No. 09-1454

In The Supreme Court of the United States

BOB CAMRETA,

Petitioner,

v.

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

Respondent.

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

BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, LEAGUE OF CALIFORNIA CITIES, AND CALIFORNIA SCHOOL BOARDS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

JOHN E.B. MYERS
Of Counsel
UNIVERSITY OF THE PACIFIC MCGEORGE SCHOOL OF LAW
3200 Fifth Avenue
Sacramento, CA 95817
Phone: 916.739.7176
jmyers@pacific.edu

JOHN J. SANSONE
County Counsel
JOHN E. PHILIPS
Chief Deputy
DAVID G. AXTMANN
Senior Deputy
GARY C. SEISER
Senior Deputy
Counsel of Record
OFFICE OF COUNTY COUNSEL
JUVENILE DEPENDENCY DIVISION
4955 Mercury Street
San Diego, CA 92111
Phone: 858.492.2550
Gary.Seiser@sdcounty.ca.gov
Counsel for Amici Curiae

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Additional Counsel:

JENNIFER B. HENNING
Litigation Counsel
CALIFORNIA STATE ASSOCIATION OF COUNTIES
1100 K Street, Suite 101
Sacramento, CA 95814
Phone: 916.327.7500
jhenning@coconet.org

PATRICK WHITNELL
General Counsel
LEAGUE OF CALIFORNIA CITIES
1400 K Street
Sacramento, CA 95814
Phone: 916.658.8281
pwhitnell@cacities.org

RICHARD L. HAMILTON
Acting General Counsel
Director, Education Legal Alliance
CALIFORNIA SCHOOL BOARDS ASSOCIATION
3100 Beacon Boulevard
West Sacramento, CA 95691
Phone: 916.371.4691
dhamilton@csba.org

QUESTIONS PRESENTED

(1) Public school interviews of suspected child abuse victims are a vital tool for social workers and peace officers, allowing children to be contacted in a safe, neutral setting. Normally the interviews do not restrict the child's movement any more than being in school does and do not intrude on the child's privacy beyond what the child is willing to tell. Absent egregious circumstances, do such public school interviews implicate the Fourth Amendment?

(2) The Courts of Appeals are split regarding the standard for reviewing Fourth Amendment claims in child protection investigations. Determining the correct standard involves consideration of multiple interests, including children's right to be safe from abuse and neglect. If the Fourth Amendment is implicated in a public school interview of a suspected child abuse victim, should the traditional balancing test apply?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

THE AMICI CURIAE SUBMIT THIS BRIEF IN SUPPORT OF PETITIONER 1

INTERESTS OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

REASONS FOR GRANTING THE WRIT 7

I. REVIEW IS NEEDED TO RESOLVE THE QUESTION OF WHETHER THE FOURTH AMENDMENT APPLIES TO CHILD PROTECTION INTERVIEWS CONDUCTED AT PUBLIC SCHOOLS 7

A. This Issue Is Antecedent To And Fairly Included In The Issues Raised In The Petition For Certiorari, And Thus May Be Considered On Review 8

B. The Ninth Circuit's Analysis As To Why This Public School Interview Was A Seizure Is In Conflict With Decisions Of This Court 10

C. The Ninth Circuit's Decision That The Fourth Amendment Applied To This Public School Interview Places School Officials In A Constitutionally Unnecessary And Conflicting Position 15

D. Review Should Be Granted To Decide This Constitutional Issue Of National Importance 18

TABLE OF CONTENTS – Continued

Page

II. REVIEW SHOULD BE GRANTED TO SETTLE THE CONFLICT ON AN ISSUE OF NATIONAL IMPORTANCE: IF THE FOURTH AMENDMENT IS IMPLICATED IN A PUBLIC SCHOOL INTERVIEW OF A SUSPECTED CHILD ABUSE VICTIM, SHOULD THE TRADITIONAL BALANCING TEST APPLY? 20

A. Review Should Be Granted To Make Clear That A Child's Right And Compelling Interest To Be Safe Is A Factor To Be Considered In Any Fourth Amendment Analysis. 20

B. Review Should Be Granted To Settle The Clear And Enduring Conflict Between Circuits As To The Proper Standard For Reviewing Fourth Amendment Claims Arising From Child Protection Investigations 24

CONCLUSION..... 26

TABLE OF AUTHORITIES

Page

CASES

Alejo v. City of Alhambra, 75 Cal. App. 4th 1180 (Cal. Ct. App. 1999) 16

Arcadia v. Ohio Power Company, 498 U.S. 73 (1990) 8

Calabretta v. Floyd, 189 F.3d 808 (9th Cir. 1999) 25

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 8, 19

Couture v. Bd. of Educ. of the Albuquerque Pub. Schs., 535 F.3d 1243 (10th Cir. 2008) 13

DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189 (1989) 23

Ferguson v. City of Charleston, 532 U.S. 67 (2001) 16

Florida v. Bostick, 501 U.S. 429 (1991) 11, 12, 13

Gates v. Tex. Dept. of Protective and Regulatory Services, 537 F.3d 404 (5th Cir. 2008) 21, 22, 23, 24

Gilmer v. Interstate, 500 U.S. 20 (1991) 8

Graham v. Florida, 176 L.Ed.2d 825 (2010) 21

Greene v. Camreta, 588 F.3d 1011 (5th Cir. 2009) .....*passim*

Illinois v. Lidster, 540 U.S. 419 (2004) 23

In re Gault, 387 U.S. 1 (1967) 20

INS v. Delgado, 466 U.S. 210 (1984) 12, 13

TABLE OF AUTHORITIES – Continued

Page

Kolstad v. ADA, 527 U.S. 526 (1999) 8

Pennsylvania v. Ritchie, 480 U.S. 39 (1987).....7

Rhode Island v. Innis, 446 U.S. 291 (1980) 15

Roper v. Simmons, 543 U.S. 551 (2004).....20

Safford Unified Sch. Dist. 1 v. Redding, 129 S.Ct. 2633 (2009).....17

Saucier v. Katz, 533 U.S. 194 (2001).....9

Spiering v. Heineman, 448 F.Supp.2d 1129 (D.Neb. 2006) 22

Teague v. Lane, 489 U.S. 288 (1989) 8

Tenenbaum v. Williams, 193 F.3d 581 (2d Cir. 1999) 9, 24

*Terry v. Ohio, 3*92 U.S. 1 (1967) 11

United States v. Drayton, 536 U.S. 194 (2002).....12

United States v. Hollingsworth, 495 F.3d 795 (7th Cir. 2007) 17

Vance v. Terrazas, 444 U.S. 252 (1980) 8

Vernonia Sch. Dist. 47j v. Acton, 515 U.S. 646 (1995).....13

Wallace v. Batavia Sch. Dist. 101, 68 F.3d 1010 (7th Cir. 1995) 13

Wildauer v. Frederick County, 993 F.2d 369 (4th Cir. 1993) 9

TABLE OF AUTHORITIES – Continued

Page

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 14(1)(a) 8

Rule 37.2(a) 1

Rule 37.6 1

OTHER

Child Maltreatment 2008, U.S. Dept. of Health and Human Servs., Children's Bureau (2010) http://www.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf 19

Child Welfare Services Reports for California, Univ. of Cal. at Berkeley, Cen. for Soc. Servs. Research, http://cssr.berkeley.edu/ucb_childwelfare/allegations.aspx 18

Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2007) 8

Section 5.11 19

Section 6.25(h) 19

Section 6.26(d) 8

John E.B. Myers, *Child Protection in America* 3 (2006) 19

John E.B. Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases*, § 7.01, (2005) (successor edition to John E.B. Myers, *Evidence in Child Abuse and Neglect Cases* (3d ed. 1997)) 7

TABLE OF AUTHORITIES – Continued

Page

The Declaration of Independence para. 2 (U.S. 1776) 6

THE AMICI CURIAE SUBMIT THIS BRIEF IN SUPPORT OF PETITIONER

The California State Association of Counties, League of California Cities, and the California School Boards Association respectfully submit this brief as *amici curiae* in support of Petitioner.

INTERESTS OF THE AMICI CURIAE[1]

The California State Association of Counties (CSAC) is a nonprofit corporation, the membership of which consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case involves issues affecting all California counties.

The League of California Cities (League) is an association of 474 California cities dedicated to

[1] Pursuant to Rule 37.2(a) of the Rules of the Supreme Court of the United States, *amici curiae* provided at least ten days' notice of their intent to file this brief to counsel of record for all parties. The parties have consented to the filing of this brief. Pursuant to this Court's Rule 37.6, this brief was not authored in whole or in part by counsel for any party, and no person or entity other than the *amici curiae* made a monetary contribution to this brief's preparation or submission.

protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide – or nationwide – significance. The Committee has identified this case as being of such significance.

The California School Boards Association (CSBA) is a California nonprofit corporation. CSBA is a member-driven association composed of nearly 1,000 K-12 school district governing boards and county boards of education throughout California. CSBA supports local school board governance and advocates on behalf of school districts and county offices of education. CSBA sponsors the Education Legal Alliance (Alliance), which helps to ensure that local school boards retain the authority to fully exercise the responsibilities vested in them by law to make appropriate policy and fiscal decisions for their local educational agencies. The Alliance represents its members by addressing legal issues of statewide concern to school districts. Its activities include joining in litigation where the interests of public education are at stake. The Alliance has identified this case as one that has statewide importance.

As representatives of California counties, cities, and schools, the *amici* have a compelling interest in

ensuring the safety of children. The Ninth Circuit decision in this case is already having a significant adverse impact on child protection investigations and if allowed to stand is likely to have even greater effect. As such, the *amici* submit this brief in support of Petitioner.

SUMMARY OF ARGUMENT[2]

The Fourth Amendment was written to protect the people from unreasonable governmental searches and seizures. But a social worker or peace officer going into a public school to ask a child if she has been abused was not what the Framers feared. Nor should this Court.

Child abuse and neglect is a national problem. Every school day thousands of children throughout this nation are interviewed in their schools regarding possible abuse and neglect in their homes. In many communities social workers take the lead in such investigations. In others, law enforcement does. In both there is recognized value in limiting the number of interviews. These interviews are often conducted under state laws that recognize abused and neglected children are most likely to answer interview questions honestly when they feel safe, such as at

[2] For the Court's information, the *amici* have just learned that there appears to be a related case with similar issues arising out of the same decision of the Ninth Circuit Court of Appeals. The docket number is 09-1478.

their schools; that interviewing children at their schools does not involve the privacy concerns involved with trying to interview the children in their homes; and that the need to protect children from abuse and neglect is a compelling state and national interest.

The *amici* agree with the arguments presented in the Petition for Writ of Certiorari regarding the need for this Court to settle the enduring and well-established conflict between the Courts of Appeals on the proper standard for Fourth Amendment claims arising from child protection investigations. It notes that both Fourth Amendment seizure law and child protection investigations proceed along a continuum. The nature of the interests involved and the standards for the protection of those interests differ as the acts of the government official proceed along those continuums.

The Ninth Circuit did not consider whether the public school interview in this case was a consensual encounter. Instead it created a *de facto per se* rule that all public school interviews of suspected child abuse victims by law enforcement implicate the Fourth Amendment. The *amici* assert they do not. Most are consensual encounters within the normal restrictions placed on children in public schools. Further, considering them seizures places many school officials in a difficult position; they are mandated reporters and must report reasonable suspicions of child abuse, but many schools read the Ninth Circuit's decision to mean that if police respond to the report the school can't allow the officer to interview the suspected victim absent a warrant, court order, parent's consent, or exigency. As such, the

amici ask this Court to grant review and direct the parties to brief the antecedent and fairly included question: Absent egregious circumstances, do public school interviews of suspected child abuse victims implicate the Fourth Amendment?

The Ninth Circuit also did not consider whether the public school interview of the suspected child abuse victim in this case was an investigative detention that fell short of taking the child into custody. Instead it decided it was a seizure tantamount to an arrest, applying the same test it would apply if the child was physically removed from the home and taken into protective custody. In this it erred. The *amici* assert that if the Fourth Amendment is implicated in a public school interview of a suspected child abuse victim, it will be a detention falling short of a full seizure, rather than the functional equivalent of an arrest. As such, the traditional test of reasonableness should apply.

The Ninth Circuit's decision as to the standard for reviewing Fourth Amendment claims in child protection investigations is in conflict with decisions of this Court and with decisions of other circuits. The *amici* reframes the issue and writes separately here to emphasize the child's right to be safe from abuse and neglect. The *amici* assert that children have a right to be safe from abuse and serious neglect in their homes. Whether this is a federal constitutional right, a compelling interest belonging to children, or a compelling state and federal interest that imbues to children only this Court can decide. But the *amici* assert that this right to be safe from abuse and

neglect is as fundamental, self-evident, and unalienable to a child's liberty interests as the child's right to familial association, perhaps more. The Declaration of Independence para. 2 (U.S. 1776). And the *amici* submit it must be considered in all Fourth Amendment claims arising out of child protection investigations.

The Ninth Circuit didn't do that. Only review by this Court can ensure the interest of the child in being safe from abuse and neglect is considered in any Fourth Amendment analysis, and that a reasonableness standard applies to those public school interviews that reach a stage where the Fourth Amendment is implicated. Review cannot wait for a case to come along in which the Petitioner loses on the question of qualified immunity. Doing so would result in hundreds of thousands of child protection investigations, if not more, being hampered or stopped by the Ninth Circuit's decision. As such, review of these questions of national importance is needed now.

REASONS FOR GRANTING THE WRIT

I. REVIEW IS NEEDED TO RESOLVE THE QUESTION OF WHETHER THE FOURTH AMENDMENT APPLIES TO CHILD PROTECTION INTERVIEWS CONDUCTED AT PUBLIC SCHOOLS.

This Court has recognized that, "Child abuse is one of the most difficult crimes to detect and prosecute, in large part because *there often are no witnesses except the victim*. A child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent." *Pennsylvania v. Ritchie,* 480 U.S. 39, 60 (1987) (emphasis added). That realization was echoed by one leading authority who wrote, "in many cases the need for the child's out-of-court statements is magnified by *a paucity of physical evidence and eyewitnesses*." John E.B. Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases*, § 7.01, at 478 (2005) (successor edition to John E.B. Myers, *Evidence in Child Abuse and Neglect Cases* (3d ed. 1997)) (emphasis added). Thus, an interview of the child is often the only means to obtain evidence of child maltreatment, especially sexual abuse. This is true not only in criminal cases, but in juvenile or family court cases brought for the child's protection. As such, whether a public school interview of a suspected child abuse victim implicates the Fourth Amendment is of far greater significance in child protection investigations than in other investigations.

A. This Issue Is Antecedent To And Fairly Included In The Issues Raised In The Petition For Certiorari, And Thus May Be Considered On Review.

It is a rule of Supreme Court practice that only those issues raised by the parties or fairly included in such issues will be considered by the Court. Sup. Ct. R. 14(1)(a). But that rule is not always strictly followed. *Kolstad v. ADA,* 527 U.S. 526, 540 (1999), citing *Gilmer v. Interstate,* 500 U.S. 20, 37 (1991) (Stevens, J., dissenting). And in *Vance v. Terrazas* this Court noted, "[i]n any event, consideration of issues not present in the jurisdictional statement or petition for certiorari and not presented in the Court of Appeals is not beyond our power, and in appropriate circumstances we have addressed them." *Vance v. Terrazas,* 444 U.S. 252, 258-59 n.5 (1980).

Significantly, in *Arcadia v. Ohio Power* this Court found there was an issue "antecedent" to those raised by the parties that needed to be addressed. *Arcadia v. Ohio Power Company,* 498 U.S. 73, 77 (1990). In that case the antecedent issue was identified by the Court. But on other occasions, the issue the Court reached was identified only by *amicus curiae*. *See, e.g.*, *Teague v. Lane,* 489 U.S. 288, 300 (1989); *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 697-98 (1984). *See also* Eugene Gressman et al., *Supreme Court Practice* § 6.26(d), at 466 (9th ed. 2007). Such is the case here.

In this case one of the primary issues at both the Ninth Circuit Court of Appeals and in the Petition for Certiorari was which standard of Fourth Amendment analysis should be used when a suspected child abuse victim is interviewed at a public school; the requirements of consent, warrant, court order, or exigency; or a balancing process for reasonableness. *See, e.g., Tenenbaum v. Williams,* 193 F.3d 581, 606 (2d Cir. 1999) (warrant equivalent, reasonable or probable cause, or exigency approach); *Wildauer v. Frederick County,* 993 F.2d 369, 372-73 (4th Cir. 1993) (balancing or reasonableness approach); Petition for Writ of Certiorari (Petition) 18-25. But there is an antecedent issue.

The fundamental first question of any analysis regarding an alleged violation of the Fourth Amendment is whether the Fourth Amendment is implicated in the first place. The Ninth Circuit in this case held it was, but *amici* assert it was not, and request this Court to grant review of that question as set forth in this *amicus* brief.

This issue is not new to the parties. The Ninth Circuit chose to follow the two-step inquiry of *Saucier v. Katz,* 533 U.S. 194 (2001). *Greene v. Camreta,* 588 F.3d 1011, 1021 (9th Cir. 2009). As such, it expressly addressed the question of whether the public school interview of the suspected child abuse victim implicated the Fourth Amendment. It found the interview was a seizure. *Id.* at 1022, 1027-28, 1030 n.18.

Moreover, Petitioner recognized, although did not directly address in its Petition, that not all public school interviews implicate the Fourth Amendment. Petition, at 12 ("Depending on the particular circumstances of an interview, interviewing a child may effect a Fourth Amendment seizure."), 13 ("Admittedly, not every interview of a potential child-abuse victim will amount to a constitutional seizure."), 15 ("[The Ninth Circuit's] decision is triggered only if, at some point during the interview of the potential child-abuse victim, state officials 'seize' that child.").

Thus, this Court has jurisdiction to consider the question of whether, absent egregious circumstances, a public school interview of a suspected child abuse victim implicates the Fourth Amendment. The issue is not new to the parties since it was an express part of the Ninth Circuit's decision in this case. And it was acknowledged in the Petition for Writ of Certiorari. The *amici* assert this is an antecedent issue and fairly included in the issues raised by Petitioner. They also assert this is an issue of national importance that should be reached in this case.

B. The Ninth Circuit's Analysis As To Why This Public School Interview Was A Seizure Is In Conflict With Decisions Of This Court.

While this Court has not yet addressed the issue of public school interviews of suspected child abuse victims, it has addressed the issue of peace officers

being armed during contacts with the public and with such contacts taking place in limited space situations. And it has dealt with restrictions on a child's freedom of movement at public school.

As this Court stated almost two decades ago, "Since *Terry*, we have held repeatedly that mere police questioning does not constitute a seizure."[3] *Florida v. Bostick,* 501 U.S. 429, 434 (1991). The *amici* submit the same is true when the questioning is done by a social worker. And it is true when the questioning is done by a social worker or peace officer with the other observing. Nor does the fact the peace officer in this case was armed elevate the interview to a Fourth Amendment seizure.

In *Bostick* this Court reviewed a case in which "[t]wo officers, complete with badges, insignia and one of them holding a recognizable zipper pouch, containing a pistol boarded a bus," made contact with individuals on the bus, and eventually conducted a search of one individual's luggage. *Bostick*, 501 U.S. at 431-32 (quoting the Florida Supreme Court's underlying decision; internal quotation marks omitted). This Court did not decide whether a Fourth Amendment seizure had occurred, deciding to send it back to the Florida Supreme Court to determine that question, now under the correct standard. *Id.* at 437-38.

---

[3] *Terry v. Ohio,* 392 U.S. 1 (1967).

This Court made clear, however, that the fact an armed police officer contacted a person on a bus did not decide the issue. This court found it "particularly worth noting" that "at no time did the officers threaten Bostick with a gun." *Id.* at 432; *see also*, *id*., at 437. Further, there was no suggestion the pistol the officer was carrying "was ever removed from its pouch, pointed at Bostick, or otherwise used in a threatening manner." *Id.* at 432; *see also*, *INS v. Delgado,* 466 U.S. 210, 212 (1984) (noting that "at no point during any of the surveys was a weapon ever drawn.").

Similarly, in *United States v. Drayton,* 536 U.S. 194 (2002), this Court dealt with whether a peace officer being armed transformed a contact with a member of the public into a seizure. "That most law enforcement officers are armed is a fact well-known to the public. The presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon." *Id.* at 205. This is no different with most children.

In *Bostick* this Court also addressed the question of whether being on a bus when contacted by law enforcement meant a reasonable person would not have felt free to leave. It noted:

> Here, for example, the mere fact *that Bostick did not feel free to leave the bus does not mean that the police seized him*. . . . Bostick's movements were "confined" in a sense, but this was the natural result of his

> decision to take the bus; *it says nothing about whether or not the police conduct at issue was coercive*.

Bostick, 501 U.S. at 436 (emphasis added). It went on to say "Bostick's freedom of movement was restricted by a factor independent of police conduct – *i.e*., by his being a passenger on a bus." *Id.*; *see also*, *Delgado*, 466 U.S. at 218 ("Ordinarily, when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers.").

Similarly, this Court and other courts have recognized that when children are at school their liberty is naturally restricted. "Traditionally at common law, *and still today*, unemancipated minors lack some of the most fundamental rights of self-determination – including even the right of liberty in its narrow sense, *i.e., the right to come and go at will*." *Vernonia Sch. Dist. 47j v. Acton,* 515 U.S. 646, 654 (1995) (emphasis added). *See Wallace v. Batavia Sch. Dist. 101,* 68 F.3d 1010, 1013 (7th Cir. 1995) ("[L]aw compels students to attend school, which deprives them of a level of freedom of mobility. Once under the control of the school, students' movement and location are subject to the ordering and direction of teachers and administrators."); *Couture v. Bd. of Educ. of the Albuquerque Pub. Schs.,* 535 F.3d 1243, 1251 (10th Cir. 2008) ("To qualify as a seizure in the school context, the limitation on the student's freedom of

movement must significantly exceed that inherent in every-day, compulsory attendance.").

From these cases a common thread emerges. A peace officer being armed does not render a contact a seizure absent pulling the weapon from the holster or otherwise brandishing the firearm. Children's liberty at school is naturally and permissibly restricted by the very fact they are attending school. And a peace officer or social worker contacting a person in a place where that person's mobility is already limited, such as a bus, workplace, or school, does not by itself render that contact coercive or a seizure. But the Ninth Circuit saw things differently.

In *Greene*, the court went to great length to point out the social worker who conducted the public school interview was accompanied by an armed peace officer. *Greene,* 588 F.3d at 1017 ("visible firearm"), 1027 ("visible firearm"), 1028 ("armed police officer"), 1031 ("police officer carrying a firearm"), 1032 ("armed police officer"). And it held that having the peace officer accompany the social worker for the interview "constituted sufficient entanglement with law enforcement to *trigger the traditional Fourth Amendment prerequisites to seizure of a person*." *Id.* at 1028 (emphasis added).

Although the Ninth Circuit was not asked to address whether the public school interview of the child was a search, it looked to many cases involving searches, an analogy that is not always apt. *Greene*,

588 F.3d at 1023 n.7. In doing so the Ninth Circuit's attitude toward the government officials in this case was also demonstrated by the court's repeated description of the interview of the suspected child abuse victim as an "interrogation." *Id.* at 1020, 1022, 1023, 1027 n.12, 1030. An interrogation is questioning or its functional equivalent that is "reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). A public school interview of a suspected child abuse victim is not designed to elicit an incriminating response. The child is a suspected victim. Thus, the interview is not an interrogation.

As such, both the Ninth Circuit's approach and holding are in conflict with decisions of this Court, and review by this Court is necessary to settle this issue of national importance.

C. The Ninth Circuit's Decision That The Fourth Amendment Applied To This Public School Interview Places School Officials In A Constitutionally Unnecessary And Conflicting Position.

Teachers, school staff and administrators, and school boards care deeply about the safety of the children entrusted to them. They care because they have charge of the children for a significant portion of each school day and are responsible for a very important function: the children's education. They care because the children are people they get to know

and value. And they care because they know child abuse and neglect can have a significant detrimental impact on a child's education.

Moreover, public school teachers and other authorities in the public school system are mandated reporters, requiring them to report to child protection agencies or law enforcement any reasonable suspicion of child abuse or neglect. This Court has recognized that state law may mandate child abuse reporting. *Ferguson v. City of Charleston,* 532 U.S. 67, 80-81 (2001); *id.* at 90 (Kennedy, J., concurring). Indeed, every state has such laws, which are a requirement for federal funding under the Child Abuse Prevention and Treatment Act. And, like Oregon, many states have statutory or case law mandates for the investigation of suspected child abuse. *See Alejo v. City of Alhambra,* 75 Cal. App. 4th 1180, 1186-90 (Cal. Ct. App. 1999) (California peace officers have a statutory duty to investigate and report suspected child abuse).

The Ninth Circuit has created a *de facto per se* rule that all child protection investigations by peace officers at a public school implicate the Fourth Amendment. *Greene*, 588 F.3d at 1028. The decision does not provide clarity, however; it creates confusion. Do all public school interviews of suspected child abuse victims conducted by peace officers amount to a seizure subject to *Greene*, regardless of length or circumstance? Some say yes. Some say no. And some are afraid to take the chance. As a result, many schools no longer allow peace officers on campus to interview suspected child abuse victims in the

absence of a court order or an indication of exigency. Some schools are not even allowing social workers to conduct such interviews without these.

When a parent sends a child to a public school the parent "should reasonably expect that school officials will speak with her child if the child raises serious concerns about her home life." *United States v. Hollingsworth,* 495 F.3d 795, 802 (7th Cir. 2007). The *amici* submit that because the public knows school employees are mandated reporters, parents should also reasonably expect teachers and other school officials will report any reasonable suspicions of child abuse to child protective services, law enforcement, or both. And while not all reports of child maltreatment come from schools, the *amici* assert the citizens of this nation, including parents, also expect teachers and other school officials will cooperate with child protection investigations whether carried out by social workers, peace officers, or both. The *Greene* decision makes that difficult to do.

Finally, just as "[t]eachers are not pharmacologists trained to identify pills and powders. . . ." *Safford Unified Sch. Dist. 1 v. Redding,* 129 S.Ct. 2633, 2640 n.1 (2009), they are not trained child abuse investigators or interviewers. That's not their job. It's the job of social workers and peace officers. Thus, the confusion caused by the Ninth Circuit's decision is particularly distressing for teachers and other school officials, especially if, as the *amici* believe, it is constitutionally unnecessary.

D. Review Should Be Granted To Decide This Constitutional Issue Of National Importance.

A fundamental first step in most child maltreatment investigations of verbal children involves contacting the child and asking if the child has been abused. This is especially true of school aged children. In California, during the period of October 1, 2008, to September 30, 2009, there were 335,935 referrals for child maltreatment of school age children, ages five through seventeen. Of those, 73,708 were assessed without the need for any further investigation, leaving 262,227 to be investigated. On average that is over 700 cases every day of the year, which includes every school day. Thus, every school day in California there may be 700 school age children or more needing to be interviewed. Sadly, on average over 170 of those allegations will be substantiated each day. *Child Welfare Services Reports for California*, Univ. of Cal. at Berkeley, Cen. for Soc. Servs. Research, http://cssr.berkeley.edu/ucb_childwelfare/allegations.aspx (last visited June 23, 2007). The national figures are even higher.

> During Federal fiscal year 2008, an estimated 3.3 million referrals, involving the alleged maltreatment of approximately 6.0 million children, were received by CPS agencies. Of these, approximately 63 percent (62.5%) of the referrals were screened in for investigation or assessment by CPS agencies. In other words, nearly 2 million reports

> (involving 3.7 million children) had an investigation or assessment.

Child Maltreatment 2008, U.S. Dept. of Health and Human Servs., Children's Bureau, xii (2010) http://www.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf (last visited June 22, 2010). In the end, "[m]ore than 2,500 children are abused or neglected every day in America. That is nearly a million children a year. Each day, four children die because of abuse or neglect. To make matters worse, official statistics underreport the true scope of child abuse and neglect." John E.B. Myers, *Child Protection in America* 3 (2006). These national figures are not limited to school age children, but the numbers are staggering.

Thus, whether public school interviews of suspected child abuse victims automatically implicate the Fourth Amendment is of vital importance for California and this nation. As such, the *amici* submit review should be granted and requests this Court order the parties to brief this issue: Absent egregious circumstances, do public school interviews of suspected child abuse victims implicate the Fourth Amendment? *Capital Cities*, 467 U.S. at 697. *See generally*, *Gressman*, *supra*, § 5.11, at 341, § 6.25(h), at 459-60.

II. REVIEW SHOULD BE GRANTED TO SETTLE THE CONFLICT ON AN ISSUE OF NATIONAL IMPORTANCE: IF THE FOURTH AMENDMENT IS IMPLICATED IN A PUBLIC SCHOOL INTERVIEW OF A SUSPECTED CHILD ABUSE VICTIM, SHOULD THE TRADITIONAL BALANCING TEST APPLY?

The *amici* agree with Petitioner and the Ninth Circuit in *Greene* that the Courts of Appeals are in conflict regarding the proper standard of analysis for Fourth Amendment claims in child protection investigations. Petition, at 22-25; *Greene*, 588 F.3d at 1026 n.11. The *amici* reframe the issue and write separately to ask this Court to consider one additional factor: the right of children to their own personal safety from abuse and serious neglect in their home.

A. Review Should Be Granted To Make Clear That A Child's Right And Compelling Interest To Be Safe Is A Factor To Be Considered In Any Fourth Amendment Analysis.

This Court has often stepped forward to address questions relating to the rights of juveniles suspected of committing crimes or those who have been found to have committed such crimes. *See, e.g.*, *In re Gault,* 387 U.S. 1 (1967) (certain rights afforded adults charged with crimes apply to juveniles also); *Roper v. Simmons*, 543 U.S. 551 (2004) (death penalty cannot

apply to those who were minors when the crime was committed); *Graham v. Florida,* 176 L.Ed.2d 825 (2010) (life without possibility of parole cannot be imposed for nonhomicide offenses committed by minors).

Yet this Court has never stepped forward to clearly provide similar guidance on the rights of child abuse victims and how that right should impact the analysis of Fourth Amendment claims. Nor have the Courts of Appeals, which have often commented on the state's compelling interest in protecting children, but rarely speak of the child's own right to safety, choosing instead to speak of the child's right to privacy or familial association. The Fifth Circuit is an exception.

In *Gates*, the Fifth Circuit recognized that child protection investigations in which a Fourth Amendment seizure takes place involve interests not present in most seizures in criminal cases. It noted that when a person is seized in a criminal case, it is to keep that individual from harming others. But when a child is seized in a child protection case, it is to keep others from harming the child. "Thus, while a Fourth Amendment seizure has taken place when the government seizes the alleged victim of child abuse, *the government's interest is primarily in protecting the child, not in restricting the child's freedoms*." *Gates v. Tex. Dept. of Protective and Regulatory Services,* 537 F.3d 404, 427-28 (5th Cir. 2008) (emphasis added).

Having spoken of the government's interest, the Fifth Circuit went on to speak of the child's interest in safety. "Therefore, when courts are called upon to balance the child's Fourth Amendment rights with the government's interests, *it is important to recognize that the child's interests may align with the government's interests if, indeed, the child is at risk of abuse*." *Id.* at 428 (emphasis added). *See*, *Spiering v. Heineman,* 448 F.Supp.2d 1129, 1140 (D.Neb. 2006) (there are "two competing values of equal worth: the right of parents to parent and the right of children to safety.").

The Fifth Circuit used the child's interest in safety, and the fact an abused child is normally living in the home with the abuser, to impact its definition of exigency. *Gates*, 537 F.3d at 429. The *amici* assert it should also impact the decision as to whether a traditional balancing standard should apply, rather than the standard of warrant, court order, consent, or exigency. Indeed, it should apply in any Fourth Amendment analysis. The child is not a suspect in child protection investigations. The child is a potential witness, and more importantly, a suspected victim.

As noted by this Court in an analogous situation:

> [T]he context here (seeking information from the public) is one in which, by definition, the concept of individualized suspicion has little role to play. Like certain other forms of police activity, say, crowd control or public safety, an information-seeking stop is not the kind

> of event that involves suspicion, or lack of suspicion, of the relevant individual.

Illinois v. Lidster, 540 U.S. 419, 424-25 (2004). Nor is the suspected child abuse victim being approached due to any suspicion the child has done something wrong. Instead, she is an alleged victim with a compelling interest in her own safety. Thus, if the Fourth Amendment is implicated in a public school interview of a suspected child abuse victim, the traditional balancing standard should apply. *Id.* at 424.

The Ninth Circuit did not consider the child's right to safety as a factor in its decision, nor have most other courts. They should. To be clear, the *amici* do not contend that a child's right to and compelling interest in being safe from abuse and serious neglect in the home should override all other considerations. *Gates*, 537 F.3d at 429. Nor do the *amici* suggest a constitutional right to such safety exists thereby imposing a duty on government agencies; this Court has already dealt with that issue and found there is no such obligation. *DeShaney v. Winnebago County Dept. of Social Servs.,* 489 U.S. 189 (1989).

But as a matter of constitutional interpretation and national policy, the right and compelling interest of children to be safe in their homes is a matter of great importance. The impact it should have on the nature of constitutional protections and the analysis under the Fourth Amendment in child protection investigations is a matter that needs this Court's

review. This nation has come a long way from treating children as chattel with no rights, but it has yet to fully recognize a child's right to be safe and to consider that right in constitutional analysis in child protection investigations. By granting certiorari this Court can change that.

B. Review Should Be Granted To Settle The Clear And Enduring Conflict Between Circuits As To The Proper Standard For Reviewing Fourth Amendment Claims Arising From Child Protection Investigations.

As previously noted, both Petitioner and the Ninth Circuit's decision in *Greene* recognize the Courts of Appeals are in conflict regarding the proper standard of analysis for Fourth Amendment claims in child protection investigations. Petition, at 22-25; *Greene*, 588 F.3d at 1026 n.11. Other courts have recognized this conflict as well. *See*, *Gates,* 537 F.3d at 423-26 (listing the position of the various circuits regarding "special needs"); *see also*, *Tenenbaum*, 193 F.3d at 604-05 (indicating it didn't matter under the facts of that case whether it applied a special needs reasonableness, probable cause, or exigency analysis).

The interests involved in Fourth Amendment claims proceed along a continuum; consensual encounters, detentions of possible witnesses, detentions of suspects that fall short of an arrest, and arrests or seizures. As this Court knows, the nature

of the interest and standard for addressing Fourth Amendment claims differ at each point.

Child abuse investigations proceed along a continuum too. Some are "evaluated out" at the initial referral and never need face-to-face interviews. Some end after the social worker or peace officer talks with the child, whether at school or elsewhere. Others involve taking the child from school to another location to be interviewed. In sexual abuse cases, the child may be taken for a medical examination. And some investigations eventually lead to removal from the home. The nature of the interests, degree of constitutional protections, and standard for analysis of Fourth Amendment claims at each of the points along this continuum must also, of necessity, be different.

Yet the Ninth Circuit in *Greene* applies the same standard for a public school interview of a child as it applies to removal from the home or an intrusive medical examination. *Compare*, *Greene*, 588 F.3d at 1030 (applying requirement of search warrant, court order, consent, or exigency to a public school interview of suspected child abuse victim), *with Calabretta v. Floyd,* 189 F.3d 808, 814 (9th Cir. 1999) (applying requirement of search warrant, consent, or exigency to removal of the child from the home). It should not. They are not the same. If a suspected child abuse victim is seized by virtue of a public school interview, it is not the functional equivalent of

an arrest. Only review by this Court can resolve this conflict.

CONCLUSION

Our Nation has long needed this Court to resolve the well-established and enduring conflict and confusion created by the Courts of Appeals regarding the application of the Fourth Amendment to child protection investigations. This case addresses only one small part of that morass: public school interviews of suspected child abuse victims. Thus, review in this case cannot address all that is needed to settle the conflicts and guide this area of national importance. But it's a start. A much needed and important start.

Significantly, however, that start can't wait for another case to come along in which the petitioner loses on the issue of qualified immunity at the Court of Appeals. That may take years, while hundreds of thousands of child protection investigations, if not more, are hampered or stopped by the Ninth Circuit's decision in *Greene*. The *amici* ask this Court to grant the Petition for Writ of Certiorari. They also ask this Court to order briefing on the antecedent and fairly included issue raised in this brief: Whether, in the absence of egregious circumstances, a public school interview of a suspected child abuse victim implicates the Fourth Amendment. Finally, the *amici* request this Court direct the parties to address the child's

right to and compelling interest in safety and how it impacts Fourth Amendment analysis in child protection investigations. Along with the issue raised by Petitioner, these questions are ones of national importance that only this Court can resolve. As such, review should be granted.

Respectfully submitted July 1, 2010,

JOHN J. SANSONE, County Counsel
JOHN E. PHILIPS, Chief Deputy
DAVID G. AXTMANN, Senior Deputy
GARY C. SEISER, Senior Deputy
Counsel of Record
OFFICE OF COUNTY COUNSEL
JUVENILE DEPENDENCY DIVISION
4955 Mercury Street
San Diego, CA 92111
Phone: 858.492.2550
Gary.Seiser@sdcounty.ca.gov
Counsel for Amici Curiae

JOHN E.B. MYERS
Of Counsel
UNIVERSITY OF THE
PACIFIC MCGEORGE
SCHOOL OF LAW
3200 Fifth Avenue
Sacramento, CA 95817
Phone: 916.739.7176
jmyers@pacific.edu

Additional Counsel:

JENNIFER B. HENNING
Litigation Counsel
CALIFORNIA STATE ASSOCIATION OF COUNTIES
1100 K Street, Suite 101
Sacramento, CA 95814
Phone: 916.327.7500
jhenning@coconet.org

PATRICK WHITNELL
General Counsel
LEAGUE OF CALIFORNIA CITIES
1400 K Street
Sacramento, CA 95814
Phone: 916.658.8281
pwhitnell@cacities.org

RICHARD L. HAMILTON
Acting General Counsel
Director, Education Legal Alliance
CALIFORNIA SCHOOL BOARDS ASSOCIATION
3100 Beacon Boulevard
West Sacramento, CA 95691
Phone: 916.371.4691
dhamilton@csba.org