NO. 20-659

IN THE
Supreme Court of the United States

LARRY THOMPSON,

Petitioner,

v.

POLICE OFFICER PAGIEL CLARK, SHIELD #28472,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF HOME SCHOOL LEGAL DEFENSE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Home School Legal Defense Association (HSLDA) is a nonprofit advocacy organization whose mission is to protect and advance the right of parents to homeschool their children. HSLDA provides over 100,000 families with the peace of mind knowing that they do not have to homeschool alone. This makes HSLDA the world's largest homeschool advocacy organization. Whether it is providing legal help, educating families, or awarding grants, everything HSLDA does promotes the right of parents to raise their children consistently with their core beliefs—and without unlawful government interference.

As part of its work, HSLDA protects families from unjust searches and seizures. In the early days of the modern homeschool movement, HSLDA discovered that child-welfare officials routinely avoided interacting with parents by initially going to their child's school. See, *e.g.*, *Greene* v. *Camreta*, 588 F.3d 1011, 1017 (9th Cir. 2009) (using this tactic to interact with children without first contacting parents). But because homeschooled children are at home when they are at school, officials could not use this tactic with them. This led to many distressing front-door encounters, often because homeschooling was not as widely accepted then as it is today.

While HSLDA has long praised and supported child-welfare officials for their important work protecting children from true abuse and neglect, it also

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to this filing.

recognizes the strong need to protect the interests of parents and children in the privacy of their homes and in the dignity of their bodies. So, over the years, HSLDA has assisted thousands of families who have faced these encounters. And it has often sued under 42 U.S.C. 1983 to hold officials accountable for violating the Fourth Amendment. *E.g.*, *Calabretta* v. *Floyd*, 189 F.3d 808 (9th Cir. 1999). One such case is in federal court now. *Curry* v. *Ky. Cabinet for Health & Fam. Servs.*, No. 3:17-CV-00730-JRW-CHL, 2020 WL 4820718 (W.D. Ky. Aug. 19, 2020).

This Court has repeatedly and correctly held that parents have a fundamental right to direct the care, custody, and control of their children, most recently in *Troxel* v. *Glanville*, 530 U.S. 57 (2000). Yet parents still encounter obstacles when exercising those rights—in schools, in hospitals, and even in their own homes. This case represents one such occurrence of undue government interference. And HSLDA is highly interested in curbing such official misconduct. Only Petitioner's rule, as described immediately below, would give families a fair shot at doing so.

SUMMARY OF THE ARGUMENT

This Court should hold that § 1983 plaintiffs need only show, as proposed by Petitioner, that their prior criminal proceeding ended in a manner not inconsistent with their innocence to satisfy the favorable-termination rule for malicious-prosecution claims ("Petitioner's rule"). The common law supports this view, and it best fits with the values and purposes of the Fourth Amendment. See *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 920 (2017) (giving standard); *Laskar* v. *Hurd*, 972 F.3d 1278, 1286-92 (11th Cir. 2020) (Pryor, J.) (canvassing the common law).

The alternative rule—which requires plaintiffs to show their prior criminal proceeding was resolved in a way that affirmatively indicates their innocence ("Respondent's rule")—leads to perverse results, encouraging officials to initiate process when none is due only to immunize themselves from gross misconduct. While this rule would jeopardize all Americans, it would particularly endanger innocent parents and children, who often face unjust warrantless searches and seizures as part of child-welfare investigations. Officials rarely obtain warrants before they invade homes and seize children, yet 80% of these raids uncover no wrongdoing. If parents assert their rights—like Petitioner here—they risk going to jail.

Parents and children deserve a fair shot at justice when officials ransack their homes and bodies. Otherwise, the Fourth Amendment cannot do its job. And the fallout is severe. When officials unlawfully seize children, they can inflict terrible harm—stigmatizing families, dashing their sense of privacy, and traumatizing the very ones they aim to protect. The Fourth Amendment is designed in part to prevent these

harms. And only Petitioner's rule fits with that purpose. This Court should reverse and adopt a rule that protects the dignity of vulnerable families.

ARGUMENT

This Court should adopt Petitioner's rule. Respondent's rule undercuts Fourth Amendment protection for all Americans—but especially for parents who face unjust seizures, are prosecuted, and win.

I. Respondent's rule nullifies key Fourth Amendment purposes.

When officials unreasonably seize a person pursuant to legal process, the victim cannot bring a § 1983 claim until the "prior criminal proceeding" terminates in her favor. *Heck* v. *Humphrey*, 512 U.S. 477, 484 (1994). This requirement avoids "parallel litigation over the issues of probable cause and guilt" and prevents conflicting civil and criminal judgments. *Ibid.*; *McDonough* v. *Smith*, 139 S. Ct. 2149, 2156-57 (2019). While this Court has applied the rule to many cases involving convicted individuals, this is the first opportunity to say how the rule applies to a plaintiff who was never convicted in the first place.

This Court should rule that plaintiffs need only show that prior criminal proceeding ended in a manner not inconsistent with their innocence to satisfy the favorable-termination rule. This holding best satisfies the two-step approach for establishing prerequisites for a § 1983 claim. *Manuel*, 137 S. Ct. at 920. Under this approach, the Court first considers the "[c]ommon-law principles" that were well-settled when Congress enacted § 1983, *id.* at 921; see *Nieves* v. *Bartlett*, 139 S. Ct. 1715, 1726 (2019), and then

tests whether those principles fit "the constitutional right at issue." *Manuel*, 137 S. Ct. at 921.

This approach is flexible by design. The common-law principles "are meant [only] to guide" a court—not "to control" its decision. *Ibid.* In this way, the principles serve "more as a source of inspired examples than of prefabricated components." *Ibid.* (quoting *Hartman* v. *Moore*, 547 U.S. 250, 258 (2006)). Here, the common law suggests that plaintiffs could satisfy the favorable-termination element of malicious-prosecution claims by showing that the prior prosecution ended in a manner not inconsistent with their innocence. Br. for Pet'r 22-31; *Laskar*, 972 F.3d at 1286-92 (canvassing common law to conclude this).

This view "closely attend[s] … the values and purposes" of the Fourth Amendment. *Manuel*, 137 S. Ct. at 921. Respondent's rule, however, leads to perverse results. It means that officials who abuse the legal process can virtually never be held to account. When prosecutors dismiss charges, they almost never indicate on the record that the accused is innocent; they just say they are dismissing "in the interests of justice," *Awabdy* v. *City of Adelanto*, 368 F.3d 1062, 1068 (9th Cir. 2004), or "judicial economy," *Olaizola* v. *Foley*, 797 F. App'x 623, 625 (2d Cir. 2020). Under Respondent's rule, this is enough to immunize officials from even gross abuse of process. A prosecutor who learns of such abuse could simply dismiss the case and thereby quash the accused's right to sue.

Worse, this rule could encourage *more* abuse of process. Because plaintiffs need not show favorable termination before bringing Fourth Amendment claims for unlawful seizures *without process*, *Wallace* v. *Kato*, 549 U.S. 384, 390-95 (2007), some officials

may feel pressure to initiate undue process to protect themselves—knowing the prosecutor can always dismiss the case later. That only compounds the problem. In such cases, victims of baseless charges would have to *object to* the dismissal of those charges or else forgo their cause of action under § 1983. Br. of Pet'r 35-36. That choice is perverse and untenable.

The Court should consider this improper incentive when determining what result counts as a favorable termination. *McDonough*, 139 S. Ct. at 2160. And this feature may pose the most risk for parents who are the subject of child-welfare investigations. These parents often face warrantless searches and seizures in which officials misuse Fourth Amendment exceptions. See § II.A, below. These investigations are also highly invasive, and even harmful. See § II.B, below. If parents assert their rights, they risk disobeying what officials consider to be a lawful demand and facing criminal process—like Petitioner here.

The success of § 1983 suits should not turn on whether officials file fabricated charges against victims. This Court should reject a rule that requires plaintiffs to prove their prior criminal proceeding was resolved in a way that affirmatively indicates their innocence. That rule cancels key Fourth Amendment protection by eviscerating even worthy claims. And it encourages perverse results by incentivizing government officials to cover themselves by prosecuting—all at the expense of vulnerable parents and children.

II. Petitioner's rule advances key Fourth Amendment purposes, as shown by how it best protects family privacy.

In contrast, Petitioner's rule best advances "the values and purposes of the [Fourth Amendment]." *Manuel*, 137 S. Ct. at 921. It discourages officials from initiating process for personal benefit, and it offers plaintiffs recourse when officials seize them unjustly—even if they face criminal process. The need for this protection is showcased in child-welfare prosecutions, which often include unjust seizures. As shown below, the Fourth Amendment helps hold officials accountable for misconduct and protects both parents and children. And Petitioner's rule avoids incentivizing officials to nullify these protections with unnecessary and burdensome prosecutions.

A. The Fourth Amendment helps hold officials accountable for mishandling child-welfare investigations.

The Fourth Amendment protects the right of "people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *Carpenter* v. *United States*, 138 S. Ct. 2206, 2213 (2018). The lawfulness of an official search or seizure always turns on its "reasonableness." *Id*. at 2221. And this Court has long held that warrantless searches and seizures in the home are "presumptively unreasonable." *Welsh* v. *Wisconsin*, 466 U.S. 740, 748-49 (1984). For good reason; such intrusions attack the very "essence of … liberty." *Monroe* v. *Pape*, 365 U.S. 167, 209 (1961) (Frankfurter, J., dissenting).

This principle applies with full force to searches and seizures in child-welfare investigations. Indeed, while this Court has never addressed the issue, many

federal circuit courts have held that officials may not conduct such intrusions without valid consent, exigent circumstances, or a particularized warrant and probable cause. *E.g.*, *Calabretta* v. *Floyd*, 189 F.3d 808, 813 (9th Cir. 1999); *Roe* v. *Tex. Dep't of Protective & Regul. Servs.*, 299 F.3d 395, 407-08 (5th Cir. 2002); *Good* v. *Dauphin Cnty. Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1092 (3d Cir. 1989); *Franz* v. *Lytle*, 997 F.2d 784, 787-93 (10th Cir. 1993).

This view is correct. There is no child-welfare exception to Fourth Amendment protection. Nonetheless, many officials bypass the Fourth Amendment in this context by (1) securing the apparent consent of parents, or (2) invoking exigent circumstances. And while valid consent and exigent circumstances are exceptions to the Fourth Amendment's bar on warrantless search and seizures, *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973) (consent); *Michigan* v. *Tyler*, 436 U.S. 499, 509 (1978) (exigent circumstances), officials often misuse them.

1. Officials often do not obtain valid consent from parents.

Estimates suggest that over 90% of child-welfare investigations start "with the apparent consent of relevant adults." Doriane Lambelet Coleman, *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, 430 (2005). But such consent suffices only if it is "freely and voluntarily given." *Schneckloth*, 412 U.S. at 222. Officials may not coerce or mislead about investigations to get it. *Ferguson* v. *City of Charleston*, 532 U.S. 67, 85 (2001) (requiring "knowing waiver"); accord *Tenenbaum* v. *Williams*, 193 F.3d 581, 589 (2d Cir. 1999).

While no data shows the number of consent-based investigations that have come from unjust coercion, "one could reasonably imagine that the number is not insubstantial." Coleman, *Storming the Castle*, 47 WM. & MARY L. REV. at 431. This coercion appears mostly in two forms: deception and intimidation.

Some officials believe they can lie about the "real reason" for their investigation, *Tenenbaum*, 193 F.3d at 589, or that they can just bully parents into submission—by threatening to take their children if they do not comply with officials' wishes. Some training materials appear to encourage this. *E.g.* Ga. Dep't of Human Res., Social Services Manual 2104.2 (1999) (advising officials to access children by telling parents they will "involve court/law enforcement unless [the parents] immediately cooperate.").

These tactics coerce parents with fear—nullifying any "consent" parents appear to give investigating officials. Consider Josiah and Holly Curry, the proud parents of six children who live just south of Louisville, Kentucky. A few years ago, Holly was driving her children to karate class and stopped at a local café. *Curry*, 2020 WL 4820718, at *1. She parked and left her children asleep in the van while she went in to get some snacks. *Ibid.* The outside temperature was pleasant, in the low-to-mid 60's. *Ibid.*[2]

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[2] Most adults today have childhood memories of sitting in the "car as mom or dad ran into a store on a quick errand." Diane L. Redleaf, *Narrowing Neglect Laws Means Ending State-Mandated Helicopter Parenting*, ABA (Sept. 11, 2020), https://perma.cc/RN3Q-BPUU. This event never prompted "concerns about the danger of [them] being … kidnapped," nor did it "lead to criminal or neglect investigations by the police." *Ibid.*

Someone saw Holly's children and called the police. 2020 WL 4820718, at *1. An officer approached Holly when she returned about five or 10 minutes later. *Ibid.* Holly explained that she believed her children were safe because the van's fan was on high, its key was removed, and its safety features would shut down the vehicle if anyone tampered with the transmission. *Ibid*. The officer admonished Holly that she should not leave the children unattended, and she told him she understood. *Ibid*. He also warned Holly that he had to submit a report, and that a social worker would be sent to her home to investigate. *Ibid*. The officer allowed Holly to leave with her children and did not press criminal charges. *Ibid*.

A social worker received the report the next day. 2020 WL 4820718, at *2. She went to the Currys' house, knocked on the door, and informed Holly that she needed to come inside to investigate the children. *Ibid.* Holly twice told the social worker that she could not come in without a warrant. *Ibid.* The social worker responded that she would go get the police and left. *Ibid.* The social worker met with a sheriff deputy, told him that she was having a hard time getting in Holly's house, and said she just needed to interview the children. *Ibid.* She also told the deputy that "the family's background was clean." *Ibid.*

The social worker and deputy returned to the Currys' house, and the deputy knocked on the door. 2020 WL 4820718, at *2. He was armed and in uniform. *Ibid.* Holly answered. *Ibid.* The officials warned her they needed to come in. *Ibid.* Again, Holly asked if they had a warrant. *Ibid.* The deputy said they did

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Yet, despite a plummeting crime rate, parents today fear being stopped by officials if they follow their parents' example. *Ibid.*

not, and again, Holly did not let them in. *Ibid.* The social worker then started screaming at Holly. *Ibid.*

Holly asked if they could reschedule the visit for when her husband was home. *Ibid.* She offered to bring her children to the door so the social worker could see them. *Ibid.* But the officials refused these reasonable requests. *Ibid.* Instead, they advised Holly that if she did not let them in, they "would get an emergency custody order." *Ibid.* When Holly asked what this meant, the deputy pronounced: "We'll come back and take all of your children." *Ibid.* Soon after, the officials started yelling, "What's it gonna be?" Holly broke down, started crying, and said, "Fine, we can do this." *Ibid.*

The officials entered her home. 2020 WL 4820718, at *2. The social worker interviewed the two oldest children in a bedroom, while Holly stayed with the other children in another room. *Ibid.* After the interviews, the social worker informed Holly that she needed to examine the children for signs of physical injury. *Ibid.* Holly and many of her children were crying. *Ibid.* The social worker performed the exam, which included "inspecting each child's genitals." The initial report was marked "unsubstantiated" and the investigation was closed. *Ibid.* But the social worker called Josiah and Holly and told them, "If we ever get a call against your family again, bad things will happen to you and we'll take your children." *Ibid.*

Forced to choose between keeping her children and protecting their privacy, Holly did what most parents would do in the moment: she obeyed the officials' demand. That is not consent; it is coercion. 2020 WL 4820718, at *4 (facts could show "consent was coerced"). And the Fourth Amendment forbids it. *Ibid.*

("clearly established law" prohibits this strongarm tactic). Yet under Respondent's rule, if officials had charged Holly and Josiah for resisting their order and the prosecutor later dismissed the case, the Currys would have no remedy for the violation.

2. Officials often assert exigent circumstances when none exist.

Officials also try to justify home raids by asserting exigent circumstances—even when none exist. The exigency exception is supposed to ensure that officials may intrude when someone faces imminent injury or when officials must stop the immediate destruction of evidence. *Tyler*, 436 U.S. at 509. It applies only when officials have probable cause and a true emergency exists. *Ibid.* This exception does not apply to cover "contrived emergencies" or investigations into only minor offenses. *Welsh* v. *Wisconsin*, 466 U.S. 740, 751-52 (1984).

Yet some officials (incorrectly) believe that child-welfare investigations *always* involve exigent circumstances. Take Robert and Shirley Calabretta. In fall 1994, California social workers received a report from an anonymous caller who recounted hearing a child in Robert and Shirley's home screaming "No Daddy, no" in the middle of the night, and "No, no, no" on another occasion. *Calabretta*, 189 F.3d at 810. The caller shared that the children were homeschooled and belonged to "an extremely religious family." *Ibid*. A social worker reviewed this information, verified that the family had no prior reports, and confirmed that Robert and Shirley had "never been on welfare." *Ibid.*

Four days later, the social worker visited the Calabretta home to investigate. 189 F.3d at 810. Shirley declined to let the social worker in, but her children

came to the door, and the social worker saw that they "were easily seen and … did not appear to be abused" or "neglected." *Id.* at 811. The social worker left and, obviously comfortable with the family's situation, *went on vacation*. *Ibid.* Ten days later, the social worker returned with a police officer. *Ibid.* The officer knocked, and Shirley answered. *Ibid.* The officer said they were investigating the children's welfare. *Ibid.* But Shirley did not open the door because, as she told the officer, she was uncomfortable letting them in without her husband home. *Ibid.* The officials forced their way in, believing that child-welfare investigations *always* involve exigent circumstances. *Ibid.*

The officer stayed with Shirley in one room, while the social worker took her 12-year-old daughter to another. 189 F.3d at 811. During the interrogation that followed, the child said she did not remember anyone screaming "No, Daddy, no," but did remember her little brother saying "no, no, no" one afternoon. *Ibid.* It turned out that the boy had said that because he hurt himself playing. *Ibid.* Yet the social worker pressed further. When asked about her parents' approach to discipline, the girl said that they sometimes use a "very, very thin wooden dowel," about twice the size of a pen—but emphasized that they "do not discipline indiscriminately, only irreverence or disrespect." *Ibid.* She also discussed her faith, as the social worker reported that she was "extremely religious" and often mentioned "the Lord and the Bible." *Ibid.*

These details alarmed the social worker. She immediately told the 12-year-old to pull down her three-year-old sister's pants. The older sister refused, and the younger sister began crying. Hearing the sobs, Shirley rushed in to provide care. 189 F.3d at 811. The social worker said, "I understand you hit your

children with objects." She then poked, "The rod of correction?" *Ibid.* Shirley answered that it's just "a little Lincoln log." *Ibid.* But the social worker (incorrectly) said it is illegal to discipline children with objects and demanded to see the child's bottom. *Ibid.* While the child was "screaming and fighting to get loose," Shirley obeyed the official's demand. *Id.* at 812. The social worker found no bruises or marks. *Ibid.* And after seeing the small "Lincoln log," she declined to examine the other children and left. *Ibid.*

This story shows how badly some officials misuse the exigency exception. In true emergencies, officials would *never* wait two weeks before addressing a problem. The Fourth Amendment holds officials accountable for this misconduct. See *id.* at 817 (refusing qualified immunity on "coerced entry" claim). The Calabrettas won their suit. And they should have. Yet under Respondent's rule, if officials had charged them for resisting an order and the prosecutor later dismissed the case, the Calabrettas would have lost their claim for the officials' flagrant violation of their constitutional rights. That cannot be the law.

B. The Fourth Amendment protects parents *and* children.

Despite its protective function, some officials seek to neutralize the Fourth Amendment's application to child-welfare investigations—stressing the important need to protect children. And a few courts have indulged that view. *E.g.*, *Tate* v. *Sharpe*, 777 S.W.2d 215, 216 (Ark. 1989) (applying a "reasonable cause" standard); *N.J. Div. of Youth & Fam. Servs.* v. *Wunnenbuerg*, 408 A.2d 1345, 1347 (N.J. Super. Ct. App. Div. 1979) (similar). But in their zeal to save children from supposed parental wrongs, officials can harm

those they seek to protect. Such investigations often uncover *no* evidence of wrongdoing, yet they decimate family privacy and can ruin childhoods—or worse.

1. Most child-welfare investigations uncover no wrongdoing.

The data shows that officials often overreach in child-welfare investigations. In 2019, for example, about 3.5 million U.S. children were the subject of such investigations. U.S. Dep't of Health & Human Servs., *Child Maltreatment 2019*, 18 (2021), https://perma.cc/E7MY-GZPF. But only 19% of those children were found to be victims of abuse or neglect. *Id.* at 20. This means that *2.8 million children* underwent child-welfare investigations in which officials uncovered no evidence of wrongdoing.[3] Vague laws and poor training partially explain this failure.

Take *In re Stumbo*, 582 S.E.2d 255 (N.C. 2003), a North Carolina case in which officials received an anonymous report that someone had seen "an unsupervised two-year-old child, naked in the driveway of a house." *Id.* at 256. This detail, along with the location of the home, was passed to a child-welfare official. *Ibid.* No evidence suggested how long the child was outside, whether such an event had happened before, or that the family had been the subject of a past

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[3] Perhaps even more "investigations should close without findings of abuse or neglect. The United States Court of Appeals for the Second Circuit has described … abuse or neglect [findings] as 'at best imperfect,' noting that three-quarters of administrative challenges succeed in reversing such findings." Josh Gupta-Kagan, *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, 362 (2012).

investigation. *Ibid.* But based on this scant record, the official visited the home two hours later and demanded to interview the child and her siblings. *Ibid.* When her parents refused, the official sought a court order compelling the parents' compliance. *Ibid.*

The North Carolina Supreme Court ultimately ruled that the official had no legal basis to investigate the parents—because the "anonymous call reporting a naked child, two years of age, unsupervised in a driveway," did not alone constitute a "report of abuse, neglect, or dependency," and thus could not trigger the state's mandatory investigation requirements. 582 S.E.2d at 260. Justice Martin's concurrence went further, suggesting that the Fourth Amendment forbids such investigations where the state cannot show "reasonable grounds" that a child has been abused or neglected. *Id.* at 268 (Martin, J., concurring). No justice doubted that the social worker overreached in *Stumbo*.

Yet a vague law was also to blame. North Carolina law defines a "neglected juvenile" as one who does not receive "proper care, supervision, or discipline" from the juvenile's parent or "who lives in an environment injurious to the juvenile's welfare." N.C. Gen. Stat. 7B–101(15). On its face, this law covers even the mildest instances of lax parenting—like forgetting to brush a child's teeth one night or letting a child stay home from school on his birthday. Officials could twist this text to target even the best parents for punishment. Thankfully, North Carolina courts have interpreted the law to cover only "severe or dangerous conduct … causing injury or potentially causing injury to the" child. *Stumbo*, 582 S.E.2d at 258. But without good training, child-welfare officials (who are rarely

lawyers) may never know that. And parents and children bear the heavy cost.

This is not just a problem for Tar Heels. Most "child neglect laws … are very broad and vague." Diane L. Redleaf, *Narrowing Neglect Laws Means Ending State-Mandated Helicopter Parenting*, ABA (Sept. 11, 2020), https://perma.cc/RN3Q-BPUU (linking to www.letgrow.org, a website canvassing neglect laws). They include nearly limitless terms—"like 'injurious environment,' 'lack of proper care,' and 'inadequate supervision'—that invite open-ended discretionary, standardless, and discriminatory applications." *Ibid.* And social workers in at least one state are sounding the alarm—suggesting this "dangerous" problem has led to "thousands of children" being "unnecessarily removed from their homes." Coleman, *Storming the Castle*, 47 WM. & MARY L. REV. at 441 n.65 (citing Troy Anderson, *Foster Care Cash Cow; "Perverse Incentive Factor" Rewards County for Swelling System* (L.A. Daily News, Dec. 7, 2003)).

If this sweeping approach was effective, that would be one thing. But even its most zealous supporters "concede that because abuse and neglect are underreported, many more victims exist than are known to the system." Coleman, *Storming the Castle*, 47 WM. & MARY L. REV. at 419. And they suspect that the investigations that do occur "sometimes, or even often, fail to" uncover abuse where children are truly victims. *Ibid.* Meanwhile, states fail to improve their tactics. They could better educate the public about how to report child abuse. *Ibid.* They could fix vague laws. Or they could better train officials, give them manageable caseloads, and set "clear guidelines" to limit their discretion. *Id.* at 420. But many states

refuse to do so, and the need for such reforms is urgent. Two for ten is not good enough.

2. Unjust child-welfare investigations can harm parents and children.

While eight out of 10 child-welfare investigations uncover *no* wrongdoing, that does not mean families are left unscathed when officials leave. The investigation *itself* can harm families: by (i) stigmatizing them, (ii) dashing their sense of privacy, and (iii) traumatizing children—those the investigation aims to protect.

i.

Take stigma first. Baseless child-abuse allegations "unfairly stigmatize" parents, marring their reputation in the "local community." *Stumbo*, 582 S.E.2d at 265 (Martin, J., concurring). The label "child abuser" or "neglectful parent" invokes "profound negative connotations" in our society. Coleman, *Storming the Castle*, 47 WM. & MARY L. REV. at 497. Many parents would give anything only to be known as "a good mother or a good father." *Ibid.* Yet one knock from a child-welfare official can change everything. The questions pour in: Who called the police? What did I do wrong? What will people think?

That knock means someone—maybe a doctor, teacher, or friend—believes "a child in the family is being abused or neglected by the very people who are intended to cherish" him or her. Coleman, *Storming the Castle*, 47 WM. & MARY L. REV. at 498. This is "the ultimate challenge" to family identity—and thus "the ultimate vehicle" to shame its members. *Ibid.* And "the potential for shame and fear" dramatically increases when officials can impose criminal penalties. *Ibid.* "[S]uch an investigation implies almost by

definition that [officials] believe the parent" may be a "bad mother or father, and that the child may be … unloved." *Ibid.*

No matter what happens after officials leave, parents often experience shame and stigma. Sabrina Luza & Enrique Ortiz, *The Dynamic of Shame in Interactions Between Child Protective Services & Families Falsely Accused of Child Abuse*, 3 Inst. for Psych. Therapies (1991), https://perma.cc/V4Y2-LF37. And many of them may live in "constant fear." *Doe* v. *Heck*, 327 F.3d 492, 506 n.10. (7th Cir. 2003). Fear caused one family to "watch for strange vehicles," not "let their children play outside," and even put "blankets over their windows." *Ibid.* The Fourth Amendment helps shield families from this harm.

ii.

Child-welfare investigations also dash a family's sense of privacy. Home visits and child seizures epitomize this truth. Coleman, *Storming the Castle*, 47 WM. & MARY L. REV. at 518. On home visits, state officials "quite literally storm the castle," invading bedrooms, scouring refrigerators, and opening closets and doors. *Ibid.* They do this "both during the day and at night," keeping families always on edge. *Ibid.* For seizures, officials often corner children to discuss "private family matters" and worse, to perform physical exams—which typically include inspecting the child's "genital and anal areas." *Id.* at 519. And they often do this for no good reason.

While *Calabretta* and *Curry* highlight this problem, few stories match the horror of Bill and Becky Wallis's. In the fall of 1991, Bill and Becky and their two children, five-year old Lauren and two-year old Jessie, lived in San Diego California. *Wallis* v.

Spencer, 202 F.3d 1126, 1131 (9th Cir. 2000). Many months had passed since they had seen Becky's sister, Rachel, who "suffers from" several "psychiatric problems" and had "made a false report" the year before, "alleging that Bill was sexually abusing Lauren." *Ibid.* Because state officials investigated the report and "found that there was no credible evidence to support the allegations," they took no further action. *Ibid.*

Rachel had now entered a psychiatric hospital because she was suicidal. 202 F.3d at 1131. There, she reported to her therapist that Bill "was planning to sacrifice his young son Jessie to Satan at the 'Fall Equinox ritual,'" and that Bill would cover this up by "staging a car accident." *Ibid.* Rachel added that both her parents and Bill were in a cult, but Becky was not. *Ibid.* And she recounted a "recently recovered memory of being with her father in the woods," where he was "wearing a cult robe reciting hypnotically 'On the third full moon after two blue moons a child will be killed.'" *Ibid.* While Rachel believed this event occurred decades before Jessie's birth, one of her "multiple personalities" said it "referred to Jessie and meant that he would be sacrificed to Satan on the 'Fall Equinox.'" *Ibid.*

Rachel's therapist reported this tale to state social workers, who contacted the police, believing they had "no choice but to take the children into protective custody." 202 F.3d at 1132. The police assigned two officers, who were told the state had a "pickup order"—but no such order existed. *Id.* at 1133. Two days later, the officers went to the grocery store where Becky was working. *Id.* at 1134. They tailed Becky as she drove home, and eventually pulled her over at a convenience store. *Ibid.* There, one officer told Becky that they "needed to 'check on' the children," and said that if she

took them to her house, they could "sit down and talk about" things. *Ibid*. This was a ruse to "pick up the children," the officers later admitted. *Ibid*.

The officers arrived at Becky's home around midnight. 202 F.3d at 1134. Her children were asleep and "appeared well-cared for." *Ibid*. Indeed, "there was no sign of anything suspicious." *Ibid*. But an officer forced Bill and Becky to awaken Lauren for an interview. *Ibid*. The five-year old answered the questions the best she could. *Ibid*. Though the officer had *no* evidence suggesting Lauren had ever been sexually abused, she asked if anyone "had ever given her bad touches." *Ibid*. Lauren truthfully answered no. *Ibid*. So the officer abruptly said they were removing the children. *Ibid*. At 1:00 a.m., the officers took Lauren and Jessie to a county facility, where they "were not allowed to see their parents and cried for them constantly." *Ibid*.

The children would not return home for over two months. 202 F.3d at 1134. Three days later, an officer took Lauren and Jessie to a local hospital, where she ordered a "physical examination of both children." *Id*. at 1135. No court order allowed this exam, nor did officials tell Bill or Becky about it beforehand. *Ibid*. Dr. Mary Spencer performed the exam, including multiple "internal body cavity examinations." *Ibid*. Spencer photographed "both the inside and outside of Lauren's vagina and rectum and Jessie's rectum." *Ibid*. Lauren "was very upset by the procedures and asked for her parents." *Ibid*. Shockingly, Spencer's report concluded that both children had been molested, and that another doctor, Susan Horowitz, agreed. *Ibid*. But that was not true. *Ibid*.

Two months later, Horowitz sent CPS officials a letter informing them that Spencer's report about her "finding of sexual abuse was false." 202 F.3d at 1135. In fact, at the time of the report, Horowitz "had not had access to" the children's records, "had not performed a full review, and had not offered *any* conclusion." *Ibid.* (emphasis added). The letter also said that Horowitz had now reviewed the full file and, based on all the evidence, she disagreed with Spencer's conclusion that the children had been abused. *Ibid.* To the contrary, Horowitz concluded that "there was *no* evidence of abuse and that there were alternative, normal physiological explanations" for what Spencer had observed. *Ibid.* (emphasis added). So officials released the children and moved to dismiss the case. *Ibid.*

While it "may be difficult to think … this way," children like Lauren and Jessie—who are "safe and healthy but [still] targeted" by officials—do not want to sacrifice "their welfare" only to make it easier for states to investigate other cases. Coleman, *Storming the Castle*, 47 WM. & MARY L. REV. at 529. They want to feel safe in their homes. And while the Fourth Amendment helps ensure that they can, Respondent's test could insulate officials from violating children.

iii.

When officials seize and strip children, they "can cause emotional and psychological damage." Coleman, *Storming the Castle*, 47 Wm. & Mary L. Rev. at 419. This damage includes "trauma, anxiety, fear, shame, guilt, stigmatization, powerlessness, self-doubt, depression, and isolation." *Id.* at 520 (citing Sabrina Luza & Enrique Ortiz, *The Dynamic of Shame*). And in a tragic irony, children who receive genital exams experience those exams as the very evil that

officials are trying to stop: *sexual abuse*. John Money & Margaret Lamacz, *Genital Examinations & Exposure Experienced as Nosocomial Sexual Abuse in Childhood*, 175 J. Nervous & Mental Disease, 713-21 (1987). Social workers recognize this risk. Br. of *Amici Curiae* Nat'l Ass'n of Social Workers et al., *Safford Unified Sch. Dist. #1* v. *Redding*, 557 U.S. 364 (2009) (No. 08-479), 2009 WL 870022, at *6 ("Even for adults, a strip search is a demeaning. For children …, it is far more significant.").

The reality is that interventions such as medical treatments designed to help children "can also [hurt them]." Coleman, *Storming the Castle*, 47 Wm. & Mary L. Rev. at 520 n.315; accord C.M. Kuhn & S.M. Schanberg, *Responses to Maternal Separation: Mechanisms & Mediators*, 16(3-4) Int'l J. of Developmental Neuroscience 261-70 (1998) ("Consequences of disrupting mother-infant interactions range from marked suppression of certain neuroendocrine and physiological systems after short periods of maternal deprivation to retardation of growth and behavioral development after chronic periods."). The main difference here, of course, is that the hurt children *never needed* the interventions, and so the harms "are less easily justified." Coleman, *Storming the Castle*, 47 WM. & MARY L. REV. at 520 n.315.

Human experience confirms the science. Consider what happened to three-year-old Lacey Doe when officials "made a 'reasonable mistake' in investigating" alleged child abuse. *Id.* at 521. Not long after officials took Lacey from her parents, "this supposedly neglected child" was described as "friendly and cooperative." *Doe* v. *Lebbos*, 348 F.3d 820, 834 (9th Cir. 2003) (Kleinfeld, J., dissenting). She enjoyed "watching cartoons and playing with toys." *Ibid.* She was curious

about the world around her. *Ibid.* And she had no fear of "strangers." *Ibid.* But after "being bounced around" in the system "for over a year," Lacey became a much different girl. *Ibid.*

Her health spiraled. "She had taken to smearing feces and to other abnormal and highly disruptive behavior." 384 F.3d at 834. She was diagnosed "with Post Traumatic Stress Disorder, hearing voices, and suicidal ideation." *Ibid.* (cleaned up). And she was "put on anti-psychotic medication." *Ibid.* While she "somehow held her personality together through her mother's death, her father's" financial trouble, and a big move, what officials did "to protect her apparently destroyed her." *Ibid.* (cleaned up). As Judge Kleinfeld found, "[s]omething in this experience, perhaps being ripped away from her father," "perhaps having strangers strip her and search her [once-considered] private parts," or perhaps being put with outsiders inflicted "a trauma that was too much for her." *Ibid.*

Lacey is not the exception. Psychologists explain that victims like her often suffer trauma—with symptoms like "sleep disturbance…, anxiety, depression, and [the] development of phobic reactions." Steven F. Shatz, *The Strip Search of Children & the Fourth Amendment*, 26 U.S.F. L. REV. 1, 12 (1991) (cleaned up). Some children even consider suicide. *Ibid.*; see also Teri Dobbins Baxter, *Constitutional Limits on the Right of Gov't Investigators to Interview & Examine Alleged Victims of Child Abuse or Neglect*, 21 Wm. & Mary Bill of Rts. J. 125, 127 (2012) (investigations "that separate children from their caregivers" can be "traumatic" for families). The Fourth Amendment helps protect these children from public abuse; Respondent's rule removes part of that protection.

C. Petitioner's rule best ensures that the Fourth Amendment protects vulnerable parents and children.

Improper searches and seizures are rampant and egregious. Only Petitioner's rule gives parents and children a fair shot at justice when officials wrongly seize them pursuant to legal process. To be sure, no one in the stories above went to jail or faced criminal prosecution—like Petitioner here. But this Court should not give officials any incentive to punish such parents with abusive process only to shield themselves from accountability. The success of § 1983 claims filed by parents should not turn on whether officials file baseless charges against them.

And the risk for such abuse is high in the child-welfare context, given how officials routinely seek to bypass inconvenient Fourth Amendment requirements. The harm from this abuse can be severe and irreversible. This Court should hold that plaintiffs need only show that their prior criminal proceeding ended in a manner not inconsistent with their innocence to satisfy the favorable-termination rule. The common law supports this view. Br. for Pet'r 22-31; *Laskar*, 972 F.3d at 1286-92. And this view best fits with Fourth Amendment values and purposes.

Only Petitioner's rule can protect vulnerable parents and children from unjust official intrusions and seizures pursuant to legal process—which is a chief purpose of the Fourth Amendment.

CONCLUSION

This Court should reverse.

Respectfully submitted,

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