734 (1978). The rule has "special force when the statements raise constitutional issues." *Id.* Whether application of that rule is jurisdictional in all instances, its application here is. And even if it were not, there are a number of prudential reasons for this Court to decline to review the Ninth Circuit's opinion. That court said only that petitioners were not entitled to summary judgment solely on the ground that undisputed facts demonstrated that they did not violate S.G.'s constitutional rights.

Not only is that issue not worth reviewing at this time, petitioners and their amici do not *want* this Court to review it. Rather, they want this Court to ignore the actual length and nature of the seizure and interrogation, and opine about hypothetical seizures and interrogations not involved in this case.

That being said, the petitioners had it within their power to fix many of these

jurisdictional and prudential problems. They could have waived their qualified immunity defense in the district court. *See Summe v. Kenton County Clerk's Office*, 604 F.3d 257, 269-70 (6th Cir. 2010) (holding that defendant who raised qualified immunity defense in his answer, but omitted any discussion of it in his summary judgment papers, waived qualified immunity). *Cf.* Camreta Br. 43 n.6 (noting indemnification provisions of Oregon law). Defendants chose the safety of qualified immunity over the greater justiciability that would have come with waiving that defense. They should be held to that decision.

A. This Court Reviews Judgments

The court below stated that "with respect to S.G.'s Fourth Amendment claims," it "affirm[ed] the district court's grant of summary judgment on th[e] basis" of qualified immunity. *Camreta v. Greene*, 588 F.3d 1011, 1037 (9th Cir. 2009). As a general matter, "[a] winning party cannot appeal merely because the court that gave him his victory did not say things that he would have liked to hear . . . Judgments are appealable; opinions are not." *Chathas v. Local 134 IBEW*, 233 F.3d 508, 512 (7th Cir. 2000). As tacit acknowledgment of this rule, petitioners' and the United States's conclusions seek to have the *judgment* reversed or vacated. *E.g.*, Alford Br. 64; Brief for the United States As Amicus Supporting Petitioners ("U.S. Br.") 34. *But cf.* U.S. Br. 17 (suggesting "vacatur of the adverse portion of the lower-court decision").

Petitioners do not explain why they need to have a *judgment* that favored them reversed or vacated.

The rule that this Court does not review statements in opinions has been applied by this Court in similar circumstances. In *California v. Rooney*, 483 U.S. 307 (1987), police had searched the communal trash bin of the apartment building in which Rooney lived and had discovered evidence of illegal gambling. The police subsequently obtained a search warrant of Rooney's apartment based upon the fruits of that trash search and other pieces of evidence. *Rooney*, 483 U.S. at 309. Rooney sought to suppress the fruits of the apartment search on the ground that the trash search was illegal and that there was insufficient other evidence to support probable cause. The California Court of Appeal stated that the trash search was, in fact, illegal, but that the other evidence supporting the warrant was sufficient. *Id.* at 310. The State sought review in this Court of the ruling that the trash search was illegal.

This Court, noting the rule that it reviews judgments, and not opinions, dismissed the writ as improvidently granted, holding:

> The fact that the Court of Appeal reached its decision through analysis different than this Court might have used does not make it appropriate for this Court to rewrite the California court's decision, or for the prevailing

> party to request us to review it. That the Court of Appeal even addressed the trash bin issue is mere fortuity; it could as easily have held that since there was sufficient evidence to support the [apartment] search even without the trash evidence, it would not discuss the constitutionality of the trash search. *The Court of Appeal's use of analysis that may have been adverse to the State's long-term interests does not allow the State to claim status as a losing party for purpose of this Court's review.*

Id. at 311 (emphasis added).

Similarly, in *Texas v. Hopwood*, 518 U.S. 1033 (1996), the district court had held that the system of admission to the University of Texas Law School in 1992 discriminated on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment because it was not narrowly-tailored to meet a compelling government interest. *Hopwood v. Texas*, 78 F.3d 932, 939 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996). Plaintiffs appealed from that judgment, but defendants did not. The Fifth Circuit Court of Appeals went further and held that educational diversity was not a compelling governmental interest sufficient to justify the consideration of race in the admissions process. *Id.* at 944.

The defendants sought to have this Court review the Fifth Circuit's rationale, and particularly its conclusion that diversity was not a compelling governmental interest. The United States filed an amicus brief to support defendants, arguing that, although the Fifth Circuit had affirmed the district court's denial of injunctive relief, "the court's opinion effectively amounts to such an injunction." Brief for the United States As Amicus Supporting Petitioners at 11, *Texas v. Hopwood*, 518 U.S. 1033 (1996) (No. 95-1773) (available at http://www.justice.gov/osg/briefs/1995/w951773w.txt). *Compare* U.S. Br.13 ("A court of appeals' constitutional determination in a case like this thus has an effect similar to an injunction or a declaratory judgment against the government as a whole").

This Court denied the petition. Justice Ginsburg wrote an opinion (joined by Justice Souter) with respect to that denial, agreeing that the question involved was one "of great national importance," but reiterating that this Court reviews judgments, not opinions; that petitioners were improperly "challeng[ing] the *rationale* relied on by the Court of Appeals"; and that the Court needed to await a "final judgment on a program genuinely in controversy before addressing the important issue raised in this petition." *Texas v. Hopwood*, 518 U.S. 1033 (1996) (opinion of Ginsburg, J.) (emphasis in original).

To be sure, the Fifth Circuit's opinion in *Hopwood* caused substantial shifts in the admissions systems of universities under its jurisdiction. *See Fisher v. University of Texas at Austin*, 645 F. Supp. 2d 587, 591-93 (W.D. Tex. 2009) (describing history of University of Texas admissions before and after *Hopwood*), *aff'd*, 2011 WL 135813 (5th Cir. Jan. 18, 2011). But that alone was insufficient for this Court to accept review.

The United States cites *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939) to support its contention that this Court has jurisdiction to hear petitioners' appeal. U.S. Br. 15-17. In that patent infringement case, the District Court ruled that a patent was valid but had not been infringed. *Both* rulings were set forth in the district court's decree, and the defendant appealed the part of the *judgment* that held the patent valid. This Court held that, although "[a] party may not appeal from a judgment . . . for the purpose of obtaining a review of findings he deems erroneous *which are not necessary to support the decree*, . . . here *the decree itself* purports to adjudge the validity of [the patent]." *Electrical Fittings*, 307 U.S. at 242 (emphasis added). This Court held only that the defendant had standing to seek *reformation of the decree*. *Id.* Thus, *Electrical Fittings* hardly undermines the rule that only judgments, and not opinions, are appealable. To the contrary, it confirms that rule.

The United States also points out that the statutes authorizing this Court's appellate jurisdiction do not specify who may invoke that jurisdiction. U.S. Br. 15. Of course, the same can be said of the statutes that provide courts of appeals with jurisdiction over orders and judgments of district courts. 28 U.S.C. §§ 1291, 1292. But even if appeals from non-aggrieved parties were statutorily permissible, Article III provides a separate limitation applicable here. Similarly, even if the historic practice of reviewing judgments, and not statements in opinions was not grounded in Article III in every instance, it is a practice that frequently conflates with Article III concerns. As it does here.

B. The "Equivalence" Argument And *Hewitt*

The United States argues that the opinion of the Ninth Circuit in this case is the same as a declaratory judgment or an injunction and, thus, should be appealable. U.S. Br. 13 ("an effect similar to an injunction or a declaratory judgment against the government as a whole"). It makes no mention of *Hewitt v. Helms*, 482 U.S. 755 (1987), a case that addressed the "equivalence" of an opinion to a judgment in a somewhat different context.

In *Hewitt*, it was the plaintiff-prisoner who made the contention the United States makes here, as part of an argument that he was entitled to attorneys' fees. The Third Circuit had held that his rights had been violated when a misconduct

hearing in prison relied solely on hearsay to find him guilty of the alleged misconduct. It had also summarily affirmed a later district court judgment granting defendants summary judgment on qualified immunity grounds and concluded that plaintiff was nonetheless entitled to attorneys' fees because its earlier constitutional ruling had the effect of a declaratory judgment. *Hewitt v. Helms*, 482 U.S. at 758-59.

The United States filed a brief as amicus supporting the *defendants* in that case. *See* Brief for United States as Amicus Curiae Supporting Petitioners, *Hewitt v. Helms*, 482 U.S. 755 (1987) (No. 85-1630) (available at http://www.justice.gov/osg/briefs/1986/sg860441.txt). It emphasized that the Third Circuit's decision finding a violation of the plaintiff-prisoner's constitutional right "did not hold that [prisoner] was entitled to a declaratory judgment" and "did not direct the district court to address" such claims on remand; and that the prisoner had not renewed any request for declaratory or injunctive relief in the district court. *Id.* It emphasized that the suit was not a class action, and that the lower courts would have had no authority to grant class-wide relief. *Id.*

This Court reversed the Third Circuit. It rejected the possibility that the previous constitutional ruling was tantamount to a declaratory judgment. First, as the United States had argued, this Court found that the prisoner had

not *sought* declaratory or other non-monetary relief in the district court. *Hewitt*, 482 U.S. at 760. Second, the Third Circuit's statements did not affect defendants' actions towards the prisoner, and "a judicial statement that does not affect the relationship between the plaintiff and the defendant is *not* an equivalent [of a judicial judgment]." *Id.* at 761 (emphasis in original). "The only 'relief' [the prisoner] received was the moral satisfaction of knowing that a federal court had concluded that his rights had been violated." *Id.* at 762.

The Court further noted:

> [T]here is a very practical objection to equating statements of law (even legal holdings en route to a final judgment for the defendant) with declaratory judgments: The equation deprives the defendant of valid defenses to a declaratory judgment to which he is entitled. . . . [Had plaintiff sought a declaratory judgment,] [t]he defendants would then have had the opportunity to contest its entry not only on the ground that the case was moot but also on equitable grounds. The fact that a court *can* enter a declaratory judgment does not mean that it *should*.

Id. (emphasis in original).

Finally, and perhaps most importantly, the Court emphasized that considerations relevant to whether to enter a declaratory judgment "may not enter into the decision whether to include statements of law in opinions – or if they do, the *court's decision is not appealable in the same manner as its entry of a declaratory judgment.*" *Id.* at 763 (emphasis added). *Cf. Citizens for Better Forestry v. U.S. Dep't of Agriculture*, 567 F.3d 1128 (9th Cir. 2009) (reversing district court's determination that a prior panel's holding was the functional equivalent of a declaratory judgment entitling plaintiff to attorneys' fees).

Thus, this Court's treatment of the Third Circuit opinion in *Hewitt* demonstrates the distinction between statements in an opinion and a declaratory judgment. Having determined that such statements are not judgments for attorneys' fee purposes, this Court should hold the same thing for purposes of appealability.

C. There Is No Case Or Controversy

Because petitioners were successful in both the District Court and the Ninth Circuit in dismissing plaintiff's claims for damages, there is no "case or controversy" sufficient under Article III of the United States Constitution. This is so because (1) petitioners have no standing to appeal and (2) respondent did not seek review of the Ninth Circuit's dismissal of her damages claims.

While this Court's "standing" cases primarily revolve around whether the plaintiff who initiates the lawsuit has standing under both Article III (pursuant to the familiar three requirements of injury, causation, and redressability) and various prudential considerations, this Court also has made clear that those who invoke an appellate court's jurisdiction must have similar (albeit not identical) interests. *E.g.*, *Arizonans For Official English v. Arizona*, 520 U.S. 43, 64 (1997) ("The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance"); *Diamond v. Charles*, 476 U.S. 54 (1986) (holding that pediatrician did not have standing to appeal circuit court's judgment enjoining certain parts of Illinois's abortion law); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1985) (holding that school board member had not had standing to appeal district court's judgment declaring that school district could not preclude student group from meeting).[2]

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[2] Prior to the decisions in *Bender*, *Diamond*, and *Arizonans*, this Court said that the rule precluding parties not aggrieved from a judgment from appealing is "one of federal appellate practice . . . derived from the statutes granting appellate jurisdiction and the historic practices of the appellate courts; it does not have its source in the jurisdictional limitations of Art. III." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326 (1980). This statement in *Roper* seems to be in some tension with the later-decided

(continued...)

A plaintiff commencing a lawsuit must be aggrieved (have suffered or will suffer an injury) by a defendant's actual or imminent actions, whereas an appellant must be aggrieved by the judgment being appealed. *E.g.*, *Arizonans For Official English*, 520 U.S. at 66 (expressing doubt as to whether organization that had sponsored state initiative had standing to appeal from a judgment declaring the initiative unconstitutional; "The requisite concrete injury to [sponsor's] members is not apparent. As nonparties in the District Court, [sponsor's] members were not bound by the judgment for [plaintiff]"). When the injury from the judgment is "not apparent," the appellant should make that demonstration to the appellate court. Petitioners have not met that burden.

The Ninth Circuit's judgment as to respondent's Fourth Amendment claim did not harm petitioners. The Ninth Circuit affirmed the district court's dismissal of that claim on qualified immunity grounds.

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[2](...continued)
cases all holding that appellants must have separate and distinct Article III standing. In any event, the statement in *Roper* is *dicta*. The appellants there were most certainly aggrieved by an interlocutory *order* (denying their motion for class certification), *id.* at 329, and that interlocutory order was merged into the final judgment from which they appealed. *Shaffer v. Carter*, 252 U.S. 37, 44 (1920). The petitioners in *Roper* were hardly appealing from statements in an opinion.

Even if the Ninth Circuit's opinion (contrary to precedent) could be deemed a declaratory judgment, petitioners have not shown how they would be harmed by such a judgment. Petitioners provide no statement (much less evidence) of what their current positions are and whether the lower court's opinion would affect the manner in which they carried out their current or future duties. *Cf.* U.S. Br. 19 (conceding that "an official defendant who has prevailed on qualified-immunity grounds will lack standing to seek further review because there is an insufficient likelihood that he will again engage in the practice that has been ruled unconstitutional").

Nor are the interests of the State of Oregon or Deschutes County adequate to substitute for the interest of an actual appellant. Those entities are not parties, petitioners' efforts to pretend otherwise notwithstanding. *E.g.*, Camreta Brief 41 ("The State recognizes . . . that because the Ninth Circuit ruled that petitioner is entitled to qualified immunity, the State received a favorable judgment. The State also recognized in its petition for certiorari . . ."); *id.* at 43-44. Petitioners cannot invoke the interests of those entities to remedy their own lack of appellate standing. *E.g.*, *Diamond*, 476 U.S. at 62-63 (holding that State of Illinois's status as a party in the Supreme Court, and its letter to the Court stating that its interests were the same as the appellant-pediatrician, were insufficient to provide appellate standing to pediatrician seeking to defend Illinois's abortion

law); *Bender*, 475 U.S. at 544 (holding that petitioner's "status as a School Board member does not permit him to 'step into the shoes of the Board' and invoke its right to appeal"). And, if those entities wanted to preserve the ability to appeal any adverse resolution of the underlying constitutional issue, they could have instructed petitioners to waive their qualified immunity to damages. Camreta Br. 43 n.6 (noting indemnification provisions of Oregon law).

Just as importantly, *respondent* lacks any interest in defending the Ninth Circuit opinion. Respondent will get nothing from this appeal *regardless of what this Court rules* on the Fourth Amendment issue. If it reached the substance, then, this Court would be deciding an important constitutional issue without the "'concrete adverseness which sharpens the presentation of issues upon which the [C]ourt so largely depends for illumination of difficult constitutional issues.'" *Diamond*, 476 U.S. at 62 (*quoting Baker v. Carr*, 369 U.S. 186, 204 (1962)).

The United States glosses over this problem by asserting that "this Court has throughout its history heard and decided numerous cases in which the non-appealing party had little or no interest in defending the lower court's judgment." U.S. Br. 18. We disagree. Such a practice would make a mockery of the "concrete adverseness" that this Court has traditionally sought as part of the Article III "case or controversy" requirement. In

the one actual holding that the United States cites for this proposition, this Court actually found ambiguity in the respondent's position, and concluded that that ambiguity left an ongoing dispute about the propriety of the lower court's judgment. *Pacific Bell Tel. Co. v. LinkLine Communications, Inc.*, 129 S. Ct. 1109, 1117 (2009).

The United States also suggests that cases in which this Court has appointed counsel to argue positions demonstrate that a non-appealing party's lack of interest in the outcome is not an obstacle to Article III jurisdiction. U.S. Br. 18. Of course, the Court's practice of appointing counsel, without any consideration of its implications under Article III, is not precedent on any jurisdictional issue. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 91 (1998) ("drive-by jurisdictional rulings . . . have no precedential effect"). In any event, it is frequently the United States that has had counsel appointed to argue its interests. It is inaccurate to say that the United States lacks an interest in those cases; rather, those are cases in which the official attorneys for the United States have declined, for whatever reason, to make the argument that is in its interests. *Dickerson v. United States*, 538 U.S. 1045 (1999) (inviting *amicus* counsel to argue that a United States statute was constitutional). Moreover, the United States is the respondent in those cases; even where it confesses error and agrees with the petitioner as to the impropriety of the *judgment* of the court

below, a case or controversy still exists because this Court must do *something* to alter that judgment.

Here, of course, it is the respondent herself, not her representatives, that lacks an interest in the outcome of the case. Further, no one is asking this Court to do anything to the Ninth Circuit's judgment dismissing respondent's Fourth Amendment claim.

D. Prudential Reasons Militate In Favor Of Declining To Address Fourth Amendment Issues

Finally, even if this Court had jurisdiction over this appeal, it should decline to address the Fourth Amendment issues, particularly the ones petitioners would like it to.

The Ninth Circuit did *not* hold (contrary to the United States's misrepresentation) that "the interview of S.G. . . . violate[d] the Fourth Amendment." U.S. Br. 6. Rather, it held that petitioners *were not entitled to summary judgment solely* on the ground that the facts, with all factual disputes and inferences from undisputed facts being resolved in respondents' favor, demonstrated that petitioners complied with the Fourth Amendment. *Camreta v. Greene*, 588 F.3d 1011, 1017 n.1, 1021 (9th Cir. 2009). Thus, at least insofar as the Fourth Amendment discussion is concerned, this case is now in an interlocutory

posture. Indeed, if this Court truly had jurisdiction because there were a live case or controversy, then an affirmance of the Ninth Circuit's ruling on the denial of summary judgment should lead to a trial in the district court on the question of whether petitioners *did* violate the Fourth Amendment – although there would be no point to it at all and nothing would turn on the outcome. U.S. Br. 8 (asserting that this Court should "remand for further proceedings").

What is even more remarkable, and which provides even more reason for this Court to decline deciding any constitutional issues, is that *petitioners (and the United States) do not want this Court to resolve whether petitioners were entitled to summary judgment*.

Thus, Camreta asserts that "this Court . . . need not address the reasonableness of the scope of the interview" he conducted. Camreta Br. 38. Indeed, he concedes that this is a complex issue that "ultimately depends on the resolution of heavily disputed facts by the trier of fact." *Id.* at 39. The United States makes a similar plea for judicial avoidance. U.S. Br. 32 ("This Court need not decide in the first instance whether the interview in this case was conducted in a reasonable manner").

As for Alford, he simply ignores the summary judgment posture altogether and asks this Court to do the same. *Compare* Alford Br. 55

("Nothing in this record *demonstrates* that petitioner or Camreta used coercive or intimidating tactics in asking S.G. questions") (emphasis added) *with* J.A. 71 (¶ 9) (S.G. testifying that Camreta would not accept her answers that her father had not touched her improperly and "kept asking me the same questions, just in different ways, trying to get me to change my answers"). *See also* Alford Br. 9-10 (reciting Camreta's version of events).

Petitioners and the United States want this Court to determine whether *every* interrogation of a child abuse victim in school requires a warrant or probable cause. But the Ninth Circuit never held that *every* police interrogation in school requires a warrant or probable cause (nor did respondent ever so argue). The question of whether a non-threatening, five- or ten-minute police interrogation of a possible abuse victim in school based solely on reasonable suspicion would violate the Fourth Amendment simply was not before that court – just as it is not before this Court. Indeed, it is clear that the *length* of petitioners' interrogation was quite an important element in the court below's analysis. *Camreta*, 588 F.3d at 1017 n.1; *id.* at 1023 ("Defendants urge us to conclude, in other words, that while seizing S.G. and interviewing her at home for two hours would have been unreasonable absent probable cause and a warrant or exigent circumstances, it was reasonable to do *a similarly lengthy interrogation* in the same way at S.G.'s school. We

decline to adopt this distinction.") (emphasis added); *id.* at 1032 ("[T]he justification in the record for a seizure lasting two hours is weak"); *id.* ("It is far from clear that it was reasonable for Camreta and Alford to continue to detain S.G. for an entire hour during which she continually denied such abuse."). *See F.C.C. v. Pacifica*, 438 U.S. at 734 (noting that FCC order finding that George Carlin monologue was indecent was "carefully confined to the monologue 'as broadcast'" and holding that the Court would not review general statements in the Commission's order).

Petitioners provide no reason why this Court should bother to answer a hypothetical question about interrogations in general, particularly one that the court below did not address. For this reason as well, this Court should decline to decide the issues petitioners ask it to.

II. THE COURT BELOW DID NOT ERR IN REFUSING TO GRANT PETITIONERS' MOTION FOR SUMMARY JUDGMENT SOLELY ON FOURTH AMENDMENT GROUNDS

A. Seizures For More Than A Few Minutes In Length Generally Require Probable Cause

This Court's precedents regarding the validity of seizures under the Fourth Amendment have developed a two-tiered approach. Virtually all seizures have traditionally required probable

cause. For very short seizures, involving an intrusion far less severe than the norm, the Court has used a balancing test first adopted in *Terry v. Ohio*, 392 U.S. 1 (1968), in which a reasonable suspicion that a short seizure was appropriate might be sufficient where there was a sufficient governmental interest for the seizure and the manner in which the seizure was carried out was not overly intrusive. But "because *Terry* involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope." *Dunaway v. New York*, 442 U.S. 200, 210 (1979). (Alford falsely attributes a quote about "balancing" governmental and individual interests to *Dunaway*. Alford Br. 13.)

Thus, while it is true that "reasonableness" is the touchstone of the Fourth Amendment's text, "[t]he standard of probable cause thus represent[s] the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest 'reasonable' under the Fourth Amendment." *Dunaway*, 442 U.S. at 208. It is a "standard applied to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations." *Id.* *See also Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (confirming that standard). (Alford's contention that *Atwater* did not "impose . . . a requirement . . . of probable cause" for arrests, Alford Br. 22, is thus stunningly inaccurate and disingenuous.) The court below did no more than

apply that rule to petitioners' motion for summary judgment (while resolving factual issues in respondent's favor).

In fact, outside of the *sui generis* context of a customs stop of suspected drug smugglers – *United States v. Montoya De Hernandez*, 473 U.S. 531, 538 (1985) ("the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior"); *Almeida-Sanchez v. United States*, 413 U.S. 266, 274 (1973) (noting Court's historical distinction between "searches at the border and in the interior") – this Court has never applied anything less than probable cause to any seizure regarding law enforcement more than 30 minutes long. *E.g.*, *Florida v. Royer*, 460 U.S. 491, 502-03 (1983) (holding that airline passenger had been seized in violation of the Fourth Amendment when detectives, after initial questioning in a public area, asked him to go back to a small room where he was questioned further; *Terry* "did not justify the restraint to which [passenger] was then subjected"); *United States v. Place*, 462 U.S. 696, 709 (1983) (equating seizure of an airline passenger's luggage with seizure of his person, and holding that, where it took 90 minutes for the police to bring the luggage to drug-sniffing dogs, the seizure exceeded the scope of a *Terry* stop and had to be justified by probable cause; "The length of the detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause. . . .

[T]he brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion"); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975) (holding that border patrol may stop cars based solely on reasonable suspicion that cars may contain aliens who are in the country illegally "because of the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border . . . . The officer may question the driver and passengers about their citizenship and immigration status and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause"); *Davis v. Mississippi*, 392 U.S. 721, 722, 728 (1969) (bringing a 14-year old boy in to police headquarters for "fingerprint[ing] and routine question[ing]" violated Fourth Amendment).

Of course, "probable cause" can mean somewhat different things in different contexts. *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967). Here, "probable cause" to seize a nine-year old girl means probable cause to believe (1) that a crime has been committed and (2) that the child is a victim or witness to that crime. Petitioners do not contend that they had such probable cause. Alford Br. 46-48 (arguing that probable cause requirement would be counterproductive).

The law surrounding seizures is equally clear in another (although perhaps less relevant) way: arrests for criminal conduct do not generally require a warrant provided that probable cause is present. *United States v. Watson*, 423 U.S. 411 (1976). Whether, of course, this is also true for seizures of witnesses is a question that this brief does not address at length since it is undisputed that petitioners lacked probable cause.

Thus, the standards in applying the Fourth Amendment to seizures have been far simpler than the standards for searches. For seizures, probable cause is the general rule with basically one very limited exception. For searches, this Court has identified, at one end, various "special needs" and different contexts in which modest searches can be effected consistent with the Fourth Amendment for reasons other than probable cause related to law enforcement. At the other end, there is a complex and not altogether consistent set of rules about when warrants are needed for searches. *See generally California v. Acevedo*, 500 U.S. 565, 581-85 (1991) (Scalia, J., concurring).

This can be explained by the different interests the Fourth Amendment protects. Searches implicate privacy interests, which vary greatly. Such interests are at their height at one's home, are less on the street, and may be even lower in the office of one's employer. But seizures usually implicate the same concerns. They implicate one's liberty to go about one's business.

Place, 462 U.S. at 708 (holding that the detention of an airline passenger's luggage is tantamount to a seizure of the person because it "intrudes on . . . his liberty interest in proceeding with his itinerary"). Further, and particularly relevant here, seizures create anxiety and fear in the person seized. *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976) (noting that the Court views "checkpoint stops in a different light because the subjective intrusion – the generating of concern or even fright on the part of lawful travelers – is appreciably less in the case of a checkpoint stop"). *See also Illinois v. Lidster*, 540 U.S. 419, 425 (2004) (noting that the car stops seeking information regarding a hit-and-run accident were "less likely to provoke anxiety or to prove intrusive" because they were "likely brief"); *Watson*, 423 U.S. at 428 (Powell, J., concurring) ("A search may cause only annoyance and temporary inconvenience to the law-abiding citizen, assuming a more serious dimension only when it turns up evidence of criminality. An arrest, however, is a serious personal intrusion regardless of whether the person seized is guilty or innocent"). *Cf.* Alford Br. 59 (describing S.G. as "a frightened 9-year old girl").

Petitioners and their amici would replace the simple and clear "probable cause" standard for all but the briefest seizures with a dizzying array of factors tossed into an amorphous balancing test that would undermine the clarity of the law. Aside from the impropriety of the factors they identify to

diminish the central role of probable cause in seizures, they grossly undervalue the need for clarity that this Court has stressed:

> But we have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review. . . . Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules.

Atwater, 532 U.S. at 347. *See also Oliver v. United States*, 466 U.S. 170, 181 (1984) ("This Court repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment

standards to be applied in differing factual circumstances."); *Carroll v. United States*, 267 U.S. 132, 159 (1925) (upholding the rule that the police may seize from a car anything unlawfully there, noting that the rule "is a wise one because . . . it is easily applied and understood and is uniform."). *Compare* U.S. Br. 9 (claiming that this Court "has consistently evaluated the constitutionality of [a] seizure under a context-specific reasonableness standard").

As shown below, "complications arise the moment we begin to think about the possible applications of the several criteria [petitioners and their amici] propose" to be tossed into the reasonableness mix to replace probable cause. *Atwater*, 532 U.S. at 348.

B. Petitioners' Criteria Lack Both Coherence And A Fourth Amendment Pedigree

Among the myriad of considerations that petitioners suggest this Court consider in determining whether the initial seizure of S.G. complied with the Fourth Amendment are history, the context of a child abuse investigation, the fact that S.G. was a possible victim of child abuse, and the school setting. These suggestions are misguided.

1. History. – Petitioners misunderstand the role that history should play in determining the propriety of a seizure. This Court does not

break down each specific factual setting to determine whether the common law recognized a right to be free from seizures in precisely that setting. If it did, then presumably probable cause could be abandoned in all automobile searches.

Among the cases that are traditionally cited as supporting a common law analysis for Fourth Amendment protections is *Watson*. *E.g.*, *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). And in *Watson*, this Court held that "probable cause" was the basis for arrests for criminal conduct under the common law. *Cf. Pierson v. Ray*, 386 U.S. 547, 555 (1967); *id.* at 556-57 ("Part of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause"). It has never suggested that the common law had a lower standard for the seizure of witnesses, children, victims, or anyone else. *Cf.* Horace L. Wilgus, *Arrest Without A Warrant*, 22 U. Mich. L. Rev. 541, 820-21 (1924) (in a common law suit against an officer for seizing a suspected insane person, officer had to prove both that the arrestee was insane and that he was a danger to himself or others).

2. Child Abuse Investigations. – Petitioners suggest that child abuse investigations are uniquely difficult making the normal reasonableness standard of probable cause for seizures inapplicable. The United States, on the other hand, acknowledges that the governmental interest in preventing child abuse (intrafamily or

otherwise) is similar to the governmental interest in any efforts to prevent crimes. U.S. Br. 28 n.5.

Crimes of all stripes can be difficult to solve because of a lack of evidence. The inability to find crime perpetrators and remove them from the public risks further crime against others (including children who go to school). *Place*, 462 U.S. at 705 n.5 (noting the difficulties in stopping drug trafficking and concluding that "'[a]s a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement.'") (*quoting United States v. Mendenhall*, 446 U.S. 544, 562 (1980) (opinion of Powell, J.)). Murder sprees are very serious, but the fact that many perpetrators may be clever in covering up evidence – attacking in places without witnesses, hiding the bodies, leaving no physical evidence – has never been thought grounds for suspending the guarantees of the Fourth Amendment. *Almeida-Sanchez*, 413 U.S. at 273 (holding that automobile search of Border Patrol twenty miles from the border violated the Fourth Amendment because it was effected without consent or probable cause; "The needs of law enforcement stand in constant tension with the Constitution's protection of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards."). Nor can they be here.

3. Witnesses And Victims. – Petitioners and their amici suggest that a different standard

should apply to those not suspected of criminal conduct. They do not explain why an indisputably innocent individual should receive less protection under the Fourth Amendment than a potential criminal.

Petitioners' suggestion also runs into a whole host of practical problems. Police frequently do not know whether the person they are speaking to is or should be a suspect. *E.g.*, *Dunaway*, 442 U.S. 200, 207 (1979) (holding that seizure and interrogation violated the Fourth Amendment even though "police had a 'reasonable suspicion' that petitioner possessed 'intimate knowledge about a serious and unsolved crime.'"); *Davis*, 394 U.S. at 722 (noting that early questioning of defendant "apparently related primarily to investigation of other potential suspects"). The alleged blackmail victim may turn out in some cases to be a statutory rape perpetrator, and vice versa. This is not a problem when the purported victim has voluntarily agreed to an interrogation. But the Fourth Amendment precludes seizing suspected victims and witnesses on anything less than probable cause that they are, indeed, victims or witnesses of an actual crime.

Finally, the assessment of "brief, information-seeking highway stops" in *Lidster* is simply irrelevant here. The much lengthier and far more traumatic questioning of a nine-year old girl about her father's touches are far more likely to "provoke anxiety or to prove intrusive," *id.* at

425, one of the core concerns of the Fourth Amendment prohibition against unreasonable seizures. *Cf. id*. at 426 ("the motorist stop will likely be brief"), 427 ("Viewed objectively, each stop required only a brief wait in line – a very few minutes at most. Contact with the police lasted only a few seconds").

4. School Context. – Finally, petitioners and their amici argue that the seizure of a nine-year old by law enforcement at school should be subject to a lower standard because children's freedom of movement at school is already restricted. *E.g.*, U.S. Br. 30-31.[3]

Schools are not the only places where

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[3] The United States emphasizes the school context of S.G.'s seizure despite the fact that one of its interests in this case is a statute that apparently permits non-consensual seizures of children to investigate potential child abuse occurring on Indian lands. U.S. Br. 2, 14 (citing 25 U.S.C. § 3206). Of course, that statute apparently authorizes seizures of children in their own homes (§§ 3206(a), (b)) and allows judges to issue warrants to seize children on less than probable cause (§ 3206(d)). None of the arguments the United States makes here would appear to solve these seemingly obvious constitutional infirmities.

So, too, Camreta's suggestion that the State can actually change the scope of Fourth Amendment protections by passing constitutionally questionable legislation that reduces citizens' reasonable expectations of privacy, Camreta Br. 33, is without basis in any of this Court's precedents.

people's movements are restricted by the government. Many government employees presumably need to show up to work each day; citizens make appointments at government offices and in government buildings (including courts) for a wide variety of reasons, and need to be in certain places at certain times. The notion that the police can seize a government employee in her office on something less than probable cause, take her to a conference room against her will, and question her there at noon for several hours, just because her employer expects her to be available for a 2:30 p.m. meeting, should give anyone pause. The United States cites *INS v. Delgado*, 466 U.S. 210 (1984) (U.S. Br. 31), but it misses the point of that case; the employees there were indeed at work, but this Court nonetheless went through an extensive analysis to determine if any of the plaintiffs were "seized" by the federal agents' questioning. *Id.* at 218, 219 n.7 (noting that "respondents [had] no reason to believe that they would be detained if they . . . simply refused to answer" and that several respondents had left the building during the investigation).

This Court has made clear that proper Fourth Amendment analysis considers not just *where* a search or seizure takes place, but *by whom* and *why*. *E.g.*, *Ferguson*, 532 U.S. at 84 (holding that program testing pregnant woman for drugs violated Fourth Amendment; "The fact that positive test results were turned over to the police . . . provides an affirmative reason for enforcing

the strictures of the Fourth Amendment"); *id.* at 79 n.15 (noting that precedent distinguishes "searches in schools conducted by school authorities alone from those conducted with law enforcement agencies"); *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) (holding that employees in government offices had reasonable expectations of privacy in their place of work even though "[t]he operational realities of the workplace . . . make *some* employees' expectations of privacy unreasonable when an intrusion is by a supervisor *rather than a law enforcement official.*") (plurality op.) (emphasis added); *id.* at 731 (Scalia, J., concurring) ("The identity of the searcher (police v. employer) is relevant . . . to whether the search of a protected area is reasonable").

The fact that the patients in *Ferguson* had every expectation that medical professionals employed at a state hospital would view their blood test results did not warrant a conclusion that the police could mandate that those tests be taken and view the results consistent with the Fourth Amendment. Similarly, the fact that parents send their children to school knowing that their "liberty" will be restricted by *school officials* does not mean that the Fourth Amendment does not apply in full when the student is seized in school by other state officials. Such officials are not entrusted with the "custodial and tutelary" responsibilities over public school children that public school officials have. *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, 655 (1995).

C. Other Factors Militate In Favor Of Strict Adherence To Fourth Amendment Standards

Petitioners and their amici ignore two important factors that weigh heavily in favor of the traditional reasonableness standard of "probable cause." First, the seized party here was a nine-year old girl. Second, she and her family had independent constitutional rights.

1. Children Cannot Consent As Adults Do. – Government officials do not violate the Fourth Amendment by going up to someone and asking questions. *E.g.*, *Royer*, 460 U.S. at 497. "The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way." *Id.* at 497-98. Such an encounter is not a Fourth Amendment issue because it is deemed voluntary.

The degree to which a nine-year old's agreement to cooperate or to answer questions under *any* circumstances – much less, the ones here where no one has even *argued* that S.G. voluntarily went with her guidance counselor and spoke with petitioners – is a far more difficult question. Under the common-law, for example, a person charged with kidnapping a child could not claim that the child voluntarily went with him. The law was (and is) that a child could not consent. *E.g.*, *Commonwealth v. Colon*, 726 N.E.2d

909, 911 (Mass. 2000) (relying upon the common law, and concluding that a 12-year old could not consent to her own kidnapping); *State v. Hoyle*, 194 P. 976, 977 (Wa. 1921) (discussing "tender years" doctrine under the common law; "[a] child of tender years was regarded as incapable of consenting to its own seizure . . . ").

Similarly, this Court has repeatedly noted that the standards for determining whether a minor's confession was "voluntary" for Fifth Amendment purposes requires a more careful and nuanced weighing of factors – including the child's age – than a similar analysis for an adult. *Fare v. Michael C.*, 442 U.S. 707, 725 (1979) (applying a "totality-of-the-circumstances" approach to a juvenile's waiver of *Miranda* rights, including "the juvenile's age, experience, education, background, and intelligence. . . ."). *See also Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (recognizing that "a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police," and that such a person is "not equal to the police in knowledge and understanding of the consequences . . . and . . . unable to know how to protect his own interests or how to get the benefits of his constitutional rights."); *Hayley v. Ohio*, 332 U.S. 596, 599 (1948) (noting that when "a mere child–an easy victim of the law–is before us," the Court must exercise special care, as "[t]hat which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.")

This consideration of consent can be seen in one of this Court's recent Fourth Amendment cases as well. In *Safford Unified School District #1 v. Redding*, 129 S. Ct. 2633 (2009), this Court considered school officials' search of a 13-year old girl for pain relief pills. After being questioned, the girl had "agreed to let [a school official] search her belongings," *id.* at 2638, and her backpack was searched. This Court nonetheless analyzed whether the school official had enough justification for that search, and, indeed, insisted that "[t]here is no question that justification for the school officials' search [of her backpack] was required . . . " *Id.* at 2641 n.3. That is, the girl's agreement alone to have her backpack searched was insufficient for Fourth Amendment purposes. Such consent, of course, would have been dispositive for an adult.

The fact that children cannot consent to a seizure suggests that law enforcement officials should limit their contacts with them. The normal standard for reasonableness as to seizures, *viz.*, probable cause, can effectively limit these contacts to situations where such involuntary, non-consensual contacts are truly needed.

2. Family Rights. – The interest of parents in the upbringing of their children is the seminal "fundamental" liberty interest protected by the Fourteenth Amendment. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("'The liberty interest at issue in this case -- the interests of

parents in the care, custody, and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized by this Court.") It protects the rights of parents to make important decisions for their children. *Id.* at 66. *Cf. Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 2000) (children have the right to have important medical decisions made by their parents).

Whether or not to cooperate with state authorities in their efforts to seek information from a child is a decision of great concern, one that normally would be entrusted to a parent. To be sure, as petitioners argue, there may be situations where a parent might have a conflict of interest; the state officials may be seeking information about improper conduct of the parent. But precisely because such efforts to pit a child against one of her parents is so fraught with consequences for the entire family – as they were here – the fundamental rights of parents and children should not be casually overcome on the mere suspicion that there is a conflict of interest. Again, the fundamental liberty interest of familial association strongly suggests that nothing less than probable cause should warrant a child's seizure to extract a condemnation of one of her parents.

CONCLUSION

This Court should conclude that it lacks jurisdiction to assess the Ninth Circuit's opinion regarding respondent's Fourth Amendment claim, or, alternatively, that it should not, in its discretion, exercise whatever jurisdiction it might have. Should the Court reach that issue, it should agree with the Ninth Circuit that there were genuine issues of material facts precluding a grant of summary judgment to the petitioners solely on the ground that they complied with the Fourth Amendment.

Respectfully submitted,

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