No. 18-1173

In The
Supreme Court of the United States

I.B. and JANE DOE,
Petitioners,

v.

APRIL WOODARD, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICI CURIAE* HOME SCHOOL LEGAL DEFENSE ASSOCIATION AND PARENTAL RIGHTS FOUNDATION IN SUPPORT OF PETITIONERS

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Dated: April 10, 2019

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CORPORATE DISCLOSURE STATEMENT

Amici curiae Home School Legal Defense Association and Parental Rights Foundation are both nonprofit corporations. Neither of them have any parent corporations, nor is there any publicly held company that owns 10% or more of the amici's stock.

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INTEREST OF AMICI CURIAE[1]

Home School Legal Defense Association is a national nonprofit organization whose mission is to protect the fundamental constitutional right of parents to direct the education and upbringing of their children. With over 80,000 member families in fifty states, HSLDA is the world's largest homeschool advocacy organization.

In the early days of the modern homeschooling movement, we discovered that child-welfare investigators routinely avoid interacting with parents at the beginning of an investigation by going to the child's school or pre-school, as was done in this case.[2] But because homeschooled children are at home when they are at school, child-welfare investigators could not routinely avoid parents. This led to many distressing encounters at the front door of homeschooling families, often simply because they

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[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief. Counsel for all parties have received notice of HSLDA's intent to file this brief. All parties have consented to the filing of amicus briefs.

[2] See, e.g., *Greene v Camreta*, 588 F.3d 1011, 1017 (9th Cir. 2009)("Camreta thought the school would be a good place for the interview because it is a place where children feel safe and would allow him 'to conduct the interview away from the potential influence of suspects, including parents.' According to Camreta, '[i]nterviews of this nature, on school premises, are a regular part of [child protective services] practice and are consistent with DHS rules and training.'")

homeschooled at a time when it was not as accepted as it is today. It was HSLDA's position then, as it is now, that child-welfare investigators have a difficult and often thankless job in protecting children from abuse and neglect, but the government also has an important interest in protecting the interests of children in the privacy and dignity of their homes and bodies and in the lawfully-exercised authority of their parents even while investigating allegations of abuse or neglect.

From its founding in 1983, HSLDA has assisted thousands of families in protecting those interests during these encounters, often commenced in response to anonymous or malicious hotline tips that later prove to be unfounded. HSLDA was lead counsel in *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999), in which the Ninth Circuit held that the nonconsensual entry into the home and subsequent strip search of the children violated the constitutional rights of that homeschooling family, and that both rights were clearly established in 1994. HSLDA filed an amicus brief in another strip search case, *Roe v. Texas Dep't of Protective and Regulatory Services*, 299 F.3d 395 (5th Cir. 2002), in which the Fifth Circuit held the search of the child was unconstitutional, but not yet clearly established. HSLDA also joined an amicus brief in *Camreta v. Greene*, 563 U.S. 692 (2011), in which this Court granted certiorari to decide whether traditional Fourth Amendment analysis applies in child-welfare investigations, then dismissed when it became moot.

HSLDA is currently representing a homeschooling mother in Kentucky whose six children were strip searched by a child-welfare

investigator. After the investigation was closed as unfounded, we sued the investigator, who was responding to a non-emergency report that the mom had left her children in the car for less than ten minutes the day before while she ran into Cobbler's Café to buy the kids some muffins on the way to karate practice. *Curry v. Kentucky Cabinet for Health and Family Services*, 3:17CV-730 (W.D. Ky, filed 2017).

Parental Rights Foundation is a national, nonprofit, nonpartisan advocacy organization with supporters in all fifty states.

Parental Rights Foundation is concerned about the erosion of the legal protection of parents to raise, nurture, and educate their children without undue state interference, and about the unfortunate, unintended consequences to innocent children caused by the routine overreach of the child-welfare system. Parental Rights Foundation seeks to protect children by preserving the liberty of their parents by educating those in government and the public about the need to roll back some of the intrusive state mechanisms that have worked to harm more children than they help.

This Court has repeatedly held that parents have a fundamental right to direct the care, custody, and control of their children, most recently in *Troxel v. Granville*, 530 U.S. 57 (2000). Yet parents continue to encounter obstacles in exercising those rights—in schools, in hospitals, in their communities, and in the family court system. This case represents one of the most heart wrenching, yet all-too common occurrences of undue interreference: the unjustified strip search of a child by a child-welfare investigator.

Parental Rights Foundation was an amicus in the case below.

Amici curiae respectfully adopt, in relevant part, the Statement of the Case set forth in the Petition for Certiorari filed by the Petitioners. Petition for a Writ of *Certiorari* at 2.

SUMMARY OF ARGUMENT

Amici Home School Legal Defense Association and Parental Rights Foundation have seen the damage caused to families by unconstitutional searches of children by child-welfare investigators. Both our experience and significant scholarly research show that strip searches, which can include intrusive vaginal and anal exams and photographs of a child's most intimate areas against the child's protest, can cause immense emotional and psychological harm to the child.

I.B.'s petition for certiorari presents the Court with an excellent vehicle to halt the nationwide problem of unconstitutional searches and seizures of children practiced on a regular basis during child-welfare investigations.

ARGUMENT

I. Strip searches in child-welfare investigations harm children.

Child-welfare investigations, especially those that involve strip searches, are harmful to children in several ways. In her seminal article on the effect of child-welfare investigations, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 Wm. & Mary

L. Rev. 413, 419 (2005), Duke University law professor, Doriane Coleman, said, "The investigations undermine the fundamental values of privacy, dignity, personal security, and mobility that are protected by the Fourth Amendment." Regarding strip searches specifically, Professor Coleman said, "it is patently wrong for states to assume that a child will be equally comfortable with a full or partial strip search conducted during an annual checkup and a full or partial strip search conducted during a child abuse investigation." *Id.* at 517-18

This Court has held that the "search of a child's person ... no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy." *New Jersey v. T.L.O.*, 469 U.S. 325, 337-338 (1985). "And in the ultimate irony, children who are subject to genital examinations appear to experience the investigatory examinations as sexual abuse." Coleman, *supra* at 521.[3]

Even social workers understand the heightened risks posed by strip searches. The National Association of Social Workers cautioned in its amicus brief in *Safford Unified School Dist. #1 v. Redding*, 557 U.S. 364 (2009), "Even for adults, a strip search is a demeaning and distasteful procedure that requires a high level of justification. For children and adolescents, it is far more significant." Possibly to

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[3] Citing Money, John & Margaret Lamacz, *Genital Examinations and Exposure Experienced as Nosocomial Sexual Abuse in Childhood*, 175 J. Nervous & Mental Disease, 713-21 (1987) (peer-reviewed article setting out this finding and noting the implications of sexual abuse by care providers).

counteract the negative associations with strip searches, it is becoming more common for child-welfare investigators to instead refer to nude examinations of children as "body checks." See, e.g., *Garcia v. County of San Diego*, 2018 U.S. Dist. LEXIS 101718 (describing a search for marks and bruises in a child rape investigation as a "body check"); *D.P. v. M.P.*, 2016 Cal.App. Unpub. LEXIS 330 (search under the child's diaper described as "body check"); *T.H. v. Jefferson County Dept. of Human Resources*, 70 So.3d 1236 (Ala. Civ. App. 2010) (search of genital area called "body check" rather than "search"). But the intrusions on privacy and psychological harms remain the same, no matter the term.

In *Storming the Castle*, Professor Coleman notes that "the scientific evidence is strong that children, even babies, have the ability to develop – and indeed most healthy children do develop – a strong sense of bodily security, intimacy, and privacy." Coleman, *supra* at 515. That was certainly the case in this matter, where I.B. said, "Mommy, do you remember when the woman with white hair came to my school? I hope she doesn't come again, because I don't like it when she takes all my clothes off."

Strip searches can bring emotional and psychological damage to children. In *Wallis v. Spencer*, 202 F.3d 1126, 1136 (9th Cir. 2000), the exams "included internal body cavity examination of the children, vaginal and anal. Dr. Spencer also took photographs of both the inside and the outside of Lauren's vagina and rectum and Jessie's rectum. These examinations were conducted on Jessie's third birthday." The court found that "Lauren was very

upset by the procedures and asked for her parents." *Id*.

In *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 399 (5th Cir. 2002), the child-welfare investigator assured six-year-old Jackie's mom, "Oh, don't worry. It's more stressful for the parent than it is the child," then "took pictures of Jackie's vagina and buttocks in a closed position, and then instructed Mrs. Roe to spread Jackie's labia and buttocks, so that she could take pictures of the genital and anal areas." Jackie "subsequently experienced frequent nightmares involving the incident, and exhibited anxiety responses, for which she underwent counseling. The symptoms persisted for about six months." *Id*.

Courts have recognized that strip searches are "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." (*Chapman v. Nichols*, 989 F.2d 393, 395-96 (10th Cir. 1993); "thoroughly degrading and frightening" (*Justice v. City of Peachtree City*, 961 F.2d 188, 192 (11th Cir. 1992); and "an embarrassing and humiliating experience." (*Hunter v. Auger*, 672 F.2d 668, 674 (8th Cir. 1982)).

Steven F. Shatz's excellent article *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. Rev. 1, 12 (1991), revealed that "psychological experts have also testified that victims often suffered post-search symptoms including 'sleep disturbance, recurrent and intrusive recollections of the event, inability to concentrate, anxiety, depression and development of phobic reactions,' and

that some victims have been moved to attempt suicide." Professor Coleman also lists studies that found "as a result of the investigation, family members, including children, suffer from a range of responses including trauma, anxiety, fear, shame, guilt, stigmatization, powerlessness, self-doubt, depression, and isolation." Coleman, *supra* at 520.

Dr. Maisha Hamilton-Bennett, a Chicago psychologist, points out, "we learn how to trust by trusting our parents to take care of us no matter what." Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* 59 (Basic Civitas 2002). Strip searches that are done against the parents' wishes or without their knowledge can negatively affect this bond of trust between children and parents.

II. Child-welfare investigations can be traumatic, life-altering events.

Federal courts such as the Tenth Circuit below often fail to realize the harm that child-welfare investigations can cause to innocent children, and research shows that the state, in its effort to investigate child abuse and neglect, can often cause more harm than good. Coleman, *supra* at 441 ("The majority of intrusions on family privacy do not directly benefit the children involved, and in many instances actually cause them demonstrable harm.") More recently, Teri Dobbins Baxter has found that "research has shown that investigations, particularly those that are unnecessarily intrusive or that separate children from their caregivers, can be traumatic and psychologically harmful to the children as well as damaging to the family as a whole." *Constitutional Limits on the Right of Government*

Investigators to Interview and Examine Alleged Victims of Child Abuse or Neglect, 21 Wm. & Mary Bill of Rts. J. 125, 127 (2012). Jennifer Kwapisz wrote in the same year that "children, of course, have a strong interest in being free from abuse. But they also have a strong interest in being free from intrusive, traumatic questioning by strangers." *Fourth Amendment Implications of Interviewing Suspected Victims of Abuse in School*, 86 St. John's L. Rev. 963, 965 (Fall 2012).

Unnecessary investigations and unduly harmful ones would be moderated by application of the Fourth Amendment requirement for a warrant prior to seizing the children for interviewing them without their parent's knowledge or consent, examining their bodies, or photographing them, as suggested by Petitioners' first Question Presented. Kwapisz points out that "being questioned about [child abuse] in any fashion can be an extremely traumatic experience for a child, with both short-term and long-term effects on children's mental and emotional stability. One can only imagine how this harm might be exacerbated if a stranger approaches a child and begins questioning her in a direct, rushed fashion about whether she has been abused." Kwapisz, *supra* at 993. Actually, because of the facts of this case, this Court does not even have to imagine. The complaint alleges that I.B. was upset by the strip search (App. 118a), that she is angry and still talks about it years later (App. 121a), and that she "suffered trauma similar to that suffered by children who are sexually abused…" (App. 121a).

Yet child-welfare investigators often resist the modest steps required of law enforcement authorities,

whether by making a blanket argument that the Fourth Amendment does not apply to child-welfare investigations (a position now rejected across the country), or as in this case, through seeking to apply some exception to the Fourth Amendment's warrant requirement to any case involving child protection concerns. Josh Gupta-Kagan asserts that viewing the Fourth Amendment as allowing warrantless searches in child-welfare investigations "permits significant invasions of children's and families' privacy at home and elsewhere, implicating fundamental constitutional rights without consideration of the severity or credibility of allegations." *Beyond Law Enforcement: Camreta v. Greene, Child Protection Investigations and the Need to Reform the Fourth Amendment Special Needs Doctrine*, 87 Tul. L. Rev. 353, 357 (2012). Amici agree with Teri Dobbins Baxter, who argues that "the warrant requirement – or at least the requirement that searches or seizures be conducted based on probable cause – should not be dispensed with lightly, even when government officials are trying to protect vulnerable children." Baxter, *supra* at 141.

Some child-welfare investigations are "relatively narrow in scope, initially including only a private discussion with the child." Coleman, *supra* at 438. But Baxter argues that in warrantless searches by social workers, the law requires that "any visual inspection … should be limited to the area alleged to have been injured. For example, if the report claims that the child has bruises on his arm, the child could be required to roll up his sleeves so that the social worker can examine his arms. The social worker could not, however, require the child to lift his pant legs or

his shirt for examination of the legs or torso." Baxter, *supra* at 167.

But many investigations quickly escalate to include strip searches, photographs of nude children (as in this case), intrusive questionnaires that go far beyond the initial allegations, and even vaginal/anal exams. In *Franz v. Lytle*, 997 F.2d 784, 785 (10th Cir. 1993), a state actor conducting a child-welfare investigation forced the child to:

> Remov[e] her pants, laying her down on the floor, and spreading her legs apart as ordered. Kneeling over Ashley, Officer Lytle then touched her vaginal area in several places 'checking for any soreness or swelling,' and Ashley's reaction to his touch, asking her if the places he pressed hurt.

The investigators in *Camreta v. Greene*, 563 U.S. 692 (2011), "chose to interview S.G. at her school, during the school day, and without contacting her mother first, and—at least as alleged by S.G.—chose to keep S.G. in a room with him until she agreed that her father had molested her." Gupta-Kagan, *supra* at 371. While this Court determined that S.G.'s claims were moot after she left the state of Oregon and was nearly 18 years old, the harm she experienced during the investigation was undisputed. See *Greene v. Camreta*, 588 F.3d 1011 (9th Cir. 2009). Indeed, she too was later strip searched following the two hours of questioning she experienced, and her claims as to the strip search were sustained by the Ninth Circuit. *Id.* at 1037.

The Fifth Circuit has recognized that child-welfare investigations can cause "trauma" to the

child, especially if the child is subjected to multiple interviews or investigations. *Gates v. Tex. Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 413 (5th Cir. 2008).[4] Children know that they are being singled out and interviewed, and this can imply to them that an authority figure thinks they have done something wrong. This is especially the case in situations like *Camreta*, where an investigator and armed police officers, both male, kept a nine-year-old girl in a room for questioning, without any familiar adult present for one to two hours. They also proceeded to give her – through their intrusive questions about alleged sexual activity – a lesson in sexual education that her own parents had never taught her. This poorly-performed interview of a child can be traumatic. As counsel for the child told this Court in oral argument, "When a child is asked, interrogated about whether or not her father touches her inappropriately, that's not a neutral action. Whether or not she has been abused, that causes trauma to the child." Transcript of Oral Argument at 39, *Camreta v. Greene*, *supra* (2011), cited in Gupta-Kagan, *supra* at 375.

Often, it does not matter what the original report was, or what the reporter's veracity and basis of knowledge was – the investigator will "search every room of the home and interview all children and adults in that home," Gupta-Kagan, *supra* at 370, whether or not she has probable cause. And many of these interviews and exams are done without the consent or even knowledge of the child's parent, as in this case.

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[4] Amicus HSLDA was also an amicus in *Gates*.

III. Most child-welfare investigations are closed without finding abuse or neglect.

Millions of child-welfare investigations are conducted every year, and the vast majority of these investigations, roughly 80 percent, end with a finding that the children were not victims.

The numbers are staggering. In 2002, there were approximately 1.8 million child-welfare investigations nationwide. Only twenty-eight percent of the children "were ultimately found to be victims of abuse or neglect." Coleman, *supra* at 417. More recent numbers are even more sobering. According to federal government statistics, in 2014-2016, child-welfare investigations now occur more than 4 million times a year, and actual victims range from 17% to 19%.[5] Most investigations end with no administrative finding that the child has suffered abuse or neglect.[6] A leading family defense attorney, Diane Redleaf, revealed in her recently-published book *They Took the Kids Last Night: How the Child Protection System Puts Families at Risk* xvii (Praeger 2018), that "that figure masks a range of errors [by child-welfare investigators] that the overall statistics don't

[5] U.S. Department of Health & Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau. (2018). Child maltreatment 2016. Available from https://www.acf.hhs.gov/cb/research-data-technology/statistics-research/child-maltreatment.

[6] "Perhaps even more of these investigations should close without findings of abuse or neglect. The United States Court of Appeals for the Second Circuit has described administrative findings of abuse or neglect as "at best imperfect," noting that three-quarters of administrative challenges succeed in reversing such findings." Gupta-Kagan, *supra* at 362.

tell…when they take kids who were not abused or neglected or when they label an innocent parent guilty of abuse in the State's child-abuse register but never press charges, there are rarely any headlines concerning these types of mistakes."

In other words, for every family investigated and found to be neglectful or abusive, four other families are disrupted by an investigation that finds no victim. Such was the outcome of the state's investigation of I.B., which was closed as unfounded. App. 5a.

IV. Child-welfare investigations harm families.

Almost two decades ago, this Court recognized that the interest of parents "in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (internal punctuation removed). Importantly, this interest in protecting familial integrity and parental control is aligned with the interest of the state, since "the government's interest in the welfare of children embraces not only protecting children from physical abuse, but also protecting children's interest in the privacy and dignity of their homes and in the lawfully exercised authority of their parents." *Calabretta v. Floyd*, 189 F.3d 808, 820 (9th Cir. 1999).

Unwarranted child-welfare investigations cause problems for the entire family. First, "the stigma of being officially identified with criminal child abuse … is inherent in most child maltreatment investigations. Despite its prevalence in the society, the label 'child abuser' or 'neglectful parent' carries

with it profound negative connotations." Coleman, *supra* at 497. Parents – especially those who are dedicated to doing the best for their children – often view even the investigation as shameful, since it "implies almost by definition that the authorities believe the parent involved may be a particularly bad mother or father…" *Id.* at 498. In one investigation, the family "lived in constant fear that [the investigating social worker] or one of her associates would come to [their] home and remove [their] children." Motivated by this fear they watched for strange vehicles, didn't let their children play outside, and even put blankets over the windows. *Doe v. Heck,* 327 F.3d 492, fn. 10 (7th Cir. 2003).

Second, "even the more subtle 'family-friendly' approaches to interventions adopted by some [child-welfare] agencies can be pervasively destructive of the values ensconced in the Fourth Amendment, and consequently of the children's and the family's well-being." Coleman, *supra* at 509. American jurisprudence, mindful of the important rights that families have to be left alone unless there is good evidence of abuse or neglect, has required that courts begin by presuming that parents are fit. *See Parham v. J.R.*, 442 U.S. 584, 604 (1979) (citing the "traditional presumption that the parents act in the best interests of their child").

Child-welfare investigators do not generally approach investigations with this presumption, despite the evidence that four-fifths of the children they investigate are not victims. Instead, "it is only after the caseworker investigates a report of child maltreatment, determines whether it is valid, and decides what to do about it that all these critical

judgments face any sort of adversarial challenge or judicial review." Roberts, *supra* at 55. Attorney Redleaf argues that this unfettered investigation without court oversight "is akin to allowing a police officer to investigate, charge, find guilt, and issue a sentence without ever appearing before a judge or jury." *Id.* at 55-56.

The powerlessness felt by parents is exacerbated by investigators who expect cooperation – and this cooperation "is coded language for the birth parent doing whatever the social worker wants her to do." Zach Strassburger, *Medical Decision Making for Youth in the Foster Care System*, 49 J. Marshall L. Rev. 1103, 1120 (2016). Unfettered state power is the very antithesis of the Fourth Amendment. *See Brown v. Texas*, 443 U.S. 47, 51 (1979). The privacy and dignity of children is no less important than that of their adult parents. It should receive no less constitutional protection.

CONCLUSION

Subjecting children to strip searches in nonconsensual, non-emergency circumstances is almost always more harmful to the children than the harm their caregivers are alleged to have caused. This unacceptable practice of child-welfare investigators remains far too common, even in the face of many federal cases and years of academic research.

This Court should grant the petition for certiorari.

Respectfully submitted,

April 10, 2019

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