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1 P R O C E E D I N G S

2 (10:17 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 09-1454, Camreta v. Greene,
5 and 09-1478, Alford v. Greene.

6 General Kroger.

7 ORAL ARGUMENT OF JOHN R. KROGER

8 ON BEHALF OF THE PETITIONERS

9 MR. KROGER: Mr. Chief Justice, and may it
10 please the Court:

11 In Pearson v. Callahan, this Court gave the
12 lower Federal courts discretionary power to decide
13 substantive questions of constitutional law in qualified
14 immunity cases in order to further the development of
15 constitutional precedent. If it is valuable for the
16 lower courts to decide these cases, then it is essential
17 that this Court be able to review those decisions in
18 order to ensure that they are accurate. For this
19 reason, the case is justiciable and should be reviewed
20 on the merits.

21 Turning to the merits of this case, the
22 Court of Appeals held --

23 JUSTICE SCALIA: Not so fast.

24 (Laughter.)

25 JUSTICE KENNEDY: Of course, there are two

1 issues here, and I hope we do get to the substance. Can
2 you tell me Camreta's current occupation? Does the
3 record establish that? Does the record tell us what
4 Camreta is doing now? Is --

5 MR. KROGER: The record does not, Your
6 Honor, because the mootness issue was raised relatively
7 late in the proceedings, but I'm aware of what his
8 current occupation is.

9 JUSTICE KENNEDY: Which is?

10 MR. KROGER: He is a child protective
11 services worker with the Oregon Department of Human
12 Services.

13 JUSTICE SCALIA: What I was about to ask is
14 this: I can agree with you that -- that where there is
15 a -- a determination on the merits, it should be
16 reviewable, but could still disagree that it's
17 reviewable where the requirements for Article III are
18 not met; that is, where there is really no justiciable
19 controversy between the parties.

20 What -- what is the interest of the -- of
21 the parties who were victorious here?

22 MR. KROGER: Your Honor, the interest of Mr.
23 Camreta is the ongoing harm he has in his job. Under
24 the Ninth Circuit's decision, he is forced to either
25 forgo a regular and recurring duty of his job, which is

1 to interview potential child victims in school, or to
2 face liability for doing so.

3 JUSTICE GINSBURG: Why would he face
4 liability? Because he didn't have the opportunity to
5 challenge that decision, the Fourth Amendment decision;
6 therefore, it would have no preclusive effect on him. A
7 party who doesn't have the -- if there are alternative
8 holdings and you lose on one, win on the other, you're
9 not precluded by the loss because you didn't have an
10 opportunity to raise it on appeal. So why would Camreta
11 be precluded? Why would he face punitive damages as
12 you're suggesting?

13 MR. KROGER: Your Honor, the Ninth Circuit
14 opinion does apply to Mr. Camreta. The court
15 specifically advised Mr. Camreta and others in his
16 position that they are on notice that in-school
17 interviews of students that require a seizure require a
18 warrant, and, thus, the Ninth Circuit decision does have
19 precedential effect and impacts Mr. Camreta.

20 JUSTICE SCALIA: But it takes --

21 JUSTICE SOTOMAYOR: General --

22 JUSTICE SCALIA: It takes two to tango, and
23 a case or controversy requires somebody on the other
24 side who cares a fig about the outcome. And here, S.G.,
25 who was the -- the young woman affected in the case, has

1 moved to another State and -- making it virtually
2 certain that she'll never confront this situation again.
3 She doesn't care what the result of this thing is.
4 Besides which, I think she's, what, 17 years old or so
5 now? It's impossible that she will be confronted with
6 the same situation.

7 MR. KROGER: Your Honor, I disagree that
8 S.G. has no ongoing concrete stake in the outcome of
9 this case. In footnote 20 of the Respondent's brief on
10 page 33, the Respondent notes that they have filed a
11 motion in the United States district court to bring
12 their Fourth Amendment claim against Deschutes County, a
13 potential party that has no qualified immunity as a
14 defense. And, obviously, the legal viability of that --
15 that claim against Deschutes County will depend very
16 much on the ruling on the merits of this Court.

17 JUSTICE KENNEDY: This is a Monell claim,
18 and it's -- and the district court has held its ruling,
19 I take it, in abeyance pending -- a ruling for
20 reinstatement of that claim, pending our decision here?

21 MR. KROGER: That is correct, Your Honor.
22 The district court ruled that it was premature until
23 these proceedings were concluded.

24 JUSTICE GINSBURG: Well, why isn't the
25 answer, then, that that's the right case to take up?

1 Because in this case, we have a plaintiff who is not
2 going to be confronted with this situation again and who
3 has put herself out of the running for damages because
4 she didn't -- she didn't challenge the qualified
5 immunity ruling. So she has no stake in any monetary
6 relief from this claim. She has no continuing -- the --
7 what has happened to her, happened to her at age 9, will
8 never happen again now that she's past 18.

9 So she hasn't -- if she came to court today
10 with her case as an 18-year-old, she would have no case
11 or controversy. It just seems like the whole case has
12 evaporated. She has no claim. She did have a claim
13 for -- for money damages, but she has relinquished that.
14 So, what -- what genuine controversy is before us?

15 MR. KROGER: Your Honor, the controversy
16 remains the Fourth Amendment claim, which is the
17 Respondent is seeking to pursue in the United States
18 district court and that gives the Respondent here a
19 direct financial stake in the viability of their Fourth
20 Amendment argument, and --

21 JUSTICE SOTOMAYOR: I'm sorry. Isn't
22 that -- isn't that the -- the county's claim? How
23 Camreta does his job doesn't -- that claim doesn't
24 belong to him; it belongs to the entity who is telling
25 him how to do his job. And so why don't we go back to

1 Justice Ginsburg's question of why isn't the Monell
2 situation the proper case? Because there, it's the
3 party interested in how its officers will do their job
4 at its directive. It has the case and controversy at
5 issue, not S.G.

6 Right now, she's never going to be
7 investigated again. She's in another State. I
8 understand that she doesn't even ever want to return to
9 Oregon for, probably, fairly good reasons, at least from
10 her perspective. So, again, why isn't this the
11 interests of the county, not -- not the interests of the
12 officer?

13 MR. KROGER: Your Honor, in *Arizonans v.*
14 *Arizona*, the Court recognized that the employee in that
15 case had an interest in how she was able to conduct her
16 job. The Court decided that the case was -- was moot
17 because she had resigned from her position with the
18 State. But there was no objection to -- to her standing
19 because she was a public employee that wanted to perform
20 her job in a particular way because she was required to
21 under State law, and here --

22 JUSTICE GINSBURG: She was the plaintiff.
23 In *Arizona*, we were talking about whether a plaintiff
24 still had a viable claim, right?

25 MR. KROGER: That is correct, Your Honor.

1 JUSTICE KAGAN: General Kroger, I don't
2 think that the question here is really a standing
3 question; it's really whether there is a controversy
4 between this particular plaintiff and this particular
5 defendant such that a judgment in this case would
6 actually affect the legal relationship between the two,
7 between the particular plaintiff and the particular
8 defendant.

9 So how would it do that? How would a legal
10 judgment in this case affect the legal relationship
11 between this plaintiff and this defendant?

12 MR. KROGER: Your Honor, the -- the -- Mr.
13 Camreta remains a party below, and it's possible that
14 the Court's rulings on the Fourth Amendment merits may
15 impact the Fourteenth Amendment claims that are being
16 made against Mr. Camreta that are alive and in
17 controversy below.

18 Moreover, this case, even if one strips out
19 the ongoing motion that's been made in the district
20 court, resembles in all material respects *Erie v.*
21 *Pap's A.M.*, where the Court found that there was
22 standing to bring the case and it was not moot. And so,
23 there does seem to be an active case or controversy that
24 is equivalent to that that was present in *Erie v.*
25 *Pap's A.M.*

1 JUSTICE SCALIA: How does it affect the
2 Fourteenth Amendment? There's a Fourteenth Amendment
3 claim pending below?

4 MR. KROGER: Yes, Your Honor.

5 JUSTICE SCALIA: And what's the substance of
6 that?

7 MR. KROGER: It is a claim of Mrs. Greene to
8 interference with familial rights as a result of certain
9 actions by Mr. Camreta and other defendants.

10 JUSTICE GINSBURG: But that didn't have to
11 do with the school search -- the school seizure?

12 MR. KROGER: That is correct, Your Honor.

13 JUSTICE GINSBURG: So -- and this case
14 presents the question about was this unreasonable? That
15 -- what's left in the case has to do with the mother's
16 claim, and it has to do with putting the girls in
17 custody, right?

18 MR. KROGER: That is correct, Your Honor.

19 So the --

20 JUSTICE SOTOMAYOR: Counsel, if we were to
21 hold this case was moot, what would -- what do you think
22 the appropriate disposition of the case would be?

23 MR. KROGER: Your Honor, I believe if the
24 Court determined that this case was moot, the -- the
25 appropriate remedy would be pursuant to Munson where --

1 to vacate the Ninth Circuit decision.

2 JUSTICE SOTOMAYOR: Well, you don't really
3 want that, because the Ninth Circuit granted qualified
4 immunity. What would be -- what would we be vacating?
5 They haven't rendered a judgment on the search warrant
6 issue.

7 MR. KROGER: That is correct, Your Honor.
8 What -- what I think the appropriate remedy for the
9 Court would be would be to effectively --

10 JUSTICE SOTOMAYOR: Vacate the opinion.

11 MR. KROGER: -- vacate the opinion or
12 decision on the Fourth Amendment claim.

13 JUSTICE SCALIA: That would make you happy,
14 won't it? Won't that make you happy?

15 MR. KROGER: Yes, Your Honor. The -- the --
16 I think the only difficulty with that as a -- as a
17 outcome of the case is it undercuts the logic of the
18 Pearson decision.

19 CHIEF JUSTICE ROBERTS: It doesn't just do
20 that. Is -- is Mr. Camreta in any more comfortable
21 position when he knows that the Ninth -- what the Ninth
22 Circuit thinks on this issue and he just has to wait
23 until there's another case when they can impose the view
24 that they've already spelled out? I know as a technical
25 matter it's not binding, but if you're Camreta, do you

1 say, well, the Supreme Court vacated that decision, so I
2 can go ahead and do this again and not have to worry
3 about personal liability?

4 MR. KROGER: You're correct, Your Honor. It
5 would place Mr. Camreta and other child protective
6 services workers in the Ninth Circuit in a very --

7 JUSTICE SCALIA: There are different panels
8 on the Ninth Circuit, aren't there?

9 MR. KROGER: Yes, Your Honor.

10 JUSTICE SCALIA: And -- and they don't all
11 hold the same thing, fortunately, do they?

12 (Laughter.)

13 MR. KROGER: They do they do not, Your
14 Honor.

15 CHIEF JUSTICE ROBERTS: They're supposed to
16 file circuit -- follow circuit precedent, aren't they?

17 MR. KROGER: That is correct, Your Honor.

18 JUSTICE SCALIA: But an opinion that is
19 vacated is not circuit precedent, is it?

20 MR. KROGER: It is not, Your Honor.

21 JUSTICE ALITO: Mr. Camreta would be
22 protected. He would presumably still be entitled to
23 qualified immunity because a vacated alternative holding
24 certainly could not really establish something, I would
25 assume. But municipalities, if they continue to

1 participate in -- in questioning of this nature, would
2 not be protected; isn't that right?

3 MR. KROGER: That is correct, Your Honor.

4 JUSTICE GINSBURG: What happened in --
5 what -- what has Oregon done in response to this Ninth
6 Circuit decision? Before it said that the caseworkers
7 could have this kind of interview with the -- the child
8 where there was a suspicion of abuse. Was there any
9 change in practice in Oregon in response to the Ninth
10 Circuit's decision?

11 MR. KROGER: Your Honor, that is not in the
12 record, but I would happy -- be happy to respond. The
13 State of Oregon provided legal advice advising child
14 protective services workers to attempt to avoid anything
15 that would be a seizure in a school and, in cases where
16 there would pose no risk of danger to the children, to
17 seek consent of -- of a parent before conducting an
18 interview. Nevertheless, that legal advice puts a
19 significant burden on the child protective services
20 workers to -- to do their utmost to protect Oregon's
21 children.

22 CHIEF JUSTICE ROBERTS: On the merits --

23 JUSTICE SOTOMAYOR: Excuse me --

24 CHIEF JUSTICE ROBERTS: -- do you think that
25 the same approach you're following here would apply if

1 the investigation focused on the student rather than a
2 third party? Would in those cases a warrant have to be
3 obtained?

4 MR. KROGER: Your Honor, I think in -- in
5 those cases, because parental consent is a viable
6 alternative where the allegation is a child is being
7 abused by another child --

8 CHIEF JUSTICE ROBERTS: No, no, not another
9 child. It could be anything. We think the child is,
10 you know, selling drugs, obviously not a 7-year-old, but
11 someone else in the school is involved in legal
12 activity, him- or herself.

13 MR. KROGER: Your Honor, I believe the --
14 the child abuse context is somewhat unique in that there
15 are very few ways to investigate properly child abuse
16 without speaking to the only witness that's typically
17 available in the case, and that is the child.

18 CHIEF JUSTICE ROBERTS: So -- so you think
19 it would be a different rule if we're talking about some
20 other criminal activity? The father's selling drugs,
21 and you think the child might have some evidence or at
22 least be willing to talk about that. Do you need
23 anything other than reasonableness in that case?

24 MR. KROGER: Your Honor, it would be the
25 same reasonableness standard that would apply, but I

1 think the courts might reach different conclusions about
2 what would be reasonable in those circumstances.

3 JUSTICE KENNEDY: Well, on -- we're getting
4 to the merits. Do you agree that search -- strike
5 that -- that seizure under the Fourth Amendment is the
6 relevant category here?

7 MR. KROGER: Absolutely, Your Honor.

8 JUSTICE KENNEDY: You agree that the child
9 was -- was seized?

10 MR. KROGER: Yes, Your Honor, we concede
11 that the child was seized.

12 JUSTICE KENNEDY: What -- what happens if
13 the teacher tells -- the student is misbehaving on the
14 playground: Go back in the classroom. You can't -- you
15 sit there by yourself. You can't be part of recess.

16 Is that a seizure?

17 MR. KROGER: No, Your Honor, I -- I disagree
18 that that would be a seizure, because --

19 JUSTICE KENNEDY: What made this a seizure?
20 The fact that it wasn't a teacher?

21 MR. KROGER: Your Honor, the reason we
22 conceded the issue of seizure is we are here on -- on
23 summary judgment, and we took the facts as alleged,
24 which involved transporting the student inside the
25 school.

1 JUSTICE KENNEDY: Well, but I'm -- I'm
2 asking for your view of the proper category to apply in
3 these cases, and if it is a seizure, then -- then it's
4 just a question of reasonableness, and we'd look at all
5 the circumstances.

6 MR. KROGER: That is correct, Your Honor.

7 Mr. Chief Justice, I'd like to reserve the
8 balance of my time.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 Ms. Kruger.

11 ORAL ARGUMENT OF LEONDRA R. KRUGER,
12 ON BEHALF OF THE UNITED STATES,
13 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

14 MS. KRUGER: Mr. Chief Justice, and may it
15 please the Court:

16 A number of the questions this morning have
17 focused on the question whether a live case or
18 controversy remains because Respondent has chosen not to
19 challenge the Ninth Circuit's qualified immunity ruling
20 and so purportedly has no continuing stake in the
21 resolution of this controversy. We think that that's
22 not correct for the reasons General Kroger has given,
23 but it's also not an irreducible minimum of this Court's
24 jurisdiction to correct the mistake that the Ninth
25 Circuit made in this case. I think, too --

1 JUSTICE GINSBURG: What about -- did she --
2 did she -- let's go back one step. Does she have any
3 viable claim now? This is not capable of repetition,
4 evasive of review?

5 MS. KRUGER: Well, two responses, Justice
6 Ginsburg. First, as General Kroger mentioned, she has a
7 continuing interest in how this Court resolves this
8 controversy because of her attempt to bring the same
9 Fourth Amendment claim against Deschutes County. But
10 setting that aside, this Court hasn't universally
11 required that as a prerequisite to exercising its
12 jurisdiction. I think there are two examples that help
13 to illustrate the point.

14 The first is the City of Erie v. Pap's A.M.
15 case, in which this Court decided to review a State
16 court injunction entered in favor of a plaintiff who no
17 longer had what we would think of as an Article III
18 stake in the case by the time the case reached this
19 Court.

20 The plaintiff in that case had left the nude
21 dancing business and had affirmatively stated they had
22 no intention to return. The Court, nevertheless,
23 reached the merits of the State court decision that was
24 on review because to do otherwise would be to saddle the
25 City of Erie with an ongoing injury. In the --

1 JUSTICE SCALIA: There was a dissent in that
2 case, wasn't there?

3 MS. KRUGER: There was indeed a dissent in
4 that case. But I would note that there was also --
5 (Laughter.)

6 MS. KRUGER: -- a dissent from the denial of
7 cert in *Bunting v. Mellen*, in which very much the same
8 situation was presented. The cadets who brought the
9 challenge to the VMI supper prayer that was at issue in
10 that case had graduated from VMI by the time this case
11 reached this Court. And I think, as you quite properly
12 noted in your dissent from denial of review in that
13 case, for this Court to essentially insulate those types
14 of constitutional rulings from review would be to
15 undermine the very purposes for which this Court --

16 JUSTICE KAGAN: Ms. Kruger, how does this --
17 this situation, the qualified immunity situation, differ
18 from a wide variety of other situations in which we
19 might not be able to get to the underlying
20 constitutional ruling?

21 For example, in any case where there's a
22 constitutional ruling but also a harmless error ruling,
23 or in a Sixth Amendment case where there are standards
24 about ineffective assistance of counsel but then a
25 finding that there's no prejudice. In all of those

1 kinds of cases, the underlying substantive ruling might
2 be insulated from our review. How would you say that
3 the qualified immunity situation is different and how
4 would you be able to cabin this rule?

5 MS. KRUGER: The reason we think the
6 qualified immunity situation is different, it presents a
7 set of exceptional circumstances that weren't an
8 exception to the usual prudential rule, is because the
9 qualified immunity situation is one in which this Court
10 has encouraged courts to undertake these kinds of
11 constitutional rulings for the purpose of changing the
12 legal landscape going forward, for the very purpose of
13 establishing the law so that the -- that qualified
14 immunity doesn't remain perpetually available to
15 officials even though they are engaging in conduct --

16 JUSTICE KAGAN: But, presumably, in every
17 case --

18 MS. KRUGER: -- that has been found
19 unconstitutional.

20 JUSTICE KAGAN: Excuse me. Presumably, in
21 every case in which a court does these paired rulings,
22 if you will -- it doesn't just say that the error was
23 harmless, but says that there was an error -- there's a
24 purpose to clarify the law. How is this different, once
25 again?

1 MS. KRUGER: I think that in this situation
2 what we have is not just a preview of how the court of
3 appeals would decide the case subsequently in a case in
4 which it was actually necessary to reach a certain
5 judgment. What we have is a decision that changes the
6 legal landscape going forward. It establishes the law
7 such that qualified immunity will not be available in
8 the next case. And it means that people like Petitioner
9 Camreta and other child protective services workers who
10 are doing their best to protect children from abuse are
11 now on notice that if they attempt to detain temporarily
12 a child in school for the purposes of trying to confirm
13 or dispel a reasonable suspicion of child abuse without
14 a warrant supported by probable cause, that they will
15 invite lawsuits that would put them on the line for
16 personal monetary damages.

17 JUSTICE SCALIA: But that wouldn't be the
18 case if the opinion were vacated --

19 MS. KRUGER: That's true.

20 JUSTICE SCALIA: -- under Munsingwear?

21 MS. KRUGER: That's true, Justice Scalia,
22 and I think that if that's the disposition that this
23 Court thinks is appropriate, we would be certainly be
24 happier with that than a rule that says --

25 CHIEF JUSTICE ROBERTS: It would be --

1 MS. KRUGER: -- an incorrect constitutional
2 ruling.

3 CHIEF JUSTICE ROBERTS: It would be a
4 partial vacatur, right? The Court's done that before,
5 hasn't it, where we vacate part of a decision under
6 Munsingwear?

7 MS. KRUGER: That's correct, Mr. Chief
8 Justice. But I would note that a vacatur rule would
9 come with certain costs that I think this Court should
10 keep in mind as it decides what the appropriate
11 disposition of this case is.

12 The reason that Respondent has so vigorously
13 objected to that disposition is because it is
14 inconsistent in some ways with the very reason for
15 permitting courts of appeals to undertake this kind of
16 constitutional determination in the first place. It
17 undermines the -- the development of the constitutional
18 law if this Court simply wipes the -- the slate clean
19 but doesn't exercise its own authority to clarify the
20 law by correcting what the Ninth Circuit has done. And
21 I think, as the Chief Justice has quite correctly
22 pointed out, it also does nothing to dispel the cloud of
23 uncertainty that hangs over individuals within the
24 territorial jurisdiction of the Ninth Circuit.

25 CHIEF JUSTICE ROBERTS: Well, I'm not so

1 sure he was correct. The --

2 (Laughter.)

3 CHIEF JUSTICE ROBERTS: If it's vacated, it
4 indicates that there's no established law on that
5 question, and it seems to me Camreta would be free to do
6 what he considered appropriate under the circumstances,
7 and if somebody tries to impose personal liability on
8 him, it seems he has an even stronger case than he might
9 have before.

10 MS. KRUGER: I think that's correct, Mr.
11 Chief Justice, and I think for that reason we would not
12 object to that disposition in this case. We would just
13 observe that that disposition is one that does not sit
14 particularly comfortably with the reasoning of Pearson
15 and the line of cases that comes before it, that
16 recognizes that the reason why we encourage courts of
17 appeals to undertake these determinations in the first
18 place is to promote the development of constitutional
19 law and to ensure that the law doesn't remain not
20 clearly established in perpetuity.

21 JUSTICE KENNEDY: It seems to me it would
22 affect Camreta's behavior and that of other child
23 protective officers. The lawyer would explain: Now,
24 legally this is not binding; it just never happened.
25 But three judges of the court of appeals in a reasoned

1 decision have explained why this is contrary to the
2 Constitution, and it would seem to me that any
3 conscientious law enforcement officer would -- would
4 take that seriously into account.

5 MS. KRUGER: I think that's absolutely
6 right, Justice Kennedy.

7 JUSTICE SCALIA: Why? What's the test?
8 Isn't the test clearly established law?

9 MS. KRUGER: That's right.

10 JUSTICE SCALIA: Would this be clearly
11 established law under any -- any conceivable
12 interpretation of that?

13 MS. KRUGER: I think it's -- it's true that
14 if this Court were to vacate the Ninth Circuit's
15 constitutional ruling, Mr. Camreta and others who are
16 similarly situated wouldn't face the very significant
17 concrete prospective effect of this decision, which is
18 to strip them of qualified immunity in future cases.
19 They would be able to argue, as you're suggesting, that
20 the law is not clearly established. At the same time --

21 JUSTICE SOTOMAYOR: If we told them --

22 JUSTICE GINSBURG: You have very limited
23 time. Could you -- could you go to the merits of the
24 Fourth Amendment question and give us the Government's
25 position on that?

1 MS. KRUGER: Certainly, Justice Ginsburg.
2 The Ninth Circuit in this case held that the temporary
3 detention of a child in school to confirm or dispel
4 suspicions that that child is being abused is
5 unconstitutional unless the questioning officials have a
6 warrant, probable cause, or parental consent. We think
7 each of those requirements is unjustified as a matter of
8 Fourth Amendment law and imposes a serious burden on the
9 conduct of the -- of the government at the initial
10 stages of a child abuse investigation. As --

11 JUSTICE SOTOMAYOR: Counsel, would -- I'm
12 interrupting you only for a quick reason. What's the
13 test? Is it a question of whether the seizure is
14 reasonable or not?

15 MS. KRUGER: That's correct, Justice
16 Sotomayor. The question is reasonableness.

17 JUSTICE SOTOMAYOR: All right. So -- so
18 that would be your proposed test. If we were to say you
19 don't need any of those three things right now, where
20 would that leave us or leave the courts below on
21 determining whether what happened here was reasonable or
22 not? Meaning, what if a child is called in and says, I
23 don't want to talk to you without my mom; and they
24 continue to speak to the child? Is that reasonable?

25 MS. KRUGER: I think that the answer is that

1 would go to the -- the question of the manner in which
2 the -- the interview is conducted, as opposed to whether
3 it's --

4 JUSTICE SOTOMAYOR: So how do we --

5 MS. KRUGER: -- reasonable at its inception.

6 JUSTICE SOTOMAYOR: How do we develop the
7 law, or how do we help develop the law in this case if
8 we answer your question but leave unanswered with no
9 parameters, any idea -- because we have no set of facts;
10 no one's going to review that question -- of what is
11 reasonable in this context?

12 MS. KRUGER: Well, the question that the
13 Ninth Circuit answered in this case was a question that
14 concerns the justification for the interview at its
15 inception. The Ninth Circuit said a warrant, probable
16 cause, or parental consent is required from the very
17 outset. That would be true whether an interview lasted
18 2 hours or 10 minutes, whether the child was responsive,
19 whether the child wasn't.

20 JUSTICE SOTOMAYOR: That -- you see, that's
21 the problem with taking up a case with no case in
22 controversy, because what do we do? We don't remand for
23 them to reach the second question, which is really the
24 one that law enforcement needs some help on.

25 MS. KRUGER: Well, I -- I would disagree

1 with that proposition. I think law enforcement very
2 much needs help on the questions the Ninth Circuit
3 actually decided because the warrant or probable cause
4 requirement is one that has a very significant effect on
5 the way that they carry out their very important
6 business in this area.

7 If the Court has no further questions --

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 Ms. Kubitschek.

10 ORAL ARGUMENT OF CAROLYN A. KUBITSCHEK

11 ON BEHALF OF THE RESPONDENTS

12 MS. KUBITSCHEK: Thank you. Mr. Chief

13 Justice, and may it please the Court:

14 There is no case or controversy between S.G.
15 and the Petitioners. That ended when --

16 CHIEF JUSTICE ROBERTS: Then why are you --
17 why are you here?

18 (Laughter.)

19 CHIEF JUSTICE ROBERTS: You're not
20 challenging the qualified immunity ruling?

21 MS. KUBITSCHEK: Precisely.

22 CHIEF JUSTICE ROBERTS: Yet, you have --
23 yet, you have -- why didn't you just go away?

24 (Laughter.)

25 MS. KUBITSCHEK: Mr. Chief Justice, we are

1 not here voluntarily.

2 (Laughter.)

3 CHIEF JUSTICE ROBERTS: No, I know that.

4 But why --

5 (Laughter.)

6 CHIEF JUSTICE ROBERTS: I do know that. But
7 on the other hand, you had no -- you could have filed a
8 paper saying we have no continuing interest in the case,
9 but you haven't done that. You've fought the legal
10 issues on the merits in -- in an area where it's been
11 suggested you don't have a stake.

12 MS. KUBITSCHKEK: We -- S.G. does not have a
13 legally cognizable stake, Your Honor. She won a moral
14 victory when she obtained a ruling in her favor on the
15 Fourth Amendment claim in the Ninth Circuit, but as this
16 Court said in *Hewitt v. Helms*, a moral victory is no
17 victory at all, but --

18 CHIEF JUSTICE ROBERTS: So you have
19 objection if we entered a *Munsingwear* order vacating the
20 decision of the Ninth Circuit on the merits of the
21 dispute?

22 MS. KUBITSCHKEK: Well, Your Honor, the -- we
23 would submit that the *Munsingwear* test would not apply
24 in this case because *Munsingwear*, which permitted
25 vacating a decision when it became moot, talked about

1 decisions which become moot through happenstance, and --

2 CHIEF JUSTICE ROBERTS: Well, again --

3 MS. KUBITSCHKEK: -- the reason for that is
4 because of preclusion. I'm sorry.

5 CHIEF JUSTICE ROBERTS: I'm sorry. Again, I
6 get to the question, why do you care? Why do you care
7 whether we vacate the -- the order or not? Your
8 position is your client has no continuing interest in
9 the case.

10 MS. KUBITSCHKEK: That -- our client has no
11 legally binding, legally cognizable interest in the
12 case. She has an interest in protecting her moral
13 victory, as do -- and in the issue, as do the many amici
14 who filed briefs on her behalf.

15 JUSTICE GINSBURG: She's asserting the
16 interests of other children who would be in the
17 situation that she was once in, but no longer; but we
18 have said the plaintiff herself must have a live
19 controversy, and there was no class action here.

20 MS. KUBITSCHKEK: That -- that is correct,
21 Justice Ginsburg. She does not have an interest, and
22 the case is moot.

23 JUSTICE ALITO: But you want to have the
24 Fourth Amendment decision preserved and have it govern
25 an enormous chunk of the country so that all the States

1 in the Ninth Circuit have to comply with it, and anybody
2 -- any individual officer who doesn't comply with it
3 would do so on pain of personal liability, but you don't
4 want that ground-breaking decision to be subject to
5 review by this Court on the merits. Is that a summary
6 of what you want? Does that make any sense?

7 MS. KUBITSCHKEK: Your Honor, the -- the case
8 -- if the case is truly as important to other employees
9 of the States in -- within the confines of the Ninth
10 Circuit, it will arise again, and this Court will have
11 the opportunity to decide the issue again between
12 parties who have a live stake in the issue; or it will
13 arise in another circuit, and it will present a live
14 controversy between parties who have a stake.

15 JUSTICE SCALIA: So, you want us -- so
16 Munsingwear. You don't want us just to leave it sitting
17 because there's no controversy; you want us to erase
18 that holding below, right?

19 MS. KUBITSCHKEK: No, Your Honor, we would
20 not ask the holding below be erased. That's --

21 JUSTICE SCALIA: Well, then -- then the
22 answer you just gave doesn't make any sense. You say it
23 can -- you know, it can arise again. That would be the
24 answer of someone who wants us to eliminate the holding
25 here: Don't worry; it will come up again in a context

1 where, on appeal, somebody will have an interest in
2 arguing to -- to sustain it, but that interest doesn't
3 exist here. That's the argument you're making, but
4 that's the argument of someone --

5 MS. KUBITSCHKEK: I'm sorry --

6 JUSTICE SCALIA: -- who wants us to
7 Munsingwear.

8 MS. KUBITSCHKEK: I'm sorry, Your Honor, I
9 misspoke. It will come up -- if it is as -- if the
10 practice is as widespread as the Petitioners claim, it
11 will come up again in other circuits, and this Court
12 will have the opportunity to review it and --

13 JUSTICE KENNEDY: Well, but Justice Alito's
14 question was addressed to the Ninth Circuit. In the
15 Ninth Circuit, it's not going to come up again if we
16 assume that our public employees are going to be
17 law-abiding. They're bound by this in the Ninth
18 Circuit.

19 MS. KUBITSCHKEK: Well, Your Honor, I
20 guess that's --

21 JUSTICE KENNEDY: And you -- and you want
22 them to be bound, and yet you say there's -- that the
23 case is moot. I just don't understand it.

24 MS. KUBITSCHKEK: Well, Your Honor, that
25 leads to the question of what exactly are they bound by?

1 And our reading of the court of appeals decision is not
2 nearly as broad as the Petitioners' reading. The court
3 of appeals said specifically our caseworkers and police
4 officers are always allowed to question children in a
5 protractive custodial setting with --

6 JUSTICE GINSBURG: Where are you reading in
7 the holding of the court of appeals? Because I was
8 under the impression that they did say there's only
9 three ways: One is you get a warrant; another is you
10 get parental consent; and a third is exigent
11 circumstances. I thought that was the -- the ruling of
12 law by the Ninth Circuit.

13 MS. KUBITSCHKEK: That was -- that was the
14 ruling as it applied to S.G. herself, Justice Ginsburg.
15 This was not a class action lawsuit, and the court was
16 deciding what happened to one 9-year-old child on
17 February 24th, 2003.

18 JUSTICE GINSBURG: Well, let's see where
19 they -- I thought that, yes, the case is about a single
20 plaintiff; it's not a class action. But they're making
21 a rule of law. What does the Fourth Amendment require?

22 MS. KUBITSCHKEK: Okay. On page 1022, Your
23 Honor, it says: "We consider the relatively
24 straightforward question whether an in-school seizure
25 and interrogation of a suspected child abuse victim is

1 always permissible under the Fourth Amendment without
2 probable cause and a warrant or the equivalent of a
3 warrant." And the court -- and the court said: No, not
4 always and not in this case.

5 And if this Court does reach the merits
6 of -- of this case, we would ask this Court to uphold a
7 rule that -- stating that a protracted custodial
8 interview of a child by police and child welfare
9 investigators is presumptively unconstitutional unless
10 they have a warrant or court order or parental consent
11 or exigent circumstances.

12 JUSTICE ALITO: What is there in the Ninth
13 Circuit's opinion, which -- which generally requires a
14 warrant, to suggest that the length of the interrogation
15 was relevant to their decision? I mean, at least the
16 child protective services need to decide whether they
17 need a warrant before they begin the questioning, no
18 matter how long it's going to last.

19 Where does it say that the length is
20 relevant to the -- to the issue that they decided?

21 MS. KUBITSCHKE: Well, Your Honor, the --
22 the length of the questioning has been historically
23 important to this Court's jurisprudence. It
24 distinguishes, for example, between a Terry stop and a
25 seizure. And this Court said, for example, in the

1 United States v. Place, that a 90-minute detention is --
2 falls out of the realm of a Terry stop and into the
3 realm of a seizure for which full Fourth Amendment
4 protections are required of a criminal suspect. And
5 this Court has also said, in Soldal v. Cook County, that
6 it would be anomalous if people who are not suspected of
7 any wrongdoing at all had fewer Fourth Amendment
8 protections than --

9 JUSTICE SCALIA: I don't understand. It
10 seems like a very strange rule to me. You mean it's
11 okay for a child protection worker to just ask the child
12 passing in the hall, you know, has your -- or not
13 passing in the hall. Come into this room, I have a
14 question for you: Has your father been abusing you?
15 And if the child says yes, thank you, and the child
16 goes, then that's okay?

17 MS. KUBITSCHKEK: We would --

18 JUSTICE SCALIA: Because it was a short
19 interview?

20 MS. KUBITSCHKEK: The -- I didn't mean to --
21 that the length of the interview is the only factor,
22 Your Honor.

23 JUSTICE SCALIA: Oh.

24 MS. KUBITSCHKEK: One of the other factors is
25 that the -- that the seizure is determined by the fact

1 that the police and child welfare worker removed the
2 child or removed any individual from the place where she
3 is --

4 JUSTICE SCALIA: Right. Take her into a
5 room. I see that.

6 MS. KUBITSCHKEK: -- and bring her to another
7 place, and then --

8 JUSTICE SCALIA: But once they take her in a
9 room, it depends on how long the interview is; is that
10 right?

11 MS. KUBITSCHKEK: That -- that goes to the
12 question of whether or not there was a seizure.

13 JUSTICE SCALIA: Whatever.

14 MS. KUBITSCHKEK: In this case, it was
15 stipulated that there was a seizure.

16 JUSTICE SCALIA: We're talking about rules
17 for the future; we're not talking about this case, and
18 you're asking us to adopt a rule for the future that
19 says if it's very brief, it's okay, but if it's longer
20 it isn't okay. Right? That's what you want us to
21 adopt?

22 MS. KUBITSCHKEK: That -- that if -- if it
23 were very brief and the child was not removed from her
24 classroom --

25 JUSTICE SCALIA: No, no, no, no. Removed.

1 There has been a seizure, but it's been a very brief
2 seizure, just as a Terry stop is a very brief seizure.

3 MS. KUBITSCHKEK: Our position would be that
4 because the -- of the importance of consent here to a
5 seizure, that the -- that there would need to be a court
6 order to remove a child from her classroom and to take
7 her to another room and then --

8 JUSTICE ALITO: On the issue --

9 MS. KUBITSCHKEK: -- or parental consent.

10 JUSTICE SCALIA: So you're changing your
11 position: You need a court order, no matter how brief;
12 is that it?

13 MS. KUBITSCHKEK: I think that has been our
14 position, and I'm sorry if I didn't make it clear.

15 JUSTICE SCALIA: Oh, okay.

16 JUSTICE ALITO: Well, on the issue of
17 consent, do you read the Ninth Circuit's opinion as
18 having an age limit? Suppose that the child is, let's
19 say, 16 years old. Is the child at 16 incapable of
20 consenting to questioning?

21 MS. KUBITSCHKEK: Well, the way that we read
22 the Court of Appeals decision and the rule that we would
23 ask this Court to adopt, that is, seizure and for a
24 custodial interrogation is presumptively unreasonable
25 without parental consent or a court order leaves open

1 the possibility that there are, in fact, some children
2 who are of suitable age and discretion to knowingly make
3 a decision whether or not to talk to an armed police
4 officer and a caseworker without their parents having to
5 make it for them. But --

6 JUSTICE SOTOMAYOR: Counsel, are you -- I
7 just want to make sure I understand your position.

8 Answering Justice Scalia's question: Child walks into
9 the room -- is taken out of their classroom, walks into
10 the room. The officer says: We've heard that your
11 mommy and daddy are doing some things to your private
12 parts; is that true? And the child says -- 9-year-old
13 child says: I wish somebody had asked me before. I'm
14 so afraid of my daddy. He does these horrible things to
15 me.

16 Are you seriously suggesting that if the
17 police stay there for an hour debriefing that child as
18 to the circumstances of that situation, that that's a
19 seizure? It seems to me that what you --

20 MS. KUBITSCHKE: A seizure, yes, but that
21 would have exigent circumstances, and that would get it
22 out of the warrant requirement.

23 JUSTICE SOTOMAYOR: Well, but what does that
24 have to do or change the police bringing a child into a
25 room and just asking the question? When does -- that's

1 what you seem to have said to Justice Scalia, which is
2 that the mere removal from the classroom is the -- the
3 defining feature of seizure. So it can't be that.

4 MS. KUBITSCHKEK: Well --

5 JUSTICE SOTOMAYOR: They don't know if
6 there's exigent circumstances until they ask the
7 question.

8 MS. KUBITSCHKEK: That -- that's correct.

9 JUSTICE GINSBURG: You got a stipulation
10 that there was a seizure, so --

11 MS. KUBITSCHKEK: What? Yes, there was a
12 seizure.

13 JUSTICE GINSBURG: There was never any
14 argument that was not at issue in this case. Given that
15 there was seizure --

16 MS. KUBITSCHKEK: That's -- that's correct.

17 JUSTICE GINSBURG: -- the question is: Is
18 it reasonable?

19 MS. KUBITSCHKEK: Correct.

20 JUSTICE GINSBURG: Have you, in the -- many
21 of the questions have gone to leads, but this is
22 initially a social worker's investigation. And you
23 said, when stating what the Ninth Circuit's rule was,
24 that police are in combination with the caseworker.

25 Suppose we took out -- out of the picture.

1 He didn't utter a word in the interview. Suppose we
2 take the sheriff, deputy sheriff, out. The only one who
3 comes to the school and asks to talk to this child is
4 the caseworker from the department of health?

5 MS. KUBITSCHKEK: Well, it would depend on, I
6 think, the larger picture, whether or not there was
7 police entanglement, as this Court ruled in Ferguson v.
8 The City of Charleston. In this particular case, the --

9 JUSTICE GINSBURG: If the information
10 elicited from the child is that she has been abused by
11 her father, then there is a likelihood that there will
12 be police interest in that.

13 MS. KUBITSCHKEK: Well, and this -- this
14 Court recognized also that possibility in Ferguson v.
15 The City of Charleston, that the -- the nurses at the
16 hospital would call child protective services, but
17 the -- the -- you have to look at it from the beginning,
18 and in this case, the case began when -- on
19 February 10th, when the police got involved.

20 The police did not report the matter to the
21 child protective investigator until 10 days later, and
22 then they went out together. Subsequently, the child
23 protective investigator testified before a grand jury as
24 part of the ongoing law enforcement investigation and,
25 in fact, when he was questioned at his deposition,

1 petitioner Alford said that his reason for being at the
2 school was for law enforcement purposes.

3 JUSTICE ALITO: But what is your answer to
4 Justice Ginsburg's question, suppose it was just
5 Mr. Camreta or suppose it was the school nurse, would
6 the answer be the same?

7 MS. KUBITSCHKEK: No, it would not be the
8 same if it was the school nurse or Mr. Camreta. And
9 the -- the reason is that the school nurse is part of
10 the school administration, and the school has an
11 obligation and the authority under T.L.O. act and in
12 Earls to make rules and carry out procedures that will
13 protect the children of the school and promote learning,
14 and if the child comes --

15 JUSTICE ALITO: So if it was just
16 Mr. Camreta and he --

17 MS. KUBITSCHKEK: If Mr. --

18 JUSTICE ALITO: -- and he taped the
19 conversation and then later turned it over to the -- to
20 the police if he discovered evidence of child abuse,
21 there would be no problem? Right?

22 MS. KUBITSCHKEK: If Mr. Camreta came in from
23 the outside, he would not fall within the T.L.O. rule,
24 because in T.L.O. this Court said specifically that
25 their ruling does not apply to individuals such as

1 police officers who come from the outside in -- in order
2 to deal with situations that are not related to the
3 school, and nobody is saying that S.G. was abused while
4 she was at the school.

5 JUSTICE BREYER: Same circumstance. Was
6 there a seizure? No -- no professor -- no policeman?

7 MS. KUBITSCHKEK: If -- if --

8 JUSTICE BREYER: School nurse?

9 MS. KUBITSCHKEK: The school nurse?

10 JUSTICE BREYER: Seizure?

11 MS. KUBITSCHKEK: Probably not a seizure.

12 JUSTICE BREYER: And so, it's not a seizure
13 if exactly the same thing happens but there is no
14 outside person there, but it is a seizure if there's an
15 outside person?

16 MS. KUBITSCHKEK: If the outside person comes
17 into the school --

18 JUSTICE BREYER: That's the rule as to
19 whether there's a seizure?

20 MS. KUBITSCHKEK: That's one of the factors
21 to look at.

22 JUSTICE BREYER: No, no, no, whether there's
23 a seizure?

24 MS. KUBITSCHKEK: Yes.

25 JUSTICE BREYER: Okay. What makes it a

1 seizure? Go inside and speak to the principal, I saw
2 you push the child at recess. We want to find out who
3 was pushing you. Go inside and talk to the principal.
4 Seizure?

5 MS. KUBITSCHKEK: Your Honor, I believe that
6 it -- it would be considered a seizure, although that's
7 not our case.

8 JUSTICE BREYER: Everybody is going to stay
9 5 minutes after class, too much talking today. Seizure?

10 MS. KUBITSCHKEK: That -- that, Your Honor,
11 it might be a seizure. Again, it's T.L.O. --

12 JUSTICE BREYER: Well, that's what I need to
13 know, because I don't know see if there is no seizure,
14 how it could have been an unreasonable thing, if there
15 isn't even a seizure.

16 MS. KUBITSCHKEK: If -- if the caseworker
17 comes to the school under circumstances where a child
18 would feel free to leave or --

19 JUSTICE BREYER: You're not free to leave
20 class.

21 MS. KUBITSCHKEK: Well, Your Honor, that's --
22 children -- this is correct, children have lesser
23 expectations of privacy, but when they are forcibly
24 taken out of class and moved to another location --

25 JUSTICE BREYER: Go to the principal's

1 office. Too much talking.

2 MS. KUBITSCHKEK: That -- that would be --
3 Your Honor, if that is a seizure, it would fall within
4 T.L.O., precisely within T.L.O., whereas --

5 JUSTICE SCALIA: If you send her to the
6 school nurse, it's not a seizure, but if the school
7 doesn't have a nurse and it brings in a nurse from the
8 outside and say, you know, we think you have some
9 contagious disease, we would like you to speak to
10 this -- then it becomes a seizure?

11 MS. KUBITSCHKEK: Well, Your Honor, the
12 T.L.O. framework would certainly apply in that
13 situation, where you have a child who has a potentially
14 contagious disease, then the analysis you follow --

15 JUSTICE SCALIA: Contagious, it's just a
16 disease that's going to kill this child and nobody else,
17 okay?

18 (Laughter.)

19 MS. KUBITSCHKEK: Your Honor, that certainly
20 also would fall within the T.L.O. --

21 JUSTICE SCALIA: Okay.

22 MS. KUBITSCHKEK: -- special needs exception.

23 JUSTICE SCALIA: So why doesn't it --
24 likewise, it's not a nurse, but it's a social worker
25 who's brought in to interrogate the child about

1 something else that is going to very much harm that
2 child, why is that any different?

3 MS. KUBITSCHKEK: Well, Your Honor, because
4 child welfare investigations are also harmful to
5 children. And when -- when a child is asked,
6 interrogated about whether or not her father touches her
7 inappropriately, that's not a neutral action. Whether
8 or not she has been abused that causes trauma to the
9 child --

10 JUSTICE SCALIA: It has nothing to do with
11 whether there's a seizure, nothing whatever to do with
12 whether there's a seizure.

13 MS. KUBITSCHKEK: If -- if there --

14 JUSTICE SCALIA: The questions you ask after
15 the seizure don't make it a seizure or make it not a
16 seizure, do they?

17 MS. KUBITSCHKEK: They -- they affect the
18 constitutionality of the interaction between the child
19 and the --

20 JUSTICE SOTOMAYOR: Doesn't that go to the
21 question of the reasonableness of the scope of the
22 seizure? Don't we have *Lidster* and -- and other
23 jurisprudence that basically addresses this question and
24 says is this type of seizure or stop detention
25 reasonable?

1 And it's hard to swallow that if a police
2 officer asks a child are you being abused and the child
3 says, yes, I need help, it is nearly impossible to think
4 that that seizure is unreasonable. You're -- you're --
5 you're -- it may well be that 2 hours for a protesting
6 child would be, but isn't that all subject to a question
7 of reasonableness as to the scope of the seizure?

8 MS. KUBITSCHKE: Well, Your Honor,
9 because --

10 JUSTICE SCALIA: She's helping you, I think.

11 MS. KUBITSCHKE: I'm sorry?

12 JUSTICE SCALIA: She's helping you, I think.

13 (Laughter.)

14 JUSTICE SCALIA: But -- but that goes to the
15 reasonableness of the seizure. I was asking you about
16 whether there has been a seizure. Step one, has there
17 been a seizure? And you're saying that in a lot of
18 these situations there simply hasn't been a seizure.

19 Now, once there is a seizure, then we can
20 inquire to whether it's unreasonable or not. But -- but
21 those are two distinct questions, and -- and we've been
22 discussing the mere existence of a seizure. Now, true
23 in this case it was already conceded, but you're asking
24 us to adopt a rule for future cases, and we can't adopt
25 a rule for future cases until we know what we're talking

1 about when -- when -- when we talk about a seizure.

2 CHIEF JUSTICE ROBERTS: He was not trying to
3 help you.

4 (Laughter.)

5 MS. KUBITSCHKEK: I'm aware of that. But,
6 you know, that again is perhaps a good reason why this
7 Court should not reach the merits of the Fourth
8 Amendment question, because in this particular case it
9 was conceded that there was a seizure so early in the --
10 in the case that the normal development of facts which,
11 as Justice Scalia, you have pointed out, whether or not
12 there is a seizure is certainly dependent on the
13 individual facts of the encounter between the individual
14 child and the individual police officer.

15 CHIEF JUSTICE ROBERTS: So you're --

16 MS. KUBITSCHKEK: Those facts were not
17 developed.

18 CHIEF JUSTICE ROBERTS: So that's your
19 argument, again, that we shouldn't reach the merits?

20 MS. KUBITSCHKEK: That's correct.

21 CHIEF JUSTICE ROBERTS: Now, do you agree
22 that if we vacate the court of appeals' decision on the
23 merits, that if Camreta had did exactly what he did in
24 this case again, that he would not face personal
25 liability?

1 MS. KUBITSCHKEK: If you -- if you vacate the
2 decision on the merits --

3 CHIEF JUSTICE ROBERTS: Right. Then that
4 cannot be used -- that cannot be used to establish that
5 there's clearly established law. And in the absence of
6 clearly established law, he cannot be found personally
7 liable?

8 MS. KUBITSCHKEK: That -- that would be
9 correct.

10 CHIEF JUSTICE ROBERTS: So if he did exactly
11 the same thing, he would still be entitled to qualified
12 immunity?

13 MS. KUBITSCHKEK: He would still be entitled
14 to qualified immunity, but if this Court were to vacate,
15 this Court would be effectively be telling lower courts
16 that they should not follow the Pearson sequence ever
17 because if they -- if the lower court reaches a
18 constitutional issue and then rules that the defendant
19 has qualified immunity, which Pearson said that they
20 could do, that this Court would then say no, don't --

21 JUSTICE SCALIA: Not always. Not always.
22 Only when there is no longer a case in controversy.
23 In -- in many cases there will still be a case or
24 controversy.

25 MS. KUBITSCHKEK: Well --

1 JUSTICE SCALIA: It will be something that
2 could be replicated again in the future for some other
3 reason. It -- it isn't true that it will just eliminate
4 the whole purpose of our -- of our jurisprudence in this
5 area. In many cases the -- the decision below can be
6 appealed, and -- and we will rule on the -- on the
7 constitutional question.

8 MS. KUBITSCHKEK: Which is -- that's --
9 that's correct --

10 JUSTICE SCALIA: But you moved away, I mean
11 if -- you know, it's a different situation.

12 MS. KUBITSCHKEK: It -- it's a different
13 situation, but if they're in the situations where
14 individual defendants have qualified immunity, it has
15 been the procedure in this Court not only since Pearson
16 but really going all the way back to Siegert v. Gilley,
17 1991, where the Court recommended that the lower courts
18 reach the constitutional issue -- in Siegert this Court
19 said that they can. In County of Sacramento v. Lewis,
20 the Court said that they -- it's the better approach.

21 JUSTICE ALITO: Well, could you have
22 cross-petitioned in an effort to get damages, so if you
23 had wanted to preserve the issue, you surely could have
24 done that, couldn't you?

25 MS. KUBITSCHKEK: S.G. could have

1 cross-petitioned, but she decided not to.

2 JUSTICE KAGAN: But then we wouldn't have a
3 case.

4 JUSTICE KENNEDY: But there's nothing in the
5 record that indicates that you're withdrawing your
6 Monell action against the municipality, is there?

7 MS. KUBITSCHKEK: The Monell action against
8 the municipality was dismissed on the facts.

9 JUSTICE KENNEDY: But isn't it -- isn't a
10 motion to reinstate it still pending in the district
11 court?

12 MS. KUBITSCHKEK: The motion to reinstate it
13 was denied without prejudice to reinstate after this
14 Court rules, and --

15 JUSTICE KENNEDY: All right, so it's still
16 alive. And --

17 MS. KUBITSCHKEK: It's still alive.

18 JUSTICE KENNEDY: -- there's nothing in the
19 record to indicate that you won't ask that it be
20 reinstated.

21 MS. KUBITSCHKEK: That's correct.

22 JUSTICE KAGAN: Is that against a different
23 party, Ms. Kubitschek?

24 MS. KUBITSCHKEK: That is against Deschutes
25 County, Justice Kagan.

1 CHIEF JUSTICE ROBERTS: But who is -- who is
2 on the other side of the county?

3 MS. KUBITSCHKEK: I'm sorry; who's on the
4 other side of the --

5 CHIEF JUSTICE ROBERTS: The claim pending
6 below involves which two parties?

7 MS. KUBITSCHKEK: Oh, it -- it involves S.G.
8 and the county.

9 CHIEF JUSTICE ROBERTS: Oh. So --

10 MS. KUBITSCHKEK: -- claim that it's alive?
11 The claim that is alive involves different incidents,
12 incidents that took place in March of 2003, not --

13 CHIEF JUSTICE ROBERTS: Does the decision on
14 the merits here have any relevance whatever to the
15 action that's still pending?

16 MS. KUBITSCHKEK: No.

17 CHIEF JUSTICE ROBERTS: So you agree that if
18 -- if this is -- we vacate the decision on the merits,
19 that's of no meaning whatever in the pending action
20 below?

21 MS. KUBITSCHKEK: It would not have an effect
22 on the action.

23 JUSTICE BREYER: Suppose that we dismiss the
24 case as improvidently granted, while indicating in an
25 opinion some of the questions that we find difficult

1 such, for example, as the seizure question, et cetera;
2 what kind of impact would that have in your opinion?

3 MS. KUBITSCHKEK: If the Court were to
4 dismiss the case as --

5 JUSTICE BREYER: Yes, if -- while indicating
6 the reasons being in part that there are difficult
7 questions here, suggesting what they are. What would
8 the -- impact would that have?

9 MS. KUBITSCHKEK: Well, Your Honor, it would
10 have some impact at least on the Petitioner's position.
11 The Petitioner's opinion as stated in their brief that
12 all seizures of children to investigate child abuse are
13 constitutional at their inception, meaning there --
14 there are no limits, there are no constraints on what a
15 child abuse --

16 JUSTICE GINSBURG: It wouldn't affect your
17 client in any way, because she's out of it and you were
18 candid from the beginning to say as far as she's
19 concerned this is a moot case; but as far as Camreta and
20 the other officers are concerned, we were told by
21 Oregon's representative that they are not -- that they
22 have tailored their behavior to conform to this
23 decision.

24 MS. KUBITSCHKEK: And, Your Honor, that --

25 JUSTICE GINSBURG: So --

1 MS. KUBITSCHEK: -- that would be to -- to
2 tell the officials who investigate child abuse that in
3 the name of protecting children, they do not have free
4 rein to do anything and everything that they think is
5 appropriate, because what they do harms children,
6 including the very children they claim to be trying to
7 protect.

8 As Justice Breyer said, even raising those
9 questions would -- would be beneficial to children who
10 are forced to undergo child abuse investigations, 75
11 percent of whom have not been abused at all, and who
12 find the experience psychologically traumatic.

13 CHIEF JUSTICE ROBERTS: If you're making an
14 argument on something that you've already told us you
15 have no cognizable interest in -- correct?

16 MS. KUBITSCHEK: Correct.

17 JUSTICE ALITO: If you were designing what
18 you would regard as an ideal system, and you're very
19 knowledgeable in this -- in this area, and you concluded
20 that some kind of approval by a detached individual
21 should be required before something like this is
22 allowed, would you set the standard at probable cause?
23 Would you say that the child protective service has to
24 have probable cause that there's abuse before they can
25 question the child to find whether or not there was

1 abuse, or would you set it at some lower level?

2 MS. KUBITSCHKEK: Well, in fact, Your Honor,
3 the -- most of the States have a procedure for seeking
4 court approval, and their -- they differ in whether they
5 require probable cause or reasonable suspicion or
6 something like reasonable cause; and so while we put in
7 our brief that the seizure of S.G. should have been
8 based upon probable cause, given the law enforcement
9 component, if there was -- if Alford, the deputy
10 sheriff, were not there at all, and it was purely a
11 child welfare seizure and the child welfare caseworker
12 were going to a juvenile court judge and seeking some
13 kind of judicial approval, the -- because the laws of
14 the States differ between reasonable suspicion and
15 probable cause, I would suggest that the better course
16 would be to let this play itself out between those two
17 legal standards.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 MS. KUBITSCHKEK: Thank you.

20 CHIEF JUSTICE ROBERTS: General Kroger, you
21 have 4 minutes remaining.

22 REBUTTAL ARGUMENT OF JOHN R. KROGER

23 ON BEHALF OF THE PETITIONERS

24 MR. KROGER: Mr. Chief Justice, and may it
25 please the Court --

1 JUSTICE SOTOMAYOR: General, just a point of
2 clarification before you go on. You said earlier that
3 your office had advised the county not to seize
4 children. Does that mean they're not talking to
5 children at all? Is -- you used the word seized. Are
6 you advising them that they don't have the right to talk
7 to children? Without their parental consent or a
8 warrant?

9 MR. KROGER: No, Your Honor, but they would
10 have to talk to children in a way which runs no risk of
11 being found of seizing the children within the meaning
12 of the Ninth Circuit decision.

13 JUSTICE SCALIA: Well, so then walking along
14 the hall in the school, right?

15 MR. KROGER: I --

16 JUSTICE SCALIA: Just come up alongside:
17 "By the way, I wanted to ask you whether your mother --"
18 (Laughter.)

19 MR. KROGER: Yes, Your Honor, and you can
20 see the problem which the Ninth Circuit decision causes
21 practically on the child welfare system in the State of
22 Oregon. The -- Mr. Camreta and other child protective
23 services workers under the Ninth Circuit decision face
24 an enormous burden. In most of these cases it is
25 impossible to establish probable cause to get a warrant

1 without first speaking to the child because the child is
2 usually the only witness that is available to the
3 government; and so to require, as the Ninth Circuit has
4 here, that we obtain a warrant prior to even speaking to
5 a child victim places --

6 JUSTICE SOTOMAYOR: What's the standard? I
7 mean, I just assume you're not suggesting that this
8 procedure could be used with every child in every school
9 without some ground for suspicion, correct?

10 MR. KROGER: No, Your Honor, we believe that
11 reasonable suspicion is the -- is the proper basis
12 before making a seizure of a child to conduct one of
13 these inquiries.

14 Significant here in Griffin and subsequent
15 cases like Lidster, the Court has recognized that the
16 relationship between the State and the person being
17 searched or seized is significant to the reasonableness
18 analysis, and here it is not an adversarial
19 relationship. The child and the State share a
20 significant interest in making sure that that child is
21 safe; and were the government to continue to be put in a
22 position of not being able to speak to a child until
23 probable cause has developed in some other way, children
24 will continue to be placed at risk.

25 JUSTICE KAGAN: But, General, I take it that

1 that problem disappears -- tell me if I'm wrong -- if we
2 find there's no jurisdiction. If we Munsingwear this
3 case, the decision is wiped off the case, you return to
4 status quo ante, and you tell all your people that they
5 can do what they would have done beforehand; is that
6 right?

7 MR. KROGER: That is correct, Your Honor.
8 That would be a -- a significant step forward for Mr.
9 Camreta and others similarly placed. The -- the
10 challenge is that those kind of claims then would be
11 perpetually subject to -- to qualified immunity because
12 the law would not be clarified. And that --

13 JUSTICE SOTOMAYOR: Would you -- are you --
14 and I guess what I'm asking is, let's assume we go ex
15 ante. At any moment that an agency speaks to a child,
16 they can move from a nonseizure to a seizure, correct?
17 And some seizures can be reasonable and some can't,
18 right?

19 MR. KROGER: That's correct, Your Honor.

20 JUSTICE SOTOMAYOR: And law enforcement is
21 never going to know where that line of reasonableness or
22 unreasonableness is, is that correct?

23 MR. KROGER: That's correct.

24 JUSTICE SOTOMAYOR: That's in -- that's in
25 the nature of doing this without a warrant, isn't it?

1 MR. KROGER: Yes, Your Honor. That's part
2 of the reason we agreed that a seizure was committed
3 here, so that law enforcement are not placed in a
4 difficult position every time they speak to a child, of
5 trying to make their own determination as to whether --

6 JUSTICE SOTOMAYOR: But they do it anyway,
7 meaning even if we say that they can seize the child,
8 you would still have to not do a seizure that was
9 unreasonable. You wouldn't -- in scope. They can't
10 speak to the child endlessly, can they?

11 MR. KROGER: No, Your Honor, that's correct.
12 The government officials will have to conduct that --
13 that seizure in a reasonable manner for a reasonable
14 duration. That's different, I think, though, Your
15 Honor, than the threshold question of if they start to
16 talk to a child, of trying to judge in the middle of an
17 interview, have we gone too far, has a seizure occurred.

18 JUSTICE SOTOMAYOR: I'm not quite sure why
19 you stipulated to a seizure in this case, but that was
20 your strategic choice.

21 MR. KROGER: Mr. Chief Justice, the question
22 is whether vacating the decision will have an impact on
23 the litigation below, and it will. The Respondent is
24 seeking to preserve the Ninth Circuit decision precisely
25 to aid the Fourth Amendment claim that the Respondent is

1 making against Deschutes County, and thus, this is
2 somewhat analogous to the situation in the Pacific Bell
3 case, where you have a Petitioner and Respondent seeking
4 different remedies from this Court in light of the
5 impact that it will have on subsequent litigation.

6 JUSTICE ALITO: Ms. Kubitschek said it was
7 based on different events. Is that right or not?

8 MR. KROGER: The due process --

9 JUSTICE ALITO: The Fourth Amendment claim
10 against the county is based on -- on this interview?

11 MR. KROGER: Your Honor, I have not seen the
12 new complaint, but my understanding is that it is the
13 same event and same claim.

14 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
15 The case is submitted.

16 (Whereupon, at 11:18 a.m., the case in the
17 above-entitled matter was submitted.)

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