Consolidated Case Nos. 09-1478 and 09-1454

In The Supreme Court of the United States

JAMES ALFORD,
DESCHUTES COUNTY DEPUTY SHERIFF,

Petitioner,

v.

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

Respondents.

BOB CAMRETA,

Petitioner,

v.

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

Respondents.

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

PETITIONER JAMES ALFORD'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

INTRODUCTION

This Reply Brief addresses three separate arguments made by Respondents in response to Alford's brief on the merits. The first two do not go to the merits, but to Alford's ability to bring his appeal before the Court. Respondents assert the Ninth Circuit's judgment is not reviewable and that Alford's appeal is moot. The third of Respondents' arguments is that, given this Court's holding in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), the "special needs" doctrine is inapplicable to interviews like the interview of S.G. Alford believes the Ninth Circuit's judgment is reviewable and that Respondents have failed to demonstrate this appeal is moot. Alford also believes the "special needs" doctrine applies to interviews of the sort involved here, and both the Ninth Circuit's holding below and Respondents' arguments to the contrary are without merit. For these reasons, as well as the issues of law addressed in Alford's brief on the merits, the Court should hold the interview of S.G. did not violate the Fourth Amendment and announce a legal standard to govern such interviews as requested in Alford's brief on the merits.

ARGUMENT

I. Respondents Misframe the Issues; This Case is About One Initial Step in the Continuum of Child Protection Investigations, Not the Entire Child Welfare System.

Before addressing the specific points referenced above, Alford is compelled to clarify precisely what is at issue in this case. Respondents' brief and the many *amicus curiae* briefs filed in support of Respondents muddy the waters of this case by stirring in wide swaths of issues and arguments that are not applicable to the questions before this Court. It is therefore appropriate to attempt to calm those waters, allowing the silt of inapposite arguments to settle to the bottom and the relevant points from the briefs on all sides to float to the surface for closer inspection. To do so, it is as important to make clear what this case is *not* about, as it is to make clear what is actually at issue.

This case is not about best practices for interviewing children who are suspected of being abused, including the use of centers where children can be taken for forensic interviews, or the need for interviewers to be trained to properly conduct such interviews so as to avoid emotionally harming children, achieving inaccurate results, or both. Taking a child from school grounds to a children's center that may be located miles away for a full recorded forensic interview, as suggested by Respondents in their brief, raises Fourth Amendment issues beyond an initial interview at the public school itself, and certainly

beyond the issues presented here. Plus, such forensic interviews are usually a second or third step in the continuum of child protection investigations that begin with talking to the child. In the trenches of child protection, it will always be trained peace officers and social workers doing the initial interviews of children, many of which will rule out the need for further investigative action or bringing the child into protective custody, after a public school interview is concluded.

Nor is this case about the standards of proof and other practices used by juvenile courts throughout this nation to remove children from their parents after a finding of abuse or neglect, the provision or denial of services, or the termination of parental rights, none of which may ever occur in a particular case. Indeed, which may never occur because a public school interview by a social worker or law enforcement officer took place, and these child protection professionals were able to determine based on the interview that further investigative and protective steps need not be taken.

It is also not about the ongoing debate regarding how this nation should protect children and families where abuse has been alleged. That debate has existed at least since the late 19th Century and continues today throughout this country and the world. (*See* Pet. Brief, 16-20) Continued debate is a good thing, keeping the system honest, dynamic, and ever improving. But this case is not about that

debate, which is one appropriately left to legislators and policy makers.

Finally, this case is not about family privacy concerns or parents' interests in the care, custody or control of their children. While undeniably parents have such rights, they are simply not implicated in the Fourth Amendment question before the Court. That this is so is evident from the fact that the Ninth Circuit did not even mention these rights in its analysis of S.G.'s interview, and that these rights have not factored into this Court's previous holdings regarding the Fourth Amendment rights of children in public schools. Indeed, it is clear Respondents did not address these issues before the Ninth Circuit as to S.G.'s interview, and therefore they were not preserved for appeal. Clearly, the *only* issue for review here is whether Alford and Camreta violated Respondents' Fourth Amendment rights.

Instead, this case is about one distinct point in the child protection system, a defining point at or near the very first steps in a child welfare investigation: Does a public school interview by law enforcement and social workers of a suspected child abuse victim implicate the Fourth Amendment, and if so, what standard should be utilized to ensure such interviews are reasonably undertaken?[1]

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[1] Because this appeal arose out of a favorable summary judgment ruling on qualified immunity, Alford did not challenge the trial court's conclusion based on the evidence viewed in favor

(Continued on following page)

II. The Ninth Circuit's Fourth Amendment Ruling is Reviewable.

Respondents argue Alford and Camreta cannot appeal the judgment below because the Ninth Circuit upheld the district court's qualified immunity ruling and thus, as prevailing parties, they are prohibited from appealing the judgment. In his merits brief, Camreta argues why the Ninth Circuit's qualified immunity ruling should not preclude review of the Fourth Amendment ruling in the decision below. (Camreta Merits Brief, 41-44). In its amicus brief, the United States also argues constitutional ruling is reviewable notwithstanding its grant of qualified immunity to both petitioners. (United States Amicus Brief, 11-20). As he did in his merits brief (Petitioner's Merits Brief, 4), Alford adopts the arguments of Camreta and the United States as to the reviewability of the judgment below. For the reasons stated by Camreta and the United States, review of the court of

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of the non-moving party that a seizure had occurred. The Ninth Circuit, however, concluded the interview was a seizure at its inception due to the presence of an armed peace officer. Although Alford did not directly raise that issue in its Petition for Writ of Certiorari, Alford acknowledges it has now been raised by two of its amicus and impliedly supported by a third. Having been raised, Alford agrees that whether the interview implicated the Fourth Amendment at its inception is an antecedent and fairly included issue that should be reached by this Court. And Alford agrees that absent egregious circumstances, a public school interview of a suspected child abuse victim does not implicate the Fourth Amendment at its inception, even when conducted by an armed, uniformed peace officer.

appeals' constitutional ruling by this Court is appropriate.

III. Respondents Have Not Established Alford's Appeal is Moot.

Respondents claim this appeal is moot as to Alford because he is no longer employed as a deputy sheriff with the Deschutes County Sheriff's Office. The Court's test where mootness is asserted because of the voluntary conduct of a defendant, is to determine "if subsequent events [have] made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.,* 528 U.S. 167, 189-90 (2000) (quoting *United States v. Concentrated Phosphate Export Association,* 393 U.S. 199, 203 (1968)).

The burden of a party asserting mootness to come forward with sufficient evidence to demonstrate an appeal has become moot is "formidable." *Friends of the Earth, Inc.,* 528 U.S. at 189-90 ("[t]he heavy burden of persuading the [C]ourt that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness"); *Cardinal Chemical Co. v. Morton International, Inc.,* 508 U.S. 83, 98 (1993) (the party asserting that the controversy has become moot since the rendering of the judgment below "bears the burden of coming forward with the subsequent events that have produced the alleged result"). Where sufficient evidence is not

produced to demonstrate with "absolute clarity" that the wrongful behavior could not reasonably be expected to occur, the Court has refused to dispose of an appeal for mootness. *Friends of the Earth, Inc.,* 528 U.S. at 193; *Adarand Constructors, Inc. v. Slater,* 528 U.S. 216, 224 (2000) ("Because, under the circumstances of this case, it is impossible to conclude that respondents have borne their burden of establishing that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to occur,' petitioner's cause of action remains alive.")

The Court has substantial flexibility in applying the doctrine of mootness, and often allows for review in an appeal where the alleged continuing stake in a controversy is somewhat speculative. *Friends of the Earth, Inc.,* 528 U.S. at 190-92 ("The plain lesson of these cases is that there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness."). *See also, Honig v. Doe,* 484 U.S. 305, 330-31 (1988) (Rehnquist, C.J. concurring).

This flexibility is apparent in many of the Court's mootness decisions. For instance, in *Friends of the Earth, Inc., supra,* 528 U.S. at 193, the Court held that in view of the defendant's continuing permit to discharge pollutants (the terms of which it had previously violated), defendant's post-complaint decision to close its facility, thereby halting the discharge of pollutants, did not moot the appeal, as it was not "absolutely clear the permit violation could not reasonably

be expected to occur." Similarly, in *Parents Involved in Community Schools v. Seattle School Dist. No. 1,* 551 U.S. 701, 702 (2007), a case in which the petitioners challenged a policy of the respondent school district which relied on race to determine the schools certain children could attend, the Court held the school district failed to demonstrate the injuries claimed by the petitioners were too speculative to give the Court jurisdiction to hear the appeal. In so holding, the Court stated, "The fact that Seattle has ceased using the racial tiebreaker pending the outcome here is not dispositive, since the district vigorously defends its program's constitutionality, and nowhere suggests that it will not resume using race to assign students if it prevails." *Id.* In each case, despite the fact that the respondents had ceased the complained of activity, the Court found such cessation insufficient to demonstrate that the appeals involved were moot where there was no indication that such activities could not be resumed.

For similar reasons, Respondents in this case fail to satisfy their burden to demonstrate Alford's appeal is moot. Respondents base their mootness argument on the fact that Alford no longer works as a deputy sheriff in Deschutes County. However, this does not make it "absolutely clear" that Alford could not return to work as a deputy sheriff and resume the conduct complained of by Respondents in their complaint. Respondents have made no showing that Alford would not return to work as a deputy sheriff, nor have they provided any evidence to indicate whether

Alford has the desire or the ability to return to such a position. As shown in *Friends of the Earth, Inc.,* and *Parents Involved in Community Schools,* the simple fact that Alford has ceased working as a deputy sheriff does not establish his appeal is moot. Thus, Respondents fail to satisfy their formidable burden to establish the activities complained of as to Alford could not reasonably be expected to resume.

IV. Should the Court Find This Appeal is Moot as to Petitioner Alford, the Court Should Vacate the Judgment of the Court of Appeals.

When a civil case becomes moot pending appellate review, "the established practice . . . in the federal system . . . is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear, Inc.,* 340 U.S. 36, 39-40 (1950); *Deakins v. Monaghan,* 484 U.S. 193, 200 (1988) ("When a claim is rendered moot while awaiting review by this Court, the judgment below should be vacated with directions to the District Court to dismiss the relevant portion of the complaint.") Vacatur "'preserve[s] the rights of all parties,' while prejudicing none 'by a decision which . . . was only preliminary.'" *Alvarez v. Smith,* 130 S.Ct. 576, 581 (2009) (quoting *Munsingwear, Inc.,* 340 U.S. at 39-40). Such a disposition "strips the decision below of its binding effect," *Deakins,* 484 U.S. at 200, and is "commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal

consequences." *Munsingwear, Inc.,* 340 U.S. at 41. *See also,* C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4421, p. 559 (2d ed. 2002) (issue preclusive effect denied to non-appealable findings; "[s]ince appellate review is an integral part of the system, there is strong reason to insist that preclusion should be denied to findings that could not be tested by the appellate procedure ordinarily available").

Vacatur is generally required when mootness occurs through happenstance, i.e., "through circumstances unattributable to any of the parties, or where it results from the unilateral action of the party who prevailed in the lower court." *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,* 513 U.S. 18, 23 (1994). Here, Respondents assert the case was rendered moot when the Ninth Circuit ruled Alford was entitled to qualified immunity and issued a judgment in his favor. If Respondents are correct, then clearly under the authority discussed above, vacatur of the Ninth Circuit's judgment as it pertains to Alford is appropriate.

Despite this clear authority, Respondents assert the Court should leave the court of appeals' opinion intact. (Response Brief, pp. 41-43) However, this assertion ignores the established practice of this Court to vacate judgments in circumstances such as these. As the Court stated in *Munsingwear*, vacatur is generally utilized to deny preclusive effect to the unreviewable findings of an appellate court. 340 U.S. at 41. This practice stems from recognition by the Court that the ends of justice are best served by

vacating the judgment where circumstances unrelated to the controversy between the parties render a case moot:

> The reference to "happenstance" in *Munsingwear* must be understood as an allusion to this equitable tradition of vacatur. A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment. . . . The same is true when mootness results from unilateral action of the party who prevailed below.

U.S. Bancorp Mortgage Co., 513 U.S. at 25 (citations omitted). Vacatur is appropriate here for precisely the same reasons.

For these reasons, should the Court determine that Alford's appeal is moot, that portion of the Ninth Circuit's judgment pertaining to Alford should be vacated, and the case should be remanded with directions to dismiss.

V. The Presence of Deputy Alford at S.G.'s Interview Does Not Preclude the Application of the "Special Needs" Doctrine.

In its decision below, the Ninth Circuit held *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) precluded application of a reasonableness standard similar to the standard announced in *New Jersey v. T.L.O.,* 469 U.S. 325 (1985) to the interview of S.G. because it believed "law enforcement personnel and

purposes" were too deeply involved in her interview. *Greene v. Camreta,* 588 F.3d 1011, 1027 (9th Cir. 2009). Thus, rather than balancing the government's interests in the interview against S.G.'s expectations of privacy, the court held the "general law of search warrants" applies to such interviews where law enforcement personnel or purposes are involved. *Id.* at 1030. Respondents essentially parrot this view in their arguments in response to Alford's appeal. (Response Brief, 70-74) However, as shown below, the Ninth Circuit was simply wrong in holding that *Ferguson* requires a warrant or a warrant exception in this case. And, for this reason, Respondents' reliance on *Ferguson* is misplaced.

A. *Ferguson's* "Primary Purpose/Immediate Objective" Standard Does Not Apply.

In *Ferguson,* the Court considered a suspicionless drug testing policy which was defended as a reasonable measure to advance a "special governmental need." 532 U.S. at 75-76. Under the policy, a state hospital collected urine samples from certain maternity patients and tested them for the presence of cocaine. *Id.* at 71. Those patients who tested positive were expressly given a choice – obtain substance abuse treatment or be arrested. *Id.* at 72. The Court rejected the assertion that the policy at issue advanced a special government interest, and reviewed the drug testing policy itself to determine whether the "primary purpose" of the policy was "ultimately indistinguishable from the general interest in crime

control." *Id.* at 81-86. The Court found it was clear from the record "the focus of the policy was on the arrest and prosecution of drug abusing mothers." *Id.* at 82.

The Court identified nine different features of the program which, in its opinion, conclusively demonstrated the "general law enforcement purpose" of the searches: (1) the "initial and continuing focus" of the policy was on the arrest and prosecution of drug abusing mothers; (2) the document codifying the search policy incorporated the "police's operational guidelines;" (3) significant attention was paid to "chain of custody [of evidence], the range of possible criminal charges, and the logistics of police notification and arrests;" (4) the policy did not discuss different courses of medical treatment for either mother or infant; (5) police and prosecutors were instrumental in the development of the policy and its day-to-day administration; (6) law enforcement officials "helped determine procedures to be followed when performing" medical screens; (7) police had routine access to confidential medical files for the purpose of determining whether mothers should be prosecuted; (8) police "took pains to coordinate the timing and circumstances of criminal arrests with medical staff;" and (9) the threat of criminal prosecution was "essential to the program's success." *Id.* at 72, 82.

Based upon the above, the Court held that the policy's "ultimate goal" of encouraging drug rehabilitation could not be overshadowed by the fact that the policy's "immediate objective" was to "generate

evidence for law enforcement purposes in order to reach that [ultimate goal]." *Id.* at 83. Thus, the Court concluded that while the "ultimate" purpose of the policy was to get expectant mothers who tested positive into treatment and off drugs, the "immediate" means of accomplishing this purpose was the generation of evidence for criminal prosecution of the women who were tested. *Id.* at 83-84 ("[T]he central and indispensable feature of the policy from its inception was the use of law enforcement to coerce patients into substance abuse treatment."). This distinction was critical for the Court, and led it to conclude the primary purpose of the policy was to "use the threat of arrest and prosecution in order to force women into treatment." *Id.*

Critically, the ultimate goal of the drug testing policy in *Ferguson* – to get drug using expectant mothers into treatment – was *completely dependent* upon the immediate threat of prosecution to achieve its goal. *Id.* at 72. Without the prosecutorial component of the program, there was no means to ensure the expectant mothers would seek treatment. In this respect, *Ferguson* held that government officials cannot use the "special needs" doctrine as a loophole to implement suspicionless searches for law enforcement purposes. 532 U.S. at 85. If the rule in *Ferguson* applies to a challenged governmental action, then the "primary purpose" of the action as well as its "immediate objective" must be something other than the generation of evidence for criminal law enforcement purposes. *Id.* at 83.

If the present case is to be considered under the "special needs" rubric, the first issue to determine is whether *Ferguson's* "primary purpose"/"immediate objective" rule even applies. In coming to this rule, the *Ferguson* Court had to confront two cases upholding warrantless Fourth Amendment intrusions apparently undertaken in furtherance of criminal law enforcement. The first was *New York v. Burger*, 482 U.S. 691, 702 (1987), in which the Court upheld a system of warrantless searches of automobile junkyards, *by police*, pursuant to a statute calculated to further the state's interest in preventing car theft. In *Burger,* police were permitted to conduct warrantless searches of business records, vehicles and vehicle parts at businesses subject to the regulation. *Id.* at 694. A failure to keep or produce records or allow a search of vehicles and vehicle parts was a crime. *Id.* The Court concluded the warrantless searches were proper notwithstanding that their "ultimate purpose" was to deter criminal conduct, the administrative scheme itself was enforced by criminal sanctions, and police were involved in the scheme from top to bottom. *Id.* at 704.

The second case the *Ferguson* Court distinguished was *Griffin v. Wisconsin*, 483 U.S. 868 (1987). In *Griffin*, the Court evaluated a state probation regulation which permitted the nonconsensual, warrantless search of a probationer's home as long as there were "reasonable grounds" to believe the home contained contraband. *Id.* at 870-71. After determining the supervision of probationers was a "special

need[ ] beyond normal law enforcement", the Court held the special needs of the probation system justified the warrantless search. *Id.* at 880.

The *Ferguson* Court confronted this apparent inconsistency between the "primary purpose"/"immediate objective" rule it had just articulated and the dual purpose searches in *Griffin* and *Burger*. The Court dismissed the *Griffin* analysis because "*Griffin* is properly read as limited by the fact that probationers have a *lesser expectation of privacy than the public at large*." *Ferguson*, 532 U.S. at 79 n. 15. (Emphasis added.) *Burger* was distinguished on similar grounds, i.e. "that case involved an industry in which the *expectation of privacy in commercial premises was 'particularly attenuated*.'" 532 U.S. at 83 n. 21. (Emphasis added.) Also, the Court emphasized that the "plain administrative purposes" of the *Burger* scheme demonstrated that it was not simply a ruse to gather criminal evidence. *Id.*

Finally, the Court had to confront those "seizure cases in which [the Court has] applied a balancing test to determine Fourth Amendment reasonableness." Those "seizure" cases included *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (justifying warrantless, suspicionless seizures of motorists at a checkpoint set up to intercept drunk drivers) and *United States v. Martinez-Fuerte,* 428 U.S. 543, 561-64 (1976) (upholding a warrantless, suspicionless border checkpoint set up to intercept narcotics and illegal aliens). According to the Court, those cases did not apply because they involved *seizures,* not "the

intrusive search of the body or home." *Ferguson,* 532 U.S. at 83 n. 21. So even though the Court engaged in a balancing of interests in *Martinez-Fuerte* and *Sitz*, the fact that they were merely "seizure" cases established that they were not eligible to inform the analysis of the suspicionless searches at issue in *Ferguson*. *Id.*

After distinguishing *Burger*, *Griffin*, *Martinez-Fuerte*, and *Sitz* as not *really* special needs cases, the Court was able to declare "[i]n none of our previous special needs cases have we upheld the collection of evidence for criminal law enforcement purposes." *Id.* at 83, n. 20. Given how selectively the *Ferguson* Court identified cases as "special needs cases" that much is true. Nevertheless, "special needs" labels aside, the fact of the matter is that *Burger*, *Griffin*, *Martinez-Fuerte*, and *Sitz* were each decided based upon "traditional standards of reasonableness," not a presumed requirement of a warrant or probable cause. Moreover, the seizure at issue in this case possesses at least two of the characteristics the *Ferguson* Court identified as justifications for balancing using "traditional standards of reasonableness" notwithstanding their identification as a "special need." First, this case *is a* "*seizure case*," not a case involving "the intrusive search of the body or the home." Second, this case involves a child at a public school, part of a group of people who, as shown in Alford's merits brief, "*have a lesser expectation of privacy than the public at large*." (Pet. Brief, pp. 49-53).

For these reasons, *Ferguson* simply does not apply here. The *Ferguson* rule can only be said to

apply to intrusive searches, conducted without a warrant or individualized suspicion under circumstances in which the person's expectation of privacy is the same as "the public at large." Here, S.G.'s interview was a seizure. An intrusive search of a home or a person's body is clearly not at issue. Further, the only people who could possibly be subjected to such a seizure under Oregon's statutory scheme – children – clearly do not have the same privacy interests as the "public at large." Thus, the Ninth Circuit's reliance on *Ferguson* was in error, and Respondents' arguments that the "special needs" doctrine does not apply to interviews of the type involved in this case are without merit.

B. There Was Not Excessive Law Enforcement Involvement in S.G.'s Interview.

The interview at issue in this case was undertaken pursuant to Oregon's child welfare statutes. These statutes reflect the measured response the State has taken in investigating and responding to the needs of its abused and neglected children. All governmental activities relative to such children are guided by the State's expressions of policy in Or. Rev. Stat. § 419B.010 (2001):[2]

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[2] All citations to the Oregon Revised Statutes are to the 2001 versions, which were in effect in February 2003, when S.G.'s interview occurred. The same statement of policy is found in the current version of the statute, Or. Rev. Stat. § 419B.007.

> "The Legislative Assembly finds that for the purpose of facilitating the use of protective social services to prevent further abuse, safeguard and enhance the welfare of abused children, and preserve family life when consistent with the protection of the child by stabilizing the family and improving parental capacity, it is necessary and in the public interest to require mandatory reports and investigations of abuse of children and to encourage voluntary reports."

At the outset, unlike the policy involved in *Ferguson,* there is no mention of an intent to further criminal law enforcement purposes in the policy statement or, for that matter, anywhere else in the statutory scheme. The only punitive measures expressed in the scheme relate to a failure of a public official to report suspected child abuse when required, or the unlawful disclosure of confidential records. Or. Rev. Stat. § 419B.010(3); Or. Rev. Stat. § 419B.035(5).

Further, contrary to the Ninth Circuit's concerns, the statutes do not encourage "entanglement between law enforcement and social service workers." (App. to Pet. for Cert. at 35). Under Oregon law, an investigation into alleged child abuse begins when a report is made to either law enforcement or the Department of Human Services ("DHS"). Once a report is received, DHS must notify local law enforcement and vice versa. Or. Rev. Stat. § 419B.015. After cross-notification occurs, either DHS or the law enforcement agency must immediately investigate the "nature and cause of the abuse." Or. Rev. Stat. § 419B.020(1)(a). If such

an investigation concludes there is "reasonable cause" to believe abuse has occurred, the only result mandated by the scheme is protective. DHS must provide "protective social services" if necessary to protect the child from further abuse or to otherwise protect her welfare. Or. Rev. Stat. § 419B.020(2).

The governmental activity at issue here possesses none of the nine characteristics the *Ferguson* Court found indicative of an offensive "immediate [law enforcement] objective." Specifically:

1. The "initial and continuing focus" of the statutory scheme is the protection of the child, not anyone's arrest or prosecution. The duty to investigate and provide protective services exists regardless of whether a suspect can be identified or apprehended.

2. "Police operational guidelines" are not considered by Oregon's child welfare statutes or regulations.

3. There is no consideration given to the "range of possible criminal charges" or the "logistics of arrest." The administrative rules give barely a passing mention to the collection of evidence and say nothing about chain of custody. Or. Admin. Rule 413-020-0430(3)(A) (2002)[3]

[3] The 2002 regulations were the regulations in effect when the seizure occurred. The regulations underwent fairly substantial revision in 2003, but did not take effect until July of 2003.

(law enforcement "is responsible for collecting evidence to use in subsequent judicial proceedings").

4. The statutes and rules devote significant attention to the child's needs for protection and social services. For example, an abused or neglected child can be taken into protective custody, placed in shelter care, or released to a parent or other responsible person. Or. Rev. Stat. § 419B.175. If the child's needs include shelter care, civil protective proceedings are mandatory, as are "protective social services." Or. Rev. Stat. § 419B.185(1) and Or. Rev. Stat. § 419B.020(2). This scheme stands in contrast to the "treatment or jail" approach taken by the government in *Ferguson*. 532 U.S. at 72 (patient required to be arrested if she missed an appointment with a substance abuse counselor).

5. Law enforcement officials do not manage or direct the statute or its day-to-day administration.

6. Unlike *Ferguson*, concerns about the integrity of criminal evidence and other concerns unique to criminal prosecution are given a statutory back seat to the overarching interests in protecting children. Or. Rev. Stat. § 418.747(5) (In all child abuse investigations "[p]rotection of the child is of primary importance").

7. As in *Ferguson*, there is significant information sharing between law enforcement and child welfare officials. Unlike *Ferguson*, however, this exchange of information does not demonstrate it was gathered "for the specific purpose of incriminating" anyone. *Ferguson*, 532 U.S. at 85. Information is provided on an equal footing for law enforcement and non-law enforcement purposes. DHS may provide information respecting a child abuse investigation to the police, the child's physician, her attorney, a citizen review board reviewing children within the jurisdiction of the juvenile court, an abused child's court appointed special advocate, child care certification officials, and other entities as necessary to "investigate, prevent or treat child abuse and neglect, to protect children from child abuse and neglect" or research. Or. Rev. Stat. § 419B.035(1) & (2).

8. The "timing and circumstances of criminal arrests" are not relevant in Oregon's child welfare system. Indeed, there is no mention of them in the statutory scheme.

9. Finally, and perhaps most significantly, criminal prosecution of alleged offenders is *not* an essential ingredient in the success or failure of Oregon's system of child abuse investigation and response. Investigation and protection occur regardless

> of the outcome or existence of a criminal case.

To the extent *Ferguson's* "ultimate versus immediate" purpose inquiry is even required, the statutes and regulations demonstrate that the primary, ultimate, and immediate purpose of the seizures at issue here is to determine if the child has been abused and if she is in need of protection. Law enforcement interests, while significant, are always subordinate to the child's need for protection. *See* Or. Rev. Stat. § 418.747(5).

For these reasons, the Ninth Circuit clearly erred in finding that S.G.'s interview, and indeed the statutory scheme authorizing such interviews, evidence "excessive law enforcement involvement." Thus, as shown in Alford's merits brief, the "special needs" doctrine applies to interviews such as S.G.'s, and the ultimate question of whether the Fourth Amendment here requires a warrant, court order, exigent circumstances or parental consent must be determined by "balancing [the practice's] intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests." *Vernonia School District 47J v. Acton,* 515 U.S. 646, 653 (1995). To the extent Respondents rely on *Ferguson* or the Ninth Circuit's opinion in their response to Alford's appeal, such reliance is without merit.

CONCLUSION

Relying on this Court's decision in *Ferguson v. City of Charlotte,* the Ninth Circuit rejected the District Court's ruling that the "reasonableness" standard announced in *New Jersey v. T.L.O.,* 469 U.S. 325 (1985) was applicable to the interview involved in this case. In doing so, the Ninth Circuit ruled not only that the "special needs" doctrine did not apply to the interview, but that because of the presence of Alford and what it felt was excessive law enforcement entanglement in the statutory scheme governing such interviews the interview itself was unreasonable under the Fourth Amendment. However, as shown both herein and in Alford's merits brief, neither is true. *Ferguson* is both factually and legally distinguishable from this case. When one applies the factors identified by the *Ferguson* Court as relevant to the determination of excessive involvement of law enforcement, the statutory scheme governing such interviews in Oregon is almost completely devoid of any of these factors. To the contrary, the scheme is clearly intended to detect abuse and identify whether the child is in need of protection. For these reasons, it is clear the Ninth Circuit's holding that the interview violated the Fourth Amendment is wrong, and it is equally clear Respondents' reliance on *Ferguson* is without merit. This Court should reverse the Ninth Circuit and conclude the interview was reasonable.

Additionally, as requested by Alford in his brief on the merits, the Court should announce a Fourth Amendment standard to govern such interviews

based on the framework created by the Court in *T.L.O*. This reasonableness standard embraces the Court's "touchstone" analysis under the Fourth Amendment, and is the most helpful decision of the Court. Alford submits that if an interview of this sort implicates the Fourth Amendment, a test akin to that announced in *T.L.O.* is the appropriate test to be used, not the Ninth Circuit's mechanical requirement for a warrant, court order, parental consent, or exigent circumstances.

Respectfully submitted,

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