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,

Respondents.

JAMES ALFORD, Deputy Sheriff, Deschutes County, Oregon,

Petitioner,

v.

SARAH GREENE, et al.,

Respondents.

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

AMICUS CURIAE BRIEF OF THE CHILDREN'S ADVOCACY INSTITUTE IN SUPPORT OF NEITHER PARTY

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QUESTIONS PRESENTED

In this case, the Court must decide to affirm or alter a Ninth Circuit holding that requires parental consent, or a warrant (or similar court detention probable cause order) under Fourth Amendment standards, before Child Protective Services social workers conduct an in-school interview of a suspected child abuse victim. The holding may apply *a fortiori* well beyond the instant facts, and to interviews for civil/child protection purposes conducted of child witnesses to abuse, and to child interviews in other settings outside of school.

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INTEREST OF *AMICUS CURIAE*[1]

Based at the University of San Diego School of Law, the Children's Advocacy Institute (CAI) is an academic center devoted to the interests of the nation's children. It monitors California and federal standards affecting children. Since 1993, CAI has offered courses and clinics in child-related law, including the representation of children, the county, and/or parents in juvenile dependency court, and – more recently – representation of children in juvenile delinquency court. Over 500 law graduates have participated in its programs. CAI examines state and federal regulatory and legislative policies pertaining to children, and lobbies in Sacramento and Washington, D.C., on behalf of children. It has sponsored numerous enacted statutes relevant to foster children and Child Protective Services (CPS) in California. It litigates on behalf of allegedly abused children and foster care providers.[2]

2. CAI's founder and director, and co-author of this brief, is Professor Robert Fellmeth. Professor

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[1] 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 or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. Letters of consent are on file at the Court.

[2] See *California Foster Parents Association, et al. v. Wagner*, 620 F.3d 1115 (9th Cir. 2010); see also *E.T. v. George,* 681 F.Supp.2d 1151 (2010) (Case No. 2:09-cv-01950 FCD DAD), now pending before the Ninth Circuit.

Fellmeth has held the Price Chair in Public Interest Law on the USD School of Law faculty since 1990. His background in the issues surrounding this case include its Fourth Amendment and child abuse investigation elements. His experience as to the former includes nine years as a public prosecutor, search warrant applications and litigation of search standards, six years teaching Fourth Amendment related courses, and co-authorship of the treatise *California White Collar Crime* (with Papageorge, Tower Publishing, 2010) addressing constitutional search standards across various civil state interventions. In the child protection subject area, Professor Fellmeth has taught Child Rights and Remedies for 21 years; has directed a law school clinic representing children in both dependency and delinquency courts; and is the author of the text *Child Rights and Remedies* (Clarity Press 2002, 2006; 3d edition scheduled for 2011). Professor Fellmeth has long been involved in child advocacy and civil liberties-oriented national organizations.[3]

Co-author Christina Riehl is a graduate of the USD School of Law and its CAI program. She has four years of experience at the Children's Law Center

[3] He currently chairs the Boards of Public Citizen Foundation in Washington, D.C., and the National Association of Counsel for Children, and serves as Board Counsel for Voices for America's Children (formerly the National Association of Child Advocates), among others. This brief represents only the views of the Children's Advocacy Institute and no other entity or person.

of Los Angeles, the nation's largest agency of attorneys representing abused children in state dependency court. From 2006 to 2009, CAI administered a federal grant for the education of new attorneys practicing in juvenile court in California; attorney Riehl was the primary organizer of that educational program.

CAI offers this *amicus curiae* brief to present the perspective of the children it exclusively represents, particularly those subject to molestation, abuse and neglect. CAI has no financial or other interest relevant to this case.

SUMMARY OF ARGUMENT

Child Protective Services (CPS)[4] interviews of children who may be victims of or witnesses to abuse are part of the state's assumed role as child civil protector. The Fourth Amendment's important limitations on the State *vis-a-vis* individual liberty is here somewhat complicated – for the State here arguably acts not to oppress a citizen, but to preserve the rights of a helpless part of its citizenry from the depredations of privately stronger persons. And in the current context, the State may be the only protector of child rights extant.

[4] CPS is a common name for social workers who operate "hot lines" or receive initial information about abuse and conduct initial investigations, but the nomenclature varies somewhat by state and county.

Moreover, the system in place includes numerous checks to protect the rights of suspected parental abusers, including required "reasonable efforts" not to remove a child; a detention hearing before a neutral court with the burden on the State to show child danger; appointment of counsel for all involved parents; mandated "reasonable efforts" to reunify; jurisdiction hearing; disposition hearing (*pendente lite*); review hearings; and permanent placement hearings – all before the judiciary, and including liberal rights of appellate review. The sole state check in the other direction – on the failure to remove a child subject to continuous beatings, molestation or severe neglect – is the efficacy of the CPS investigation. Period.

The obstacle posited of parental consent to a child interview is complicated by the involvement of a parent in approximately 80% of child abuse cases. And it is further exacerbated by the regrettably common dynamic of "failure to protect" or even complicity in the abuse by the non-offending parent.[5] The alternative obstacle of a probable-cause based warrant or detention order is complicated by both the time and resources required for its acquisition, and the fact that probable cause achievement typically comes *from* the child interview (not before it occurs), which creates a "Catch-22" preclusion to effective CPS inquiry. The fact that about one-half of child

[5] Parental protection is surprisingly trumped by spousal or sexual partner loyalty in many cases.

deaths from abuse or neglect currently occur with prior reports to CPS about that child victim underscores the tragic consequences of the requirements here propounded.

Amicus curiae CAI agrees that CPS interviews should not be cover for criminal investigations, and that children are best interviewed by multidisciplinary experts. But our advocacy for an ideal interview methodology, for a quicker timeline, and for clear delineation from a parallel criminal investigation should not yield the *non sequitur* of Constitution-based rules and limitations with unintended and devastating consequences. If the interview is for *bona fide* child protection purposes, is conducted by the civil servant so dedicated, and would have been justified and would have occurred without the criminal inquiry aspect, it should not be precluded nor measured by criminal investigative standards.[6]

CAI agrees that such interviews of children do involve "state intrusion" and can raise Fourth Amendment limitations on the State. But it is not the "seizure" of a parent's property as if the child were chattel.[7] CAI respectfully argues that the intrusive

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[6] The instant interview included a peace officer. But it was conducted by the social worker, and it occurred on the first day of school after the release of the parent from jail for relevant criminal charges.

[7] CAI also recognizes that this child did not want to be interviewed. However, "Child Abuse Accommodation Syndrome" is not uncommon, and is understandable given the dependence

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searches authorized by *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls,* 536 U.S. 822 (2002), and those now common in airports, at DUI checkpoints, and in numerous other contexts discussed below require no quantum of cause or suspicion whatever. And they often involve searches by peace officers, or with peace officers in the vicinity, and with referrals for criminal prosecution for contraband, *et al.* common and allowed.[8] But CAI respectfully urges that such blank license not be granted here. Rather, a more balanced standard of required "reasonable suspicion" should be imposed, as enunciated by this Court for school searches in *New Jersey v. TLO*.[9] The difference between "probable cause" and "reasonable suspicion" is momentous; the latter allows proper limitations on the State for

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of children on their parents, and the threats (or perceived threats) of retaliation from disclosure by the child that many children suffer. See discussion below. A gentle examination of a child's account may be necessary to identify contradictions and an accurate picture of current endangerment.

[8] Here, the person detained for two hours and questioned was not the criminal suspect, but the subject of civil protection.

[9] 469 U.S. 325 (1985). Note that the purse search in *TLO* uncovered illegal drugs and there is no judicial bar to school officials referring such offenses to peace officers for criminal arrest and prosecution. The determining variable is not the presence of peace officers or the criminal aspect, but the legitimate primary motivation of civil officials (*e.g.,* school administrators) to search for purposes of school rule compliance.

these intrusions, without the unintended consequences of an overly restrictive probable cause test.[10]

ARGUMENT

I. This Court's Fourth Amendment Balancing Test Consists of Four Elements: (a) the State Interest in the Intrusion, (b) its Nature and Degree, (c) the Opportunity for a Warrant, and (d) its Particularized Factual Basis

CAI urges this Court to explicitly adopt a four-part test for Fourth Amendment review generally. This test reflects a rational incorporation of the scattered "doctrines" and types of searches that have proliferated over the last six decades of court precedents. Instead of a body of law applying to a type of search unrelated to any unifying criteria, all state intrusions might properly be subject to criteria that allow cross-comparison, rational explanation, and enhanced predictability. There is not the temptation to invent a new term of art and body of law for each of the multitude of justifications that may come before the courts.

[10] The probable cause standard traditionally involves critical elements of prior demonstrated "source reliability" (*e.g.*, "the source has provided information on three previous occasions, each resulting in affirmation of the information and conviction"). That level of confirmation is not common in child abuse investigations – until involved children are interviewed, see discussion and citations below.

The extensive body of court-delineated law over the Fourth Amendment has involved a patchwork quilt of more than twenty different categories of searches – each enunciated and developed in sometimes idiosyncratic fashion. Examples include detention to obtain a warrant,[11] searches allowed as part of a "stop and frisk,"[12] a seizure based on "plain sight" discovery,[13] the related "open fields" doctrine,[14] "automobile stops,"[15] "evanescent evidence" (that may disappear),[16] arson investigations,[17] an "administrative search,"[18] a "border" search,[19] a "highly regulated industry" search,[20] a search "incident to lawful arrest,"[21]

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[11] *Illinois v. McArthur,* 531 U.S. 326 (2001).

[12] *Terry v. Ohio,* 392 U.S. 1 (1968); *U.S. v. Hensley,* 469 U.S. 221 (1985).

[13] *Arizona v. Hicks*, 480 U.S. 321 (1987).

[14] *U.S. v. Oliver,* 466 U.S. 170 (1984); *see also* application to trash put out for collection in *California v. Greenwood,* 486 U.S. 35 (1988).

[15] *Indianapolis v. Edmond,* 531 U.S. 32 (2000). Warrantless roadblocks have been upheld for detection and arrest for drunk driving (*see Michigan Department of State Police v. Sitz,* 496 U.S. 444 (1990)) or illegal immigration (*U.S. v. Martinez-Fuerte,* 428 U.S. 543 (1976)).

[16] *See*, *e.g., Schmerber v. California,* 384 U.S. 757 (1966) pertaining to a blood sample containing alcohol.

[17] *Michigan v. Tyler,* 436 U.S. 499 (1978).

[18] *Camara v. Municipal Court,* 387 U.S. 523 (1967).

[19] *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973).

[20] *Colonnade Catering Corp. v. U.S.*, 397 U.S. 72 (1970); *U.S. v. Biswell,* 406 U.S. 311 (1972); *Donovan v. Dewey,* 452 U.S. 594 (1981).

[21] *See*, *e.g.*, *California v. Hodari D.*, 499 U.S. 621 (1991).

"hot pursuit,"[22] explosives,[23] food safety,[24] probationers' homes exception,[25] government employee desk searches,[26] "drug testing" generally,[27] consent,[28] and many others.

There is also the "student school search" category – where searches are allowed based on "reasonable suspicion."[29] In the most recent school search case of *Safford Unified School District #1 v. Redding,* 129 S.Ct. 2633 (2009), this Court made reference to a "balancing test" in rejecting the inspection within bras and panties of an adolescent girl for pills without cause to believe such items were being so concealed. What was and is that "balancing test"? A review of the body of caselaw from this Court suggests the following four elements:

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[22] *Warden v. Hayden,* 387 U.S. 294 (1967).

[23] *U.S. v. Chadwick*, 433 U.S. 1 (1977).

[24] *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908).

[25] *See U.S. v. Knights,* 534 U.S. 112 (2001) permitting the search of a probationer's home on reasonable suspicion of a violation separate and apart from probationary conditions.

[26] *O'Connor v. Ortega,* 480 U.S. 709 (1987), allowing search of the desk of a doctor in a public hospital for work-related misconduct based only on reasonable suspicion.

[27] *Skinner v. Railway Labor Executives' Association,* 489 U.S. 602 (1989); *see also National Treasury Employees Union v. Von Raab,* 489 U.S. 656 (1989) allowing search without warrant or probable cause or even individualized reasonable suspicion.

[28] *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

[29] *New Jersey v. TLO, supra* note 9.

(a) What is the state interest in (or justification for) the search? The state's interest in a search or seizure is a necessary factor in weighing its reasonableness. And the nature and extent of the state's interest is a primary determinant in any constitutional balancing – whether it be the "compelling state interest" analyzed in "strict scrutiny," or the "legitimate state interest" weighed in "rational relation" test application. "Reasonableness" implies a reason for an action, and the greater the legitimate need for that action, the more weight properly given to an intrusion, with tolerated intrusion increasing as the state's rationale becomes more compelling.

(b) What is the nature and degree of intrusion? Four subparts make up the second element of "degree of intrusion." First, it depends upon the underlying **"reasonable expectation of privacy"** as commonly articulated by this Court.[30] That expectation varies according to the "zone of privacy" involved and the degree of state intrusion. That variation spectrum extends from the privacy accorded mutually consenting sexual decisions by adults in the bedroom to the reduced privacy expectation of a publicly regulated utility. Second, is the **nature of the intrusion**. Is it a brief stop and conversation? Or does an actual seizure occur? Where does it occur (*e.g.*, within the body, in a home, in a public place)?

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[30] *Katz v. United States*, 389 U.S. 347 (1967); *see esp. Rakas v. Illinois,* 439 U.S. 128 (1978).

Third, what is the **"nexus"** of the intrusion to the first element of compelling state interest above? Is it overly broad and involve excessive and gratuitous state interference beyond the scope of the state justification? Such an element is similar to the "no less restrictive alternatives" or "required fit" elements in much Constitutional precedent. Finally, do we enhance the degree of intrusion where the state intruder is the armed police (*e.g.,* a peace officer) engaged in a criminal investigation? Is it enhanced, in particular, where it is for the purpose of possible incarceration by armed constables, and where who is searched is determined by relatively unfettered police discretion.

(c) What is the opportunity for a warrant? The constitutional requirement of a warrant incorporates precedent for its traversal if its probable cause basis is flawed. Is the required substantive basis for a warrant properly a precondition for a search given the involved compelling state interest and the degree of intrusion occurring? Does it matter that the intervention occurs while a continuing violation may be occurring? Is there a time constraint parallel to those acknowledged, for example in the "hot pursuit" or "emergency" search and seizure exception doctrines?[31]

(d) What is the factual basis for a particular intrusion? What is the quantum and reliability of information indicating that it may produce what is

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[31] *See, e.g.*, *Warden v. Hayden,* 387 U.S. 294 (1967).

sought? Does the State have solid probable cause, and merely lacks time to obtain a warrant? Is the basis for the search nothing more than rumor? Are there objective facts producing "reasonable suspicion"? Is the motivation not *bona fide*, but occurring for an improper motivation – retaliation, harassment, discrimination or is otherwise improper? Again, does the factual basis have sufficient connection to both the State interest justifying it (*supra*), and to the scope of a particular search?

Importantly, this fourth element is very much influenced by the state justification for the search and the weight given to it viscerally. Hence, relatively baseless and boundless searches are approved involving airplane flight safety (with millions now subject to body cavity oversight), border searches, highly regulated industries, drug testing, automobile roadblocks and others. The major requirement here is lack of collateral *animus* or impermissible profiling. For other categories and circumstances individualized reasonable suspicion is necessary. For others, consent is needed, and for still other situations, a prior court warrant based on reliable probable cause is required.

II. CPS Investigations Are Complex Civil Inquiries Intended to Protect Children and Are Under the Auspices of Juvenile Courts Providing Substantial Due Process

CAI respectfully contends that the four-part test above is a fair distillation of this Court's numerous

decisions historically applying the Fourth Amendment to state action. To apply it in the instant case requires consideration of the compelling state interest in CPS investigations, the role of child interviews, and the consequences of alternative limitations or prerequisites for such interviews.

The Ninth Circuit opinion refers to the 3.6 million annual reports of child abuse or neglect nationally (using 2006 data; *see* Opinion at 16300). The opinion notes that "only ¼" are confirmed. The implication is that many instances of "state intrusion" are occurring and in only a small percentage does inquiry lead to a level of confirmation warranting such state interference. This notion, and the opinion below in general, do not reflect an accurate understanding of how CPS investigations are conducted, nor (of greater concern) the unintended consequences of its holding as applied. CAI presents an important predicate: A description of how Child Protective Services work, their authority, purposes and circumstances.

Of the cited 3 million-plus reports of child abuse received each year, over one-third are screened out at the point of the phone call.[32] This means that, while someone apparently called to report suspected abuse, no further interviews or other action was undertaken by CPS. Importantly, more than one-half (57.9%) of

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[32] U.S. Department of Health and Human Services, *Child Maltreatment 2008* at 5 (available at http://www.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf).

the reports come from professionals – such as teachers, attorneys, police officers, social services staff, medical staff, mental health workers, child daycare workers, and foster care providers, most of whom are mandated reporters. That is, under state law they are required to report suspected abuse or neglect in violation of state law. Of the reports that do reach the point of further investigation, that further inquiry finds a child to be the victim of abuse or neglect in 23.7% of the cases.[33] Underscoring the misplaced reliance on "parental consent" as a prior condition for child contact, more than 80% of these cases involve an alleged finding of abuse by one or both of the parents or caretakers of the child.[34]

While the police may be present as a part of the investigatory phase, this is often merely to assure peace throughout the process (and, often, to assure the social worker is adequately protected). In the majority of cases where child abuse or neglect has occurred, there is no subsequent arrest of the perpetrator. This disconnect between child protection and criminal arrest occurs for numerous reasons, including the very different standards of proof for

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[33] *Id.* at 5.

[34] *Id.* at 28. Regrettably, even where one parent is not involved in the abuse, in a disturbing percentage of the cases the non-offending parent covers for the offending one, or does not believe the allegations of abuse – even where they are substantiated by overwhelming evidence. This "failure to protect" problem and the primacy of spousal allegiance is not rare.

criminal abuse and neglect than for civil abuse and neglect that will give rise to the removal of a child from her home. While criminal culpability requires a finding beyond a reasonable doubt, the standard of proof for the jurisdiction of the juvenile court to protect an abused or neglected child is a "preponderance of the evidence."

The interview which occurred in the present case should be understood in the more typical context. CAI agrees that interviews of child abuse victims are best conducted not as the opinion below describes. Rather, they are best conducted by experts who know how to ask open-ended questions, with expertise, and ideally, on videotape. More and more jurisdictions are turning to Children's Advocacy Centers for the initial interview of children suspected to be the victims of child abuse.[35] There are already 300 such Children's Advocacy Centers across the country with several other jurisdictions using best practice techniques for the interviewing of children. A great deal of work has been done in recent years to establish best practices for interviewing children to improve the quality of the interviews conducted by social workers, police, and therapists.[36]

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[35] While this type of interviews is certainly a best practice approach, we note that the removal of a child to a Child Advocacy Center would certainly involve a "taking" which is not always the case in field interviews such as the one that occurred here.

[36] Lyon, Thomas D., *Investigative Interviewing of the Child*, CHILD WELFARE LAW AND PRACTICE, Second Edition (2010),

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The federal Child Welfare Act (42 U.S.C. § 670 *et seq*.) becomes universally relevant at point of initial report receipt by CPS. This statute guides the allocation of billions of dollars in federal Social Security Act Title IV-B and IV-E funding to the states. It outlines a federal-state cooperative program with elements that are not only in federal law underlying that funding, but are replicated in the statutes of all fifty states. Among these is the threshold requirement that "reasonable efforts" be employed to not remove a child from his or her home. If a child is removed, there will be an expeditious hearing before a state court judge – usually called a "detention hearing."[37] At this initial hearing, contrary to the assumptions made by the Ninth Circuit, all parties are given the opportunity to present evidence. There, the state juvenile court must find the CPS undertook "reasonable efforts" not to remove the child from the home. 42 U.S.C. § 671(a)(15)(B)(i).

Where such efforts are made and confirmed by a court, the matter then proceeds with properly exhaustive safeguards to protect the "fundamental liberty interest" of parents *qua* parents. Indeed, at this initial detention hearing, the appointment of

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Chapter 5 at 88. The established best practice for interviewing a child includes interview instructions, using rapport building, including narrative practice – before moving to the interview topic, and introducing the interview topic with open-ended questions. *Id.* at 88-100.

[37] *See, e.g.*, Cal. Welf. & Inst. Code § 315.

counsel for parents, and Guardians ad Litem for involved children, occurs. All fifty states provide counsel for parents whose children have been removed and whose parental rights are in jeopardy.[38]

One of the primary purposes of the subsequent legal process is to follow up on the required "reasonable efforts" not to remove – with a second "reasonable efforts" requirement – to reunify the child with the parent. The post detention stage is followed with a "jurisdiction" hearing at which the court may supplant parental authority *pendente lite* (while supervising a hoped-for reunification). This is followed by a "dispositional phase" where a case plan is developed to provide services to the family so that the child can safely return to the family home[39] Once it is determined that the juvenile court will take jurisdiction, the status of the child must be reviewed periodically but no less frequently than once every six months. 42 U.S.C. § 675(5)(B). At each of these review hearings, a determination must be made that reasonable efforts have been made by CPS to make it possible for the child to safely return to the child's home. 42 U.S.C. § 671(a)(15)(B)(ii). If, after between six and

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[38] In *Lassiter v. Department of Social Services* 452 U.S. 18 (1981), this Court allowed the parental rights termination of Abby Lassiter, but her situation was extreme, and this Court's analysis emphasized that the proceedings required counsel if it would make a difference in the outcome. Accordingly, appointment of such counsel is now routine for parents in all fifty states.

[39] *See, e.g.*, California Welfare and Institutions Code §§ 355, 358.

eighteen months of efforts from CPS to help reunify the family, it appears that the family is not appropriate for reunification, only then will termination of parental rights be contemplated. At this stage, this Court must find by a now-heightened burden of "clear and convincing evidence" that the parents are "unfit" and termination is appropriate. *Santosky v. Kramer*, 45 U.S. 745 (1982).

As noted above, at each of these hearings, the parents are represented by counsel. Similarly, in all fifty states, the children are represented throughout the judicial process. The Child Abuse Prevention and Treatment Act (CAPTA), another federal-state cooperative program through which states receive federal funding, requires that a Guardian ad Litem (GAL) be appointed for a child in every case involving an abused or neglected child which results in a criminal proceeding. 42 U.S.C. § 5106a(b)(2)(A)(ix). Increasingly, the GALs appointed in each jurisdiction are attorneys.[40]

The review of the decision to remove a child from her parents' custody does not end at the juvenile court. An appellate review process exists to check the appropriateness not only of the original removal of the child and of the termination of parental rights, but of many of the intervening steps.[41] And further

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[40] *See* National Association of Counsel for Children *The Legal System,* available at www.naccchildlaw.org/?page=legalsystem.

[41] *See*, *e.g.*, Cal. Welf. & Inst. Code §§ 395, 366.26(l).

protecting the reputations and private sensibilities of children and parents is the fact that in most states, the judicial process is confidential.[42] In sum, this is a civil proceeding that focuses not on punishment, but on protection, preferably by restoring the *status quo ante* as soon as possible.

CAI supports all of these safeguards and this orientation toward family preservation. Removal and foster care is disruptive to children and outcomes are uncertain. But for this Court to draw an empathy line with parents based on its own paternal and maternal instincts and love of children would be a mistake because that instinct is not universal. Most children born today are not intended, and growing up with a child's two biological parents is no longer commonplace. The percentage of children born to unwed parents has risen to forty percent. A recent important report studying 5000 children over ten to fifteen years has documented the ephemeral ties of many adults to the children living with them, and the damage caused to children from the increasingly transitory commitment of the adults in their lives.[43]

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[42] *See* First Star and the Children's Advocacy Institute, *A Child's Right to Counsel*, 2nd Edition: A National Report Card on Legal Representation of Abused and Neglected Children, (2009), available at http://www.caichildlaw.org/Misc/Final_RTC_2nd_Edition_lr.pdf.

[43] *See* Woodrow Wilson School of Public and International Affairs and the Brookings Institution, *Fragile Families*, FUTURE OF CHILDREN, Volume 20, No. 2 (Fall 2010). This longitudinal study of children born in the 1990s and the effects of parental

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In addition, child abuse incidence has increased due to the current scourge of methamphetamine addiction, which is extremely addictive, alters maternal and paternal instinct, and is now a common factor in child abuse cases.[44]

CAI acknowledges that the many checks enumerated above to prevent improvident removal and parental deprivation are of value to children given the disruptions and disadvantages of foster care. But it is important to appreciate that there is no comparable safeguard against the failure to remove and protect – where the alternative will be continued neglect, beatings, or molestation. This protective role is one that all fifty states have assumed, underlined by the commonly enacted extant laws that require professionals who come into contact with children not only to report suspected child abuse and neglect, but making the failure to do so a criminal offense. The CPS investigation is the only societal safeguard in the direction of child protection from parental abuse.

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disruption, sequencing of step parents and boy/girl friends, *et al.*, available at http://futureofchildren.org/futureofchildren/publications/docs/20_02_FullJournal.pdf.

[44] *See, e.g.*, Cathleen Otero, M.S.W., M.P.A., Sharon Boles, Ph.D., Nancy K. Young, Ph.D., Kim Dennis, M.P.A., *Methamphetamine Addiction, Treatment, and Outcomes: Implications for Child Welfare Workers*, Substance Abuse and Mental Health Services Administration Center for Substance Abuse Treatment, (2006), found at http://www.ncsacw.samhsa.gov/files/Meth%20and%20Child%20Safety.pdf.

If it does not occur or is hampered or delayed, there is no check in place to protect the child.

Almost five children (4.82) die every day as a result of child abuse.[45] Many researchers believe that this number understates the actual incidence of such fatalities.[46] The number and rate of fatalities have been increasing during the past few years; while this can be attributed to some degree to improved data collection and reporting, all the causes of the increase are not specifically identifiable.[47] Parents, acting alone or with another person, were responsible for 71% of child abuse or neglect fatalities in 2008.[48] In fact, fathers and mother's boyfriends are most often the perpetrators in deaths due to abuse, while mothers are most often the perpetrators of deaths due to severe neglect.[49] Studies of fatalities due to child abuse and neglect show that CPS is often aware of these families before the death occurs. In a study of the 2008 data from California, 45% of fatalities due to abuse or neglect involved a family that had been

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[45] Childhelp.org: National Child Abuse Statistics citing 2007 data and available at http://www.childhelp.org/pages.statistics.

[46] U.S. Department of Health and Human Services, *Child Abuse and Neglect Fatalities: Statistics and Interventions* (April, 2010) at 2, available at http://www.childwelfare.gov/pubs/factsheets/fatality.pdf.

[47] *Id.*

[48] *Id.* at 4-5.

[49] *Id.*

involved with CPS in the previous 5 years.[50] CAI studied California's fatalities due to child abuse and neglect from July 21, 2006 through December 31, 2006 and found that in 82% of the cases, the family had some CPS history; in 53% of the fatalities, the family had a CPS history which was substantially related to the cause of the fatality.

The evidence underlines the importance of these CPS investigations. Of course, no examination of abuse indicia can be perfect, but the percentage of cases where deaths occur in the face of reports to CPS, and recent or then-pending investigations, is extraordinary. It is a correlation and a volume that is deeply disturbing. These alarming statistics do not count molestations, or children beaten nightly, or those who are not fed, or those whose illnesses proceed without treatment, where there is no body to bury, and hence no body to count.

While CPS is clearly crucial to the protection of children, it is unfortunately not always provided adequate resources to do appropriate and thorough investigations. These social workers receive reports of abuse and must make difficult choices.[51] Which do

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[50] California Department of Social Services, *California Child Fatality and Near Fatality Annual Report CY 2008* (May 2010) at 19, available at http://www.childsworld.ca.gov/res/pdf/2008AnnualChildReport.pdf.

[51] A CPS worker charged with initial investigation completes 68.3 complete cases per year. This is the number of *completed* cases and does not take into consideration the other duties the

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they select for further inquiry? If the report seems troubling and is from a mandated reporter, they may have "reasonable suspicion" to inquire further. An interview of the child involved, or child witnesses, is an early requirement – and is itself necessarily based on information that does not reach probable cause sufficient to justify a search warrant. One of the common requirements as part of a supporting declaration is the reliability of the informant based on prior contacts with the declarant or the police.[52] But CPS must necessarily rely on reports from thousands of pre-designated mandated reporters, few of whom will have a long record of prior successful disclosures. Unless these thousands of sources are all designated "reliable informants" categorically, a probable cause standard is problematical as a precursor to this critical

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CPS worker may have – duties which are ever increasing as state budget cuts lead to cuts in CPS workers and higher caseloads. U.S. Department of Health and Human Services, *Child Maltreatment 2008* at 9, found at http://www.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf.

[52] See *Illinois v. Gates*, 462 U.S. 213 (1983). CAI author Fellmeth has obtained and defended numerous search warrants as a public prosecutor. An accurate description of the typical elements from a widely used online source: "Any information that is provided in an affidavit may be considered reliable when the informant: has been previously established as a reliable source, implicates themselves in the crime, provides information that is at least partially verified, is the victim of the crime, is a witness to the crime, or is an officer of the law. In most cases, when a reliable informant provides information about the likelihood of facts and circumstances related to a crime," found at http://www.criminal-law-lawyer-source.com/terms/probable-cause.html.

step in the investigation. Importantly, it is a step that can often explain the cause of a mandated call with explanatory information indicating innocence, in which case the inquiry is resolved without further effort. On the other hand, if obstacles are placed in the path of this crucial step, acquiring probable cause may be unrealistic, or may require so much evidentiary time and difficulty that the investigation may be delayed (as with the instant interview) as other work is necessarily prioritized above it.

Exacerbating the difficulty in court orders as a condition precedent is the ongoing nature of most child abuse. It is typically not like a single-event bank robbery or homicide, but involves continuing harm and risk to often helpless victims. This continuation pattern is well documented and can be deduced from the statistics noted above of child abuse fatalities – most of which occur with prior CPS histories. Indeed, if the abuse involves beatings, incidence and severity may well increase with notice to the abuser of State concern, since the child may be blamed.

III. The Four-Part Balancing Test Commends Rejection of the Categorical Requirement of Parental Consent or Probable Cause Warrants Prior to CPS Child Interviews

CAI urges the explicit adoption of this above-outlined four-part test for Fourth Amendment review generally. Applying such a distilled test to CPS interviews produces the following analysis:

(A) State Interest in (or Justification for) the Search

Two aspects here inform our judgment of the "state interest" or justification for intrusion. First, the State has assumed the role of protector. Every State has mandated reporting requirements. As discussed above, each has announced to its citizenry through child protection laws similar to those here at issue that it has assumed the task of child protection from abusive, unfit parents. Each State has created a civil court oriented system to provide detailed checks on the state's exercise of the protective role assumed.

Second, the weight of the "state interest" is enhanced by its motivation to protect the suffering weakest among us from dangerous or exploitive bullies who molest or beat or neglect those who have little voice or power. This is not the State acting for itself. It does not gain tax revenue or power – rather it spends public sums and assumes upon itself a difficult burden of care. It is not the result of monied influence, nor is it a response to a crowd shouting for blood and retribution. It is intervening to protect a weak private interest from an abusive powerful one.

As discussed in detail above, those against whom the State may act for the benefit of such weaker parties are afforded deference in the process – where the search and seizure or inquiry warrants State measures of child protection. As discussed in detail above, the State has a federal obligation to use "reasonable efforts" not to remove the child from the

custody and care of her parents, to appoint counsel, and to hold hearings and require the state to meet its burden to prove endangerment and unfit parental status – the last by "clear and convincing evidence." The process is generally confidential. However, the check to prevent continued abuse of the child is extremely limited – it rests entirely on the State's ability to detect and to investigate abuses. The state action in this context is properly subject to a measure of the rather generous solicitude this Court has applied to the State's interest in regulating alcohol, investigating arson, or combating drugs.[53]

The dangers to these children are rarely manifested on the public streets. By their very nature, they *require* a measure of intrusion. The *situs* of child molestation and beatings and neglect means that the State cannot protect these children by relying on surveillance cameras in banks and stores, or by a bullet wound showing up in the ER, or by a report to the police by the victim. The investigation does not begin with probable cause for a warrant. And it is certainly not to be guided by required consent from parents or caretakers who, in most of these cases, are the problem or too often regrettably will protect a spouse or boyfriend who is the source of the problem, as discussed above.

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[53] See citations to the numerous areas of distinct Fourth Amendment policy variation, including generous allowance of searches without even reasonable suspicion in these and other areas of apparently "compelling state interest."

The "justification for state interest" element is here underlined by the consequence of the Ninth Circuit's preconditions for interviewing child victims or witnesses. The probable cause one needs for such qualification often depends upon the very interviews barred by its absence.[54] Accordingly, the elements of required probable cause warrant or parental permission proffered below can too often form a classic "Catch-22" barrier to these protective inquiries. These are not cases where we have the kind of resources the popular culture suggests is extant in its plethora of "CSI" detective shows, nor in the depiction of attorneys on the civil side. These are social workers who have to screen information which necessarily rises only to the "suspicion" level. And who must investigate many cases not in a month or a week, but in a day.[55]

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[54] A publicized recent manifestation was revealed by Elizabeth Smart in her recent testimony against her abductor on November 10, 2010. Just weeks after her abduction she was in public wearing a veil and detective Jon Richey, aware that Elizabeth Smart was missing and searching for her, asked her apparent "parent" to lift the veil so he could view her face. Her abductor, Brian David Mitchell, citing religion and parental privilege, refused. Detective Richey walked away and Elizabeth endured continued abduction and nightly degradation for another nine months. See http://abcnews.go.com/US/wireStory?id=12109270&page=2. Although this example may be unusual and stark, and although stranger-caused abuse is relatively rare, blockage of officials concerned about child protection from potential victims leads to similar consequences with no publicly clamorous search.

[55] Note that CPS workers do not command substantial influence for allocation of state funds. The 2010-11 California budget

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The opinion below implicitly recognizes the weight given to the "special need" to control children in the classroom. Thus, it seeks to distinguish this Court's three major decisions pertaining to school searches: *TLO, Acton*[56] and *Earls*.[57] But a general reference to "educational mission" or "school order" muddles what is the directly applicable compelling State interest. It is apparently a sufficient interest to justify a rather intrusive search – the inventory of a student's purse or, more starkly, of personal urine production and testing. School order is hardly an immediate emergency in *TLO*, and *Acton* applies to anyone who wants to play athletics after school. *Earls* allows urine testing of any student seeking to play in the band, attend an honor society meeting, or banter with the Future Farmers of America. These are hardly classroom settings. And the latter intrusive drug testing "searches" appear to lack even a "reasonable suspicion" qualifier. Is the "compelling state justification" really greater in *Earls* than in a case where there is reasonable suspicion and the State interest is

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cuts their appropriations by $80 million. Note also that CAI has documented the excessive caseloads of counsel for children (e.g., at 380 in Sacramento County) and courts who would presumably be weighing such orders (over 1,000 children per juvenile court judge in Sacramento). See evidence adduced in *E.T. v. George* (cited in note 2, *supra*), now pending before the Ninth Circuit, at http://www.caichildlaw.org/caseload.htm.

[56] *Vernonia School District 47J v. Acton,* 515 U.S. 646 (1995).

[57] *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls,* 536 U.S. 822 (2002).

nothing the child is doing wrong, but stopping his or her molestation? Schools are a major arena of child abuse detection. They are also often the primary "safe" location to interview a child, away from her abuser. Presumably, the "state's interest" in having its students not suffering from neglect, beatings and molestation rises to the level of guaranteed sobriety amongst the band's brass section, as Justice Ginsburg humorously noted in her *Earls* dissent.

(B) Degree of Intrusion

The element of "degree of intrusion" encompasses a number of factors as outlined *supra*: expectation of privacy, nature and location of the intrusion, nexus to the State interest justifying it and opportunity for a warrant.

(1) Degree of Intrusion: Expectation of Privacy/Nature and Location

The holding below is applied to an intrusion that is not a typical search or seizure at all, but to an interview – albeit a somewhat lengthy one.[58] The child

[58] The confinement of a student in the principal's office or extensive questioning or detention for two hours after school is not uncommon. The separation from the classroom aspect is preferable for such personal questions. Note that school officials receive broad license for such intrusions as a necessary part of "school management", and it would appear that CPS inquiry to protect a child from rape or abuse warrants at least that deference as a compelling state interest.

is not a possession of the parent such that interviewing him or her is some sort of "seizure" of a personal item. The Seventh Circuit has held that removing a child from a class to be questioned by a social worker and a police officer about alleged abuse is a form of "seizure." *Doe v. Heck,* 327 F.3d 492, 509 (7th Cir. 2003). But at what point does the "we have some questions to ask you?" turn into a seizure? This is not a ten-hour, no-food-or-rest-room, bright-lights-in-the-face grilling. And some focused inquiry – including uncomfortable questions – is often required and can occur in a setting of child fear from adult threats, or Child Abuse Accommodation Syndrome protection of their own abusers.[59]

The overall degree of intrusion is a legitimate part of a rational search and seizure limitation balancing. In its "stop and frisk" body of law, this Court (even in the stricter context of straight criminal investigations) countenances peace officer stops of citizens, and includes the right to frisk for weapons beyond the asking of questions.[60] The standard for such a stop is "reasonable suspicion" (the basis *amicus* CAI urges be applied here). The circumstances of the stop, its length, the intrusiveness of the frisk, all turn on the "totality of the circumstances" which need not be based on the personal knowledge of the intruding officer.[61]

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[59] Roland Summit, M.D., *The Child Abuse Accommodation Syndrome*, CHILD ABUSE & NEGLECT, Vol. 7 (1983) at 177-193.

[60] See citations *supra*, at note 12.

[61] See *U.S. v. Cortez,* 449 U.S. 411 (1981); *U.S. v. Hensley,* 469 U.S. 221 (1985).

As noted above, the reasonable expectation of privacy is somewhat reduced by its location – a school setting. In that location, a purse search is justified by "reasonable suspicion." *New Jersey v. TLO*, 469 U.S. 325 (1985). One stark precedent permitting a search *a fortiori* to a school interview is *Wyman v. James,* 400 U.S. 309 (1971). There, the Court upheld a state law permitting welfare case workers to enter a residence without a warrant, finding that the Fourth Amendment did not apply where the purpose was not an arrest or other criminal sanction, but the potential termination of welfare benefits. The interview in the instant case did not involve state trespass into the bedroom or home or place of work of the parents.

(2) Degree of Intrusion: Nexus

Clearly, the nature of the intrusion is closely connected with the applicable compelling state interest. The interview was conducted by a social worker whose duties center on child protection. The questions pertained to the abuse at issue.

(3) Degree of Intrusion: Civil vs. Criminal, Target vs. Protection Facilitation

The opinion below makes much of the fact that criminal offenses may be involved and that a police officer was present. There is an interesting philosophical issue about why the degree of intrusion is so categorically enhanced where a criminal investigation is at issue. In theory, society selects only the most

serious and damaging private acts to criminalize, and its work to stop and deter crime arguably warrants a strong measure of "compelling state interest" status. On the other hand, the "degree of intrusion" prohibited by precedents is elevated where incursions are by criminal law enforcing peace officers, with particular concern over armed police search based on discretion without clear criteria. However, it is unclear why such a basis for concern would apply to searches that are instigated and conducted by CPS civilly, or would have occurred substantially as conducted with or without a criminal enforcement aspect.

Note that the other recent school setting precedents of this Court discussed above (*New Jersey v. TLO,* 469 U.S. 325 (1985), followed by *Vernonia School District 47J v. Acton,* 515 U.S. 646 (1995), and then *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls,* 536 U.S. 822 (2002)) all involve commonly prosecuted criminal drug offenses. There is no stated limitation on school officials making such referrals to law enforcement.

The interview in the instant matter was not undertaken to effectuate an arrest of the child.[62] Its

[62] Note that the "target" vs. "witness" delineation was crucial to this Court's decision in *Illinois v. Lidster,* 540 U.S. 419 (2004). There, a roadblock stopped a multitude of drivers without any probable cause or reasonable suspicion. But the target of the stops and questioning were not the drivers intruded upon. Rather, the drivers were potential witnesses to a crime in the vicinity and the stops were upheld, as was the arrest of one driver for DUI after nearly hitting an officer at the roadblock.

purpose was to ask questions about the possible victimization of the child. Whether the interview was insensitive, rude, too long or included any of the excesses focused upon by the opinion below does not justify the *non sequitur* remedy of a categorical set of obstacles to *bona fide* civil inquiry for child protection.

(C) Opportunity for a Warrant

The work of state Child Protective Services exists in a world of continuing abuse. It is not the investigation of a crime, incident, or problem that has concluded in order to ascribe guilt. It is an inquiry focusing on a child who, under the enabling statutes common in the States, is suffering from existing endangerment. Time is of the essence. And the probable cause necessary for a warrant is often dependent on the very interviews that would require a warrant or similar order under the opinion below, leading to the conundrum discussed above. The instant interview occurred the first school day after the allegedly offending parent was released from jail and CPS potentially could have private access to the child.

(D) Factual Basis for the Intrusion

In *State v. Hunt,* 406 P.2d 208 (Arizona 1965) a housekeeper reported that she observed an injured child in the Hunt household and told her mother. The housekeeper's mother called the sheriff. Peace Officer Bernal entered the home. The court upheld the entry,

the search for the child, and the interviews on the scene. Although Mrs. Hunt was arrested and prosecuted for assault and criminal child abuse, and although officer Bernal lacked sufficient probable cause for a warrant, the court wrote:

> . . . he [Bernal] is acting as the agent of the extension of the Arizona Juvenile Court. . . . for the protection of the child. This is not a criminal proceeding. The officer is not investigating [here] the commission of a crime, or gathering evidence for the prosecution of a crime, but is exercising lawful authority to take the child into protective custody, subject to the future disposition of the child under the juvenile court's protective authority, should the same be invoked by petition. We feel that officer Bernal, or any other peace officer . . . with reasonable cause to believe that a child's health, morals or welfare were being endangered therein, had not only the lawful *right*, but the lawful *duty* to enter the premises investigate, and take the child into custody, if necessary, with or without a search warrant, and with or without consent of all of the persons having proprietary interests in the premises. . . . we recognize that the magistrate could not have issued a search warrant . . . Any idea that a child is the personal 'property' of its parent is patently absurd . . . (emphasis supplied, at 214).

The state intervention at issue here was not in a home and involved a substantially lower degree of intrusion. It had less of a criminal aspect, with the

interview primarily conducted by a social worker. It was based on facts somewhat more reliable than the double hearsay from a housekeeper in the *Hunt* case, cited above. Importantly, it was not based on the *animus* of any state official or agency, but rather on a *bona fide* belief, from information received, of serious child endangerment.

CONCLUSION

This Court has not prohibited intrusive body searches at every airport in the nation – notwithstanding no factual basis for any of the individual searches – and indeed with virtually no probable cause and no warrant justifying any search. Body cavities are now being screened, and the false breasts of cancer victims inspected, because of a passenger one year ago who stuffed explosives in his underwear and failed to detonate them. The reason for this license, if honestly faced, is the overwhelming weight given to this "compelling state interest," to wit – strong empathy lines we all share with anyone even contemplating a plane explosion – a sensitive reminder of "9/11", and a transportation mode many of us and our loved ones use.

CAI does not anticipate airport search license to protect its endangered child clients. And we would readily stipulate to a list of absolute requirements for State interviews of children short of those suggested above. These might well include required consent of

parents where they are affirmatively not implicated in the suspected abuse. We would add that no such state intervention properly occurs based on the *animus* of any state official. It must not be a subterfuge for criminal law enforcement or the product of peace officer puppeteering. It must be a *bona fide* effort to protect children, with the criminal enforcement aspect ancillary and supplemental. And we agree that a "reasonable suspicion" standard may be applied – well beyond the quantum of cause demanded in many of the areas of State intrusion lacking the merits of child protection.[63] But we note that such reasonable suspicion is here present, and – critically – is present wherever a mandated report is received from someone with apparent (a) knowledge and (b) objectivity about a child's endangerment.

We would ask that the four-element formulation distilled from Court precedents cited above serve as the guide for Fourth Amendment analysis. And that often unstated balancing underlies most clearly this Court's most recent decision in *Safford v. Redding* (*supra*).

This Court is too often the destination for excessive attorney hyperbole, and it is commonly assured by its supplicants that a contrary ruling will result in the collapse of heaven upon the supine heads of us

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[63] "Reasonable suspicion" involves something more than a vague suspicion (*e.g.*, high incidence of crime or "suspicious looks") but rather some articulable, objective facts. *See Brown v. Texas,* 443 U.S. 47 (1979).

all. Nevertheless, CAI respectfully sounds an alarm. The sky will not fall on all of us, but it will upon some. We well know, as the evidence cited above suggests, that a large number of children will die if CPS is impeded in its task – an appalling and largely unreported number already die from child abuse with prior or pending CPS investigations. Beyond deaths, we well know that a larger number will suffer continued nightly rape, and a still larger number endure beatings and torture from those upon whom they depend for everything. This notice is not hyperbole. For the past 21 years, we have been inside the CPS/foster care system, representing children who are regrettably too hidden from the federal courts and from the public. It is not a comfortable world, but it is one we share with you. And we respectfully ask that it be considered in rendering this important decision.

Respectfully submitted,

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