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GIVING THE GREEN LIGHT: WHY THE SUPREME COURT SHOULD ALLOW THE SPECIAL NEEDS DOCTRINE TO APPLY TO INVESTIGATIONS OF CHILD ABUSE

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ABSTRACT

In the United States, hundreds of thousands of children fall victim to abuse every year.[1] An abused child's only hope is that a caseworker quickly identifies the abuse and remedies the issue. But caseworker investigations are too often limited by the Fourth Amendment. A caseworker's only hope to get around the barriers of the Fourth Amendment is to rely on the special needs doctrine, which serves as an exception to the Fourth Amendment warrant requirement. There is currently a circuit split regarding whether the special needs doctrine applies to investigations of child abuse.[2] With no guidance from the Supreme Court, the lower courts are free to enact conflicting decisions that impair a caseworker's ability to proactively investigate cases of child abuse. This note will argue that the Supreme Court should resolve this circuit split and find that the special needs doctrine applies to investigations of child abuse. Finding that the special needs doctrine applies would not only create a unified approach upon which caseworkers could rely when investigating child

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1. *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2018 X (2020), https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2018.pdf [hereinafter CHILD MALTREATMENT 2018].

2. This note focuses on the applicability of the special needs doctrine to investigations of alleged child abuse, meaning that the caseworkers are still trying to figure out if any abuse has actually occurred. However, for the sake of brevity, the note will use the terms "investigation(s) of child abuse."

abuse, but it would also ensure that the Court serves as a guardian for children, fulfilling its role under parens patriae.

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I. INTRODUCTION

On November 22, 2013, the El Paso County Department of Human Services ("DHS") received a disturbing report from official personnel at Oak Creek Elementary School ("School") in Colorado Springs, Colorado.[3] A teacher and behavioral health consultant at the School reported to the DHS that a student, I.B., had marks and bruises on her bottom and back.[4] A DHS worker examined I.B. at her school and found a linear welt and rash on I.B.'s back and bottom.[5] Then on December 9, 2014, DHS received another report from the School.[6] This time, the School reported seeing bumps, bruises, a small red mark, two small cuts, and bruised

3. Appellees' Response Brief at 6–7, Doe v. Woodard, 912 F.3d 1278 (10th Cir. 2019) (No. 18-1066).

4. *Id.*

5. *Id.*

6. *Id.*

knees on I.B.[7] Again, a DHS worker reported to the school and observed I.B.'s buttocks, stomach/abdomen, and back.[8] With the help of the School's health paraprofessional, the DHS worker then removed I.B.'s clothes to photograph those areas.[9] Despite the DHS worker acting with permission from the school and in accordance with county-wide policy, I.B's parents, the Does, sued under 42 U.S.C. § 1983 and claimed a Fourth Amendment violation.[10]

The case of I.B. is just one case in the thousands of cases of child abuse that the DHS investigates in any given year.[11] In 2013, 10,161 children in Colorado alone fell victim to child abuse.[12] Nationwide, around 678,932 children suffered from abuse, and 1,520 children died as a result of abuse.[13] Child abuse is a serious issue in this nation and caseworkers all over the country work tirelessly to combat and prevent such atrocities.[14] But despite their efforts, the rate of child abuse to date has remained fairly consistent with data from 2018, indicating that there were 678,000 victims of child abuse where an estimated 1,770 children died.[15] With such staggeringly high numbers, how do we, as a nation, begin to solve this problem? What, if anything, is preventing caseworkers from effectively pursuing and investigating child abuse?

Part of the problem is that the Fourth Amendment limits caseworkers' ability to thoroughly investigate[16] child abuse. To make

7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*; Doe v. Woodard, 912 F.3d 1278, 1286 (10th Cir. 2019).
11. The broad term, "child abuse," encompasses a variety of types of abuse such as physical abuse, sexual abuse, emotional abuse, and neglect. *Preventing Child Abuse & Neglect*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/violenceprevention/childabuseandneglect/fastfact.html (last updated Mar. 15, 2021).
12. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2013 32 (2015), https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2013.pdf [hereinafter CHILD MALTREATMENT 2013].
13. *Id.* at 21, 54.
14. CHILD MALTREATMENT 2018, *supra* note 1, at 1; *see generally* DIANE DEPANFILIS, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD PROTECTIVE SERVICES: A GUIDE FOR CASEWORKERS (2018), https://www.childwelfare.gov/pubPDFs/cps2018.pdf.
15. CHILD MALTREATMENT 2018, *supra* note 1, at 19, 46.
16. Although the investigation process itself is not a major part of this note, a general understanding of the process is necessary to understand the scope of the argument. Generally, a child abuse investigation consists of home visits, interviews with the child in question, with the parents or guardians, and with any necessary parties, as well as examinations of the child. *See* 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, 434 (2005). Home visits consist of the caseworker walking around the home to inspect it and learn about the child's living environment. *Id.* at 436. Interviews are conducted at home or, in the case of a child interview, at a location away from the home,

matters worse, the law regarding what is a constitutionally acceptable search or seizure during an investigation of child abuse has been increasingly muddled because of conflicting court opinions.[17] Currently, there is a circuit split as to whether the "special needs doctrine," a judicially-made exception to the warrant requirement, applies when caseworkers investigate child abuse.[18] The case of I.B., otherwise known as *Doe v. Woodard*, is the most recent case that concerns the applicability of the special needs doctrine as it relates to investigations of child abuse.[19] The Tenth Circuit's decision proves to be just another needle in a confusing legal haystack surrounding the applicability of the special needs doctrine. As it stands, caseworkers all over the nation will continue to diligently investigate without clear protection or guidance from the courts.[20]

What the children and caseworkers need is a more unified solution to this conflicting body of law to allow caseworkers to effectively perform their job and children to remain safe. Given that in the past year one in seven children have experienced child abuse, it is imperative that child

such as at school. *Id.* at 438. Examinations of a child, such as strip searches and medical exams, occur at a location away from the home. *Id.* at 438–39. A caseworker is advised to conduct any or all of these investigatory approaches to adequately determine the merits of his or her assigned case. *See id.* at 437.

17. *See generally* Darryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986); Wildauer v. Frederick County, 993 F.2d 369 (4th Cir. 1993); Good v. Dauphin Cnty. Soc. Servs. for Child. & Youth, 891 F.2d 1087 (3d Cir. 1989); Calabretta v. Floyd, 189 F.3d 808 (9th Cir. 1999); Tenenbaum v. Williams, 193 F.3d 581 (2d Cir. 1999); Roe v. Tex. Dep't of Protective & Regul. Servs., 299 F.3d 395 (5th Cir. 2002).

18. *See* Dubbs v. Head Start, Inc., 336 F.3d 1194, 1212–13 (10th Cir. 2003) ("'Special needs' is the label attached to certain cases where 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.' In special needs cases, the Court replaces the warrant and probable cause requirement with a balancing test that looks to the nature of the privacy interest, the character of the intrusion, and the nature and immediacy of the government's interest . . . . '[I]n limited circumstances, a search unsupported by either warrant or probable cause can be constitutional when 'special needs' other than the normal need for law enforcement provide sufficient justification.'") (internal citations omitted) (quoting Ferguson v. City of Charleston, 532 U.S. 67, 76 n.7 (2001)); *see also Roe*, 299 F.3d at 401 (claiming that the applicability of the special needs doctrine to investigations of child abuse is "an issue over which other courts of appeals have divided").

19. Doe v. Woodard, 912 F.3d 1278, 1299 (10th Cir. 2019) (holding that the caseworker was entitled to qualified immunity for searching and photographing a naked child while the child was at school).

20. Lauren Kobrick, *I Am Not Law Enforcement! Why the Special Needs Exception to the Fourth Amendment Should Apply to Caseworkers Investigating Allegations of Child Abuse*, 38 CARDOZO L. REV. 1505, 1540 (2017) ("The failure of the Supreme Court to provide more guidance in this area suggests that caseworkers will not know if their actions are permissible and courts will have a difficult time ruling on their actions.").

protective services are permitted to adequately investigate child abuse.[21] By reviewing this issue and clarifying the law surrounding the applicability of the special needs doctrine to investigations of child abuse, the Supreme Court has the ability to ensure that caseworkers can proactively investigate child abuse cases. By finding that the special needs doctrine applies to investigations of child abuse and resolving the confusion among the circuits, the Supreme Court can fulfill its role as *parens patriae*.[22] A nationally unified recognition of the applicability of the special needs doctrine as it relates to investigations of child abuse will ultimately satisfy the Court's paramount concern for the safety and well-being of children by allowing caseworkers to effectively identify and prevent child abuse.

Part II of this note addresses background information such as the warrant requirement of the Fourth Amendment, the special needs doctrine, including both its development and application, and the defense of qualified immunity. Part III addresses the Tenth Circuit's decision in *Woodard* and explains the court's rationale, while also providing additional information regarding the Tenth Circuit's approach to the special needs doctrine in other cases. *Woodard* highlights the ambiguity in the law and should compel the Supreme Court to clarify the issue. Part IV provides background on the doctrine of *parens patriae* and argues that the Supreme Court should address this issue and create more definitive law regarding the applicability of the special needs doctrine to investigations of child abuse. The Court should find that the special needs doctrine applies in the context of child abuse investigations because of the Court's position as *parens patriae*. As a legal guardian over those who are the most vulnerable, such as an abused child, the Court is obliged to provide ways to ensure the well-being and safety of children, regardless of whether such action might intrude on other constitutional rights.[23]

21. *Preventing Child Abuse & Neglect*, *supra* note 11.

22. The term "parens patriae" is Latin for, "parent of the country." MERRIAM-WEBSTER, https://www.merriam-webster.com/legal/parens%20patriae (last visited Aug. 9, 2021). For more background on *parens patraie*, see *infra* Part IV.A.

23. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("[A]uthority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience."); *see also* Margaret S. Thomas, Parens Patriae *and The States' Historic Police Power*, 69 SMU L. REV. 759, 780 (2016) ("[P]ower flowed . . . from universal principles about what it means to be a functioning government.").

II. BACKGROUND

The problem regarding acceptable investigation practices by caseworkers verifying allegations of child abuse ultimately stems from the law surrounding the Fourth and Eleventh Amendments. This section will focus on the Fourth Amendment warrant requirement, the development of the special needs doctrine as an exception to that Fourth Amendment requirement, including the current circuit split on its applicability in child abuse investigations, and the Eleventh Amendment two-prong test for qualified immunity.

A. Fourth Amendment

The Fourth Amendment prohibits the government from conducting a search or seizure without a warrant based on probable cause.[24] The Supreme Court has consistently reiterated that warrantless searches are "per se unreasonable under the Fourth Amendment."[25] Typically, to obtain a warrant, a law enforcement officer needs to present all of his or her gathered information to a magistrate judge who then determines whether there is sufficient probable cause to issue a warrant.[26] Courts decide whether there is sufficient probable cause by using a totality-of-the-circumstances analysis.[27]

The original purpose of the warrant requirement was to prevent against the general warrant,[28] which was traditionally used in

24. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

25. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 454–55 (1971); Katz v. United States, 389 U.S. 347, 357 (1967).

26. *See* David C. Gray, *Fourth Amendment Remedies as Rights: The Warrant Requirement*, 96 B.U. L. REV. 425, 463 (2016).

27. *See* Illinois v. Gates, 462 U.S. 213, 233 (1983) ("[T]he totality-of-the-circumstances analysis . . . [has] traditionally . . . guided probable cause determinations: a deficiency in one may be compensated for . . . by a strong showing as to the other, or by some other indicia of reliability.").

28. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 558, 558 n.12 (1999) ("The most common meaning of 'general warrant' was a warrant that lacked specificity as to whom to arrest or where to search; for example, a warrant directing arrests of 'suspected persons' or a search of 'suspicious places.' In addition, because the lack of specificity often reflected a lack of information, 'general

England.[29] The requirement for specific warrants, therefore, satisfied that purpose by mandating that warrants particularly describe who or what will be searched or seized.[30] Further, by requiring the court to act as an intermediary between law enforcement and the people, citizens can be reassured that the court will check "the natural tendency of governments and their agents" to indulge temptations of power.[31] The people put great trust in the court to ensure that their interests were protected.[32]

Even though the warrant requirement seems ironclad, it has three important exceptions: consent,[33] exigent circumstances,[34] or a special need.[35] These exceptions can serve as either bars to the exclusionary rule[36] or as defenses to civil claims.[37] Although this note will primarily

warrant' was also often used to denote a warrant that lacked an adequate showing of justification for a search or arrest.").

29. *See* Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461, 1486 (2010) ("[O]pposition to general warrants rested on the rights secured by the Magna Carta, which advocates claimed limited an 'infinite power of surveillance' that was intended to 'stifle the press' or to 'suppress[] dissent.'") (second alteration in original) (quoting WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING, 602–1791 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (ProQuest).

30. *See id.* at 1486; *see also* U.S. CONST. amend. IV. ("[N]o Warrants shall issue, but upon . . . particularly describing the place to be searched, and the persons or things to be seized.").

31. *See* Gray, *supra* note 26, at 444.

32. *See id.* at 461.

33. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) ("[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.").

34. Mincey v. Arizona, 437 U.S. 385, 393–94 (1978) ("[W]arrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." (quoting McDonald v. United States, 335 U.S. 451, 456 (1948))).

35. Ferguson v. City of Charleston, 532 U.S. 67, 74 n.7 (2001) ("[I]n limited circumstances, a search unsupported by either warrant or probable cause can be constitutional when 'special needs' other than the normal need for law enforcement provide sufficient justification.").

36. Under this judicially created rule, "evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure." United States v. Calandra, 414 U.S. 338, 347 (1974).

37. *See, e.g.*, Kentucky v. King, 563 U.S. 452, 457, 462 (2011) (finding that since there was an exigent circumstance, the police could rightfully enter the apartment and search for drugs and other paraphernalia); Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 620, 634 (1989) (finding that the plaintiff's claim was unsuccessful because "[t]he Government's interest in regulating the conduct of railroad employees to ensure safety . . . 'presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.'" (quoting Griffin v. Wisconsin, 483 U.S. 868, 873–74 (1987))).

focus on the special needs doctrine, issues of consent and exigent circumstances will weave their way into the discussion. Further, the special needs doctrine will be examined primarily as it relates to claims brought under 42 U.S.C. § 1983.[38]

B. The Special Needs Doctrine and the Supreme Court

The special needs doctrine serves as an exception to the warrant requirement.[39] The exception applies when there is "an exercise of governmental authority distinct from that of mere law enforcement," where there is a "lack of individualized suspicion of wrongdoing," and where there is "an interest in preventing future harm."[40] The Supreme Court has yet to directly consider whether the special needs doctrine applies to investigations of child abuse,[41] and as a result, the circuits have been left on their own to make the ultimate determination. Not only has the Court's failure to act resulted in incongruity among the circuits, but it has also created vast uncertainty as to whether the doctrine applies, ultimately affecting a caseworker's ability to adequately investigate child abuse.

The special needs doctrine was first established in *New Jersey v. T.L.O.*[42] In *T.L.O.*, the Court found that a public school did not violate the Fourth Amendment when a school official searched a student's purse

38. 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983 (2018).

39. *Ferguson*, 532 U.S. at 74 n.7.

40. Dubbs v. Head Start, Inc., 336 F.3d 1194, 1213 (10th Cir. 2003) ("Among the cases said by the Court to involve 'special needs' are: a principal's search of a student's purse for drugs in school; a public employer's search of an employee's desk; a probation officer's warrantless search of a probationer's home; a Federal Railroad Administration regulation requiring employees to submit to blood and urine tests after major train accidents; drug testing of United States Customs Service employees applying for positions involving drug interdiction; schools' random drug testing of athletes; and drug testing of public school students participating in extracurricular activities.").

41. Doe v. Woodard, 912 F.3d 1278, 1291–92 (10th Cir. 2019).

42. *Dubbs*, 336 F.3d at 1213 ("Justice Blackmun first coined the term 'special needs' in his concurrence in *New Jersey v. T.L.O.*").

without a warrant.[43] Writing for the majority, Justice White goes through a lengthy discussion on what makes a search reasonable, as reasonableness is the key to determining whether a search violates the Fourth Amendment.[44] Justice White noted that reasonableness varies depending on the circumstances and that ultimately, the standard is based on a balancing between "the need to search" and "the invasion which the search entails."[45] In *T.L.O.*, the two interests were the school's ability to discipline and preserve order on school grounds and a student's right to privacy.[46] Although courts traditionally find that a search without a warrant is per se unreasonable, given the school's legitimate interest in maintaining a safe educational space, Justice White articulated that "[t]he warrant requirement . . . is unsuited to the school environment" and that "school officials need not obtain a warrant before searching a student who is under their authority."[47]

Further, under *T.L.O.* not only would schools be excused from the warrant requirement, but they would also not be required to justify their searches based upon probable cause.[48] Justice White reasoned that a better standard to justify a search would be one of reasonableness, where the court would consider: "whether the . . . action was justified at its inception" and "whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'"[49] Schools would be justified in their searches if there was a reasonable likelihood that a search would produce evidence that the student "violated or is violating" either the law or school policy.[50] Ultimately, the Court found that the school's search in *T.L.O.* was valid because it was reasonable for the school to suspect that the student had cigarettes, after the school had received a report that the student had been smoking in the bathroom in violation of school policy

43. *See* New Jersey v. T.L.O., 469 U.S. 325, 327–28, 347–48 (1985).

44. *Id.* at 337–43; *see also* Brigham City v. Stuart, 547 U.S. 398, 403 (2006) ("[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness . . . .'").

45. *T.L.O.*, 469 U.S. at 337 (quoting Camara v. Mun. Ct. of S.F., 387 U.S. 523, 537 (1967)).

46. *Id.* at 339.

47. *Id.* at 340 ("[R]equiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.").

48. *Id.* ("The school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search.").

49. *Id.* at 341 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)). In the context of a school search, "[s]uch a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* at 342.

50. *Id.* at 341–42.

and because it was reasonable for the school to continue to look through the purse for marihuana upon viewing rolling papers within the purse since rolling papers are normally used for marihuana.[51]

Interestingly, the special needs doctrine is named, not from the majority's opinion in *T.L.O.*, but from Justice Blackmun's concurring opinion.[52] Blackmun used the term "special need" and asserted that the "elementary and secondary school setting presents a special need," paving the way for the doctrine to be used by numerous other courts.[53]

The Supreme Court addressed the doctrine again in *O'Connor v. Ortega*.[54] In *O'Connor*, the Court found that the special needs doctrine applied when a government employer searched a public employee's office during an investigation into allegations of wrongdoing without a warrant.[55] Like it had with schools, the Court in *O'Connor* had to balance two competing interests: the employee's expectation of privacy and the government employer's need to maintain control and stability in the workplace.[56] Further, like a school, the stringent requirements of a warrant were impractical for the work place.[57] Lastly, like a school, justification for the search based on probable cause could not functionally work in the context of the workplace.[58] After *O'Connor*, the Supreme Court addressed the special needs doctrine in various other instances and, a majority of the time, found that the special needs doctrine applied to the search or seizure in question, meaning that there was no Fourth Amendment violation.[59]

51. *Id.* at 327–28, 345–47.

52. *Id.* at 351 (Blackmun, J., concurring) ("Only in . . . exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.").

53. *Id.* at 352 ; *see*, *e.g.*, Lynch v. City of New York, 589 F.3d 94, 97–98, 105 (2d Cir. 2009) (finding that a policy which requires a police officer to immediately take a breathalyzer test after the officer causes injury or death because of his or her gun is reasonable under the special needs doctrine's balancing test).

54. O'Connor v. Ortega, 480 U.S. 709 (1987).

55. *Id.* at 712–13, 725–26.

56. *See id.* at 719–20.

57. *See id.* at 722 ("[R]equiring an employer to obtain a warrant whenever the employer wished to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome. Imposing unwieldy warrant procedures in such cases upon supervisors, who would otherwise have no reason to be familiar with such procedures, is simply unreasonable.").

58. *See id.* at 724 ("[A] probable cause requirement for searches of the type at issue here would impose intolerable burdens on public employers.").

59. *See* Griffin v. Wisconsin, 483 U.S. 868, 870, 873–74, 880 (1987) (ruling that a probation officer could search a probationer's home without a warrant under the doctrine); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 666, 677 (1989) (ruling that a drug test for U.S. Customs Service employees who wanted a promotion to certain sensitive

Finally, the Supreme Court addressed the special needs doctrine for the last time in *Ferguson v. City of Charleston*.[60] While one might think that a hospital is similar to a school or a workplace and would thus be protected by the special needs doctrine, the Court in *Ferguson* took a different approach. In *Ferguson*, the Court found that a state hospital violated the Fourth Amendment when the hospital policy required staff members to test pregnant patients who were suspected of being on drugs and report the positive results to the police, without obtaining a warrant.[61]

The Court based its decision in *Ferguson*, not on a balancing of the interests as it had done in previous cases, but on the primary purpose test.[62] Under the primary purpose test, the court considers the central reason for conducting the search, and if the central reason is to produce evidence to then turn over to law enforcement, then the special needs doctrine does not apply.[63] In *Ferguson*, the Court found that the "central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment."[64] Even if there is a broader, ultimate reason for the policy that is beyond merely helping law enforcement gather evidence, the Court still will not find that the special needs doctrine applies so long as the primary and immediate purpose is to help law enforcement.[65] The Court is focused more on the immediate purpose rather than the ultimate goal.[66] Thus, even though there was a substantial government interest

positions could be performed without a warrant under the doctrine); Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 606, 620–24 (1989) (ruling that a railway company could drug test its employees who were involved in railway accidents without a warrant under the doctrine); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 648, 665 (1995) (ruling that a school could drug test its students who participated in interscholastic sports without a warrant under the doctrine); Bd. of Educ. v. Earls, 536 U.S. 822, 825, 829 (2002) (ruling that a school could drug test its students who participated in extracurricular activities without a warrant under the doctrine). *But see* Chandler v. Miller, 520 U.S. 305, 308, 323 (1997) (ruling that a drug test for candidates for a state office did not fall under the special needs doctrine and thus required a warrant).

60. Ferguson v. City of Charleston, 532 U.S. 67 (2001).

61. *Id.* at 70–73, 76.

62. *Id.* at 84–85.

63. *Id.*

64. *Id.* at 80.

65. *Id.* at 82–84 ("While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence for *law enforcement purposes* in order to reach that goal.").

66. *Id.* at 84 ("Because law enforcement involvement always serves some broader social purpose or objective, under respondents' view, virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose.").

and even though the policy had the ultimate goal of enhancing both the mother and the unborn child's life, the *Ferguson* Court found that the special needs doctrine did not apply and, therefore, the hospital violated the patient's Fourth Amendment right by conducting the drug test without a warrant.[67]

C. Circuit Courts' Application of Special Needs Doctrine

In-between the Supreme Court's various decisions regarding the applicability of the special needs doctrine, the circuit courts were also deciding when to apply the doctrine, specifically in the context of investigations of child abuse. Given that there was no bright line test, that each situation seemed to be tested on a case-by-case basis, and that, most importantly, the Supreme Court had not specifically decided on the applicability of the special needs doctrine as it relates to investigations of child abuse, the circuit courts inevitably had varying opinions on whether the special needs doctrine applied to investigations of child abuse. As it stands, only the Seventh and the Fourth Circuits suggest that the special needs doctrine applies to investigations of child abuse, while the Third, the Ninth, the Second and the Fifth Circuits have said that the special needs doctrine does not apply.[68] The Tenth Circuit, as will later be explained,[69] fails to take a position on the issue, and the First, Sixth, Eighth and Eleventh Circuits have yet to even address the issue.

1. Circuits That Apply the Doctrine

The Seventh Circuit was the first circuit to address the applicability of the special needs doctrine in the context of investigating child abuse.[70] In *Darryl H. v. Coler*, the Seventh Circuit determined that a caseworker could inspect nude children at school for evidence of child abuse without a warrant.[71] In making its determination, the court employed a similar

67. *See id.* at 70, 81, 84–86.

68. *See* Darryl H. v. Coler, 801 F.2d 893, 901–02 (7th Cir. 1986); Wildauer v. Frederick Cnty., 993 F.2d 369, 373 (4th Cir. 1993); Good v. Dauphin Cnty.. Soc. Servs. for Child. & Youth, 891 F.2d 1087, 1093–94 (3d Cir. 1989); Calabretta v. Floyd, 189 F.3d 808, 820 (9th Cir. 1999); Tenenbaum v. Williams, 193 F.3d 581, 606 (2d Cir. 1999); Roe v. Tex. Dep't of Protective & Regul. Servs., 299 F.3d 395, 407–08 (5th Cir. 2002).

69. *See infra* Part III.

70. *See Darryl H.*, 801 F.2d at 908 (explaining that no other circuit has examined how the Fourth Amendment applies to child abuse investigations).

71. *Id.* at 897, 904.

balancing test as used by the Supreme Court in *T.L.O.*[72] In *Darryl H.*, the court balanced the child's right to privacy against the state's legitimate interest to protect children against child abuse and found that the special needs doctrine protected a visual inspection of a child, thereby eradicating the need for either a warrant or probable cause.[73] Moreover, the fact that the caseworker's primary concern was the child's well-being, rather than the collection of potential evidence against a child abuser, supplied further support for the use of the special needs doctrine.[74]

The only other circuit to favorably view the special needs doctrine as it applies to investigations of child abuse is the Fourth Circuit. In *Wildauer v. Frederick County*, the Fourth Circuit found that a caseworker could go to a child's home and conduct a medical examination without a warrant.[75] Once again, the circuit balanced the interests and found that the search of a home and the medical examination did not violate the plaintiff's Fourth Amendment right.[76] In this case, although the court could have decided the case based on special needs, the court ultimately found there was no Fourth Amendment violation because the foster mother consented to the search of the home and never objected to the medical examinations.[77] Therefore, even though the court discussed and used principles associated with the special needs doctrine, such as balancing, the court ruled in favor of the caseworker, basing its decision on the foster mother's consent.[78]

2. Circuits That Do Not Apply the Doctrine

The Third Circuit was the first circuit to prohibit the use of the special needs doctrine in investigations of child abuse.[79] In *Good v. Dauphin County Social Services for Children and Youth*, the Third Circuit held that a caseworker could not go to a child's home and inspect

72. *Id.* at 901 ("[W]e must follow the methodology established by the Supreme Court of 'balancing the need to search against the invasion which the search entails.'" (quoting New Jersey v. T.L.O., 469 U.S. 325, 337 (1985)).

73. *Id.* at 901–02.

74. *Id.* at 902 ("Of prime importance [to caseworkers] is the safety of the child, and the stabilization of the home environment.").

75. Wildauer v. Frederick Cnty., 993 F.2d 369, 372–73 (4th Cir. 1993).

76. *Id.* ("[W]e must balance the government's need to search with the invasion endured by the plaintiff. . . . [T]he state's interest in examining the neglected children outweighed any attenuated privacy interest of Wildauer . . . .").

77. *See id.* at 371.

78. *See id.* at 372–73; Adam Pie, *The Monster Under the Bed: The Imaginary Circuit Split and the Nightmares Created in the Special Needs Doctrine's Application to Child Abuse*, 65 VAND. L. REV. 563, 585 (2012).

79. *See* Pie, *supra* note 78, at 587.

a nude child without a warrant.[80] A prime consideration in the court's decision was that the search occurred at the individual's home.[81] Thus, in making its determination, the court completely rejected the special needs doctrine and instead discussed exigency.[82] Finding that there was no emergency situation for which the child was "in imminent danger of serious bodily injury and that intrusions were reasonably necessary to avert that injury," the court found that a reasonable juror could conclude that the caseworker violated the child's Fourth Amendment rights.[83]

The Ninth Circuit was the next circuit to reject the special needs doctrine as it applied to investigations of child abuse.[84] Similar to the decision in *Good,* the Ninth Circuit, in *Calabretta v. Floyd*, determined that a caseworker could not go to child's home and inspect the nude child without a warrant.[85] In fact, the court relied heavily on the decision in *Good* and agreed with *Good*'s focus on the violation in the home, finding that the special needs doctrine could not override the heavy constitutional protections afforded to the home.[86] The court explicitly noted that although the government has an interest in protecting children from abuse, it also has an interest in protecting parent's and children's privacy rights, and allowing caseworkers to conduct warrantless searches in the home would go against that interest.[87]

The Second Circuit also found that the special needs doctrine does not apply to an investigation of child abuse.[88] In *Tenenbaum v. Williams*, the Second Circuit held that a caseworker could not remove a child from school and send that child to the emergency room for a medical

80. Good v. Dauphin Cnty. Soc. Servs. for Child. & Youth, 891 F.2d 1087, 1089–90, 1095 (3d Cir. 1989).

81. *See id.* at 1092–93, 1096 n.6 ("[T]he propriety of the strip search cannot be isolated from the context in which it took place.").

82. *Id.* at 1094 ("The Fourth Amendment caselaw has been developed in a myriad of situations involving very serious threats to individuals and society, and we find no suggestion there that the governing principles should vary depending on the court's assessment of the gravity of the societal risk involved. We find no indication that the principles developed in the emergency situation cases we have heretofore discussed will be ill suited for addressing cases like the one before us.").

83. *Id.* at 1095 ("On Ms. Good's version of the facts a trier of fact could properly conclude that the information available to Hooper and Sweigart could not have led a reasonable law enforcement officer to conclude that Jochebed was in immediate and grave peril when they approached the Good's residence.").

84. *See* Pie, *supra* note 78, at 588.

85. Calabretta v. Floyd, 189 F.3d 808, 810, 817, 820 (9th Cir. 1999).

86. *Id.* at 820 ("This case is like *Good* . . . . The reasonable expectation of privacy of individuals in their homes includes the interests of both parents and children in not having government officials coerce entry in violation of the Fourth Amendment and humiliate the parents in front of the children.").

87. *Id.*

88. *See* Tenenbaum v. Williams, 193 F.3d 581, 587–88 (2d Cir. 1999).

examination without a warrant.[89] Importantly, the court refused to categorically decide whether the doctrine applied in the context of child removal, but rather just determined the applicability of the doctrine as it related to the specific facts of the case.[90] Overall, the court was concerned about giving caseworkers free reign to conduct their investigations in any manner, for fear of them eventually doing more harm than good.[91] Therefore, to properly restrain caseworkers from completely infringing on people's constitutional rights, the court found it necessary to require a court order, or some other exception such as parental consent or an emergency situation, where a caseworker wants to remove a child and send them to the hospital for medical examination.[92]

Finally, the Fifth Circuit was the last circuit to determine that the special needs doctrine does not apply to investigations of child abuse.[93] In *Roe v. Texas Department of Protective and Regulatory Services*, the court found that a caseworker could not go to a child's home and conduct a visual body cavity search without a warrant.[94] Similar to the Third and the Ninth Circuits in *Good* and *Calabretta*, the court in *Roe* was once again concerned about the sanctity of the home and the strong right to privacy the home is afforded.[95] Notably, the Fifth Circuit was the first circuit to consider Supreme Court precedent as it relates to the special needs doctrine in general.[96] Relying on the Supreme Court's decisions in *O'Connor* and *Ferguson*, the Fifth Circuit not only concluded that "[t]he home search cases underscore the strength of [the plaintiff's] privacy interest" but also that "[t]he Court only rarely has permitted 'special needs' searches in the face of a person's strong subjective privacy interests."[97] Moreover, the court noted that the caseworker "ultimately fail[ed] to identify a 'special need' separate from the purposes of general

89. *Id.*

90. *Id.* at 604 ("[W]e refrain from deciding categorically . . . that the removal of a child of whom abuse is suspected is not a 'special needs' situation. There may be circumstances in which the law of warrant and probable cause established in the criminal setting does not work effectively in the child removal or child examination context. This is not such a case.").

91. *Id.* at 595 ("[I]f officers of the State come to believe that they can never be questioned in a court of law for the manner in which they remove a child from her ordinary care, custody and management, it is inevitable that they will eventually inflict harm on the parents, the State, and the child.") (emphasis omitted).

92. *Id.*

93. *See* Pie, *supra* note 78, at 591.

94. Roe v. Tex. Dep't of Protective & Regul. Servs., 299 F.3d 395, 398, 403 (5th Cir. 2002).

95. *See id.* at 405 ([C]itizens have an especially strong expectation of privacy in their homes.").

96. *Id.* at 406 ("None of the previous courts of appeals to address these issues had the benefit of *Ferguson* . . . .").

97. *Id.*

law enforcement."[98] Thus, the court found that in order to conduct an in-home visual body cavity search, a caseworker needed probable cause and a court order, absent parental consent or an exigent circumstance.[99]

D. Qualified Immunity

Beyond the special needs doctrine, caseworkers can also find solace in the defense of qualified immunity, which finds its basis in the Eleventh Amendment.[100] Under qualified immunity, government officials are immune from suits for damages unless the plaintiff can show "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct."[101] The Supreme Court has articulated that, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."[102] Essentially, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[103]

Importantly, under the second prong of qualified immunity, even if a state official violates a plaintiff's constitutional rights, such as his or her Fourth Amendment right, the official is still protected if the law is unclear.[104] The second prong of qualified immunity is relevant to the discussion of investigations of child abuse because given the conflicting

98. *Id.*

99. *Id.* at 407–08.

100. The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

101. Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

102. Anderson v. Creighton, 483 U.S. 635, 640 (1987) ("[I]n the light of pre-existing law the unlawfulness must be apparent.").

103. Malley v. Briggs, 475 U.S. 335, 341 (1986).

104. *See* Wilson v. Layne, 526 U.S. 603, 615 (1999) (holding that since the state of the law was unclear regarding whether bringing the media to a lawful home search violated the plaintiff's Fourth Amendment rights, the police officer was entitled to qualified immunity); *see also* Amanda K. Eaton, *Optical Illusions: The Hazy Contours of the Clearly Established Law and the Effects of* Hope v. Pelzer *on the Qualified Immunity Doctrine*, 38 GA. L. REV. 661, 664 (2004) ("Because the 'clearly established' requirement is intended to provide officials with fair notice of prohibited conduct, qualified immunity protects officers that truly and reasonably believed that their actions were proper under the law. In terms of balancing the conflicting policy considerations, it makes sense that when a government official should know that the law proscribes his behavior, the interests in vindicating those constitutional rights, compensating the injured plaintiff, and deterring similar acts of misconduct carry great weight. However, if an official could not have reasonably known that his actions were illegal, then the balance should tip in favor of avoiding over-deterrence and lengthy trials.").

court decisions, some circuits have held that even though a caseworker has violated the plaintiff's Fourth Amendment right, he or she is nonetheless immune from suit under the defense.[105] However, this does not permanently solve the problem, since courts could easily clarify the law to establish that the special needs doctrine does not apply, ultimately removing the defense for caseworkers.[106] Therefore, although the defense of qualified immunity can serve as a powerful tool for caseworkers to continue proactive investigations of child abuse, it can only help them if case law is on their side.

III. THE TENTH CIRCUIT

The Tenth Circuit's decision in *Doe v. Woodard*[107] is the most recent case to address the applicability of the special needs doctrine as it relates to investigations of child abuse. In *Woodard*, the Tenth Circuit considered whether a DHS worker could remove a child's clothes and photograph the naked child, all without a warrant, in an attempt to investigate a complaint made by the child's school.[108] Although the Tenth Circuit ultimately sided with the DHS worker and found that the worker could remove the child's clothes and photograph the naked child, the Tenth Circuit came to its conclusion in a rather unique way.[109] As a result, even though the Tenth Circuit's decision helps DHS workers by allowing them to proactively investigate child abuse, the way the court structured its decision will only serve to expand the ever-growing

105. *See* Tenenbaum v. Williams, 193 F.3d 581, 596 (2d Cir. 1999) (finding that the law was not "clearly established" because the court just ruled on whether it was constitutional for a state official to remove a child where there is time to obtain a court order and thus the caseworker was entitled to qualified immunity); Roe v. Tex. Dep't of Protective & Regul. Servs., 299 F.3d 395, 403, 411 (5th Cir. 2002) (holding that at the time of the search, the law was not "clearly established" and therefore the caseworker was entitled to qualified immunity).

106. *See Tenenbaum*, 193 F.3d at 596 ("Because we now hold that it is unconstitutional for state officials to effect a child's removal on an 'emergency' basis where there is reasonable time safely to obtain judicial authorization consistent with the child's safety, caseworkers can no longer claim, as did the defendants here, that they are immune from liability for such actions because the law is not 'clearly established.'").

107. Doe v. Woodard, 912 F.3d 1278, 1299 (10th Cir. 2019).

108. For a more detailed description of the facts leading up to the case, see *supra* Part I.

109. *See Woodard*, 912 F.3d at 1299 ("We affirm the district court's conclusion that the Defendants, including supervisors, were entitled to qualified immunity and that the Fourth Amendment claims should be dismissed."). In essence, the Tenth Circuit short circuits its special needs analysis and hangs its decision solely on qualified immunity. *See id.* at 1292–93.

confusion that surrounds the applicability of the special needs doctrine as it relates to investigating child abuse.[110]

A. The Tenth Circuit's Prior Approach

To fully understand why the Tenth Circuit's decision in *Woodard* is unique, one must first examine the Tenth Circuit's prior decisions as it relates to the special needs doctrine. The Tenth Circuit first encountered the special needs doctrine in *Franz v. Lytle*, where the court found that a police officer could not go to the child's neighbor's house where the child was playing, take photos of the naked child, and then later return to the child's home to again examine the child and escort the child to the doctor's for further investigation absent a warrant or parental consent.[111] Like most courts, the court in *Franz* discussed in detail the applicability of the special needs doctrine.[112] The court even evaluated the decisions in *Darryl H.*[113] and *Good.*[114] In *Franz*, the key distinction that ultimately guided the court's decision was the fact that the government agent in question was a police officer and not a social worker.[115] The court indicated that for the police officer, the focus was on the "potential criminal culpability" of the child's parents, not on the welfare of the child; thus, the officer could not reap the benefit of the special needs doctrine.[116] Further, because the agent was a police officer, he was also denied the benefit of qualified immunity because there was a clear Fourth

110. *See* Pie, *supra* note 78, at 566 ("Through a series of cases involving a variety of investigatory techniques, this complicated web of opinions from the federal circuits creates more questions than answers in the realm of Fourth Amendment jurisprudence.").

111. Franz v. Lytle, 997 F.2d 784, 785 (10th Cir. 1993).

112. *Id.* at 788 ("[O]ur cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." (alteration in original) (emphasis omitted) (quoting Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 665–66 (1989))).

113. *Id.* at 789–90 ("In the Seventh Circuit's view, . . . caseworkers [had an] 'extraordinarily weighty' interest in the protection of children by focusing primarily on 'the safety of the child, and the stabilization of the home environment.'" (quoting Darryl H. v. Coler, 801 F.2d 893, 902 (7th Cir. 1986))).

114. *Id.* at 792 ("In denying qualified immunity, the Third Circuit rejected defendants' equating the investigation of a possible victim of child abuse with an exigent circumstance absent evidence of 'reason to believe that life or limb is in immediate jeopardy and that the intrusion is reasonably necessary to alleviate the threat.'" (quoting Good v. Dauphin Cnty. Soc. Servs. for Child. & Youth, 891 F.2d 1087, 1094 (3d Cir. 1989))).

115. *Id.* at 791.

116. *Id.* ("This distinction of focus justifies a more liberal view of the amount of probable cause that would support an administrative search.").

Amendment violation and "no reasonable officer would consider the search . . . lawful."[117]

The Tenth Circuit next considered the special needs doctrine in *Roska v. Peterson*, where the question actually revolved around the conduct of a caseworker.[118] The court in *Roska* determined that a caseworker could not go to a child's home and remove the child from the home without a warrant or parental consent.[119] As in *Franz*, the court once again first determined the applicability of the special needs doctrine before considering whether the caseworker was nonetheless immune from suit.[120] The case essentially turned on the fact that the caseworker was removing the child from the home rather than simply investigating allegations of child abuse.[121] In balancing the interests of both the parents and the government, the court found that "parents retain a vital interest in preventing the irretrievable destruction of their family life."[122] Even though the caseworker violated the Fourth Amendment, however, the caseworker was still immune from suit because the law was not clearly established.[123]

Finally, the Tenth Circuit considered the special needs doctrine in *Dubbs v. Head Start Inc*.[124] In *Dubbs*, the court found that a school could not conduct medical examinations to comply with federal regulations absent a warrant or parental consent.[125] The court in *Dubbs* dealt with the special needs doctrine in the same manner as the Supreme Court did in *T.L.O.* by conducting a balancing test.[126] The court further articulated that even if the balance were in the school's favor, the primary purpose

117. *Id.* at 792.

118. Roska *ex rel.* Roska v. Peterson, 328 F.3d 1230, 1238 (10th Cir. 2003).

119. *Id.* at 1242.

120. The court first found that the special needs doctrine did not apply. *Id.* ("We find no special need that renders the warrant requirement impracticable when social workers enter a home to remove a child, absent exigent circumstances."). The court then determined that even though there was a clear constitutional violation, the caseworker was still protected under qualified immunity because the law at the time was not clearly established. *Id.* at 1251.

121. *Id.* at 1242 ("Simply put, unless the child is in imminent danger, there is no reason that it is impracticable to obtain a warrant before social workers remove a child from the home.").

122. *Id.* (quoting Santosky v. Kramer, 455 U.S. 745, 753 (1982)).

123. *Id.* at 1251 ("[W]e conclude that defendants' warrantless entry and seizure did not violate clearly established law under the Fourth Amendment as it stood on May 28, 1999; thus, defendants are entitled to qualified immunity on plaintiffs' claim alleging warrantless entry and seizure.").

124. Dubbs v. Head Start, Inc., 336 F.3d 1194 (10th Cir. 2003).

125. *Id.* at 1214–15.

126. *Id.* The court makes note of the fact that "this case involves lack of consent rather than compelled consent" and suggests that had it been the other way around, "this case would more closely resemble a classic 'special needs' case." *Id.* at 1214.

of the medical exam was to comply with federal regulation rather than for some other need beyond mere law enforcement, making traditional means of adhering to the Fourth Amendment impracticable.[127] Therefore, the court found that the special needs doctrine did not apply, and the school violated the students' Fourth Amendment right by conducting medical examinations without a warrant or parental consent.[128] After finding that the special needs doctrine did not apply, the Tenth Circuit then considered the defense of immunity, finding that it did not pertain to the case.[129]

In short, prior to *Woodard*, while often finding that the special needs doctrine did not apply, the Tenth Circuit nevertheless specifically considered the applicability of the doctrine before turning to qualified immunity.[130] In earlier decisions, the court specifically laid out its reasoning for rejecting the doctrine. In doing so, the Tenth Circuit made sure that the law surrounding the special needs doctrine in other contexts remained clear. However, this was not the case once the Tenth Circuit reached *Woodard.*

B. The Tenth Circuit's Approach in Woodard

Although the Tenth Circuit had previously addressed the special needs doctrine, the court, in *Woodard,* makes it clear that whether the special needs doctrine applies to investigations of child abuse is a case of first impression.[131] Given that the Tenth Circuit has previously declared whether the special needs doctrines applies in other contexts,[132] it seems amiss that in *Woodard* the court neither analyzed nor concluded whether the special needs doctrine applied to investigations of child abuse. *Woodard* was an opportunity for the Tenth Circuit to provide protection to both children and caseworkers, but instead the court fell short.

127. *Id.* at 1214.

128. *Id.* at 1214–15 ("While it is certainly true that a properly conducted physical examination is 'an effective means of identifying physical and developmental impediments in children,' this supplies no justification for proceeding without parental notice and consent. The premise of the 'special needs' doctrine is that these are cases in which compliance with ordinary Fourth Amendment requirements would be 'impracticable.' There is no reason, however, to think that parental notice and consent is 'impracticable' in this context." (citations omitted)).

129. *Id.* at 1215–17.

130. *See id.* at 1214–15; Roska *ex rel* Roska v. Peterson, 328 F.3d 1230, 1242 (10th Cir. 2003); Franz v. Lytle, 997 F.2d 784, 791–92 (10th Cir. 1993).

131. Doe v. Woodard, 912 F.3d 1278, 1292 (10th Cir. 2019) ("We . . . have not established whether the special needs doctrine permits a social worker to search a child . . . to investigate a report of suspected abuse.").

132. *See Lytle*, 997 F.2d at 785; *Roska*, 328 F.3d at 1242; *Dubbs*, 336 F.3d at 1214.

In *Woodard,* the court completely avoids deciding the issue based on the special needs doctrine and instead focuses the bulk of its analysis on qualified immunity.[133] Even still, the court focuses only on the second prong of the qualified immunity test, which simply examines whether there was a clearly established law that the defendants violated.[134] In omitting any discussion of whether the special needs doctrine applies and failing to address the first prong of the qualified immunity test, which examines whether a constitutional violation occurs,[135] the Tenth Circuit bypasses any and all opportunity to clarify the law regarding acceptable investigation practices conducted by caseworkers who are investigating child abuse. Rather, by focusing on the second prong of qualified immunity, the court recognizes that the law is unclear regarding investigations of child abuse, and then simply uses that uncertainty to dismiss the case.[136]

While the Tenth Circuit noted its prior special needs cases in *Woodard*, it did so only to indicate that those cases prove there is no clearly established law; the court did not rely on those cases to help determine whether the special needs doctrine should apply.[137] The court effectively distinguished *Woodard* from *Franz,*[138] *Roska,*[139] and *Dubbs*,[140] and even effectively distinguished *Woodard* from other circuit cases.[141]

133. *See Woodard*, 912 F.3d at 1291–92 (reviewing special needs caselaw before proceeding directly to qualified immunity analysis).

134. *Id.* at 1293 ("We limit our qualified immunity analysis, as the district court did, to whether the Does can satisfy the second prong of qualified immunity—that is, whether they can show that any Fourth Amendment violation was based on clearly established law.").

135. *See supra* Part II.D.

136. *Woodard*, 912 F.3d at 1299.

137. *Id.* at 1294 ("We disagree that these cases would have put a reasonable social worker on notice that her conduct violated the Fourth Amendment.").

138. *Id.* ("*Franz* involved a police officer who searched a young child upon suspicion of abuse, and held that the officer needed a warrant, consent, or exigent circumstances to do so. In other words, the special needs doctrine did not apply. But a police search is not a social worker search, and *Franz* does not address the latter.").

139. *Id.* ("In *Roska*, we said that a special need must 'make the warrant and probable-cause requirement impracticable.' It held that, barring exigent circumstances, no special need 'renders the warrant requirement impracticable when social workers enter a home to remove a child.' *Roska* does not bear upon social workers searching and photographing a child at school for suspected child abuse." (citations omitted) (quoting Roska *ex rel* Roska v. Peterson, 328 F.3d 1230, 1241, 1242 (10th Cir. 2003))).

140. *Id.* ("In *Dubbs*, the school indiscriminately tested the entire class and performed much more invasive examinations. The defendant school officials argued that the special need was for generalized health assessment to comply with federal regulations, not to search for child abuse. Accordingly, *Dubbs* did not address the issue presented here—whether Ms. Woodard's search of I.B. for child abuse satisfied the Fourth Amendment as a special needs search.").

141. *Id.* at 1295.

However, finding that *Woodard* is specifically unique and holding that the law is ambiguous, all in order to help provide a defense to a caseworker investigating child abuse, cannot be a sustainable solution to the growing problem of acceptable investigatory practices in the face of conflicting law. In effect, the Tenth Circuit's decision did nothing to further the applicability of the special needs doctrine as it relates to child abuse investigations. The decision does little to ensure that children are adequately protected or that caseworkers can proactively investigate child abuse. The Tenth Circuit's decision only serves to further muddy the water and perpetuate the ongoing confusion. Thus, the Supreme Court must take further steps.

IV. THE NEED FOR CLARITY

On one hand, failing to clarify the law as it relates to the applicability of the special needs doctrines ensures that caseworkers can hide behind the defense of qualified immunity as the caseworker did in *Woodard*.[142] On the other hand, without clarity, caseworkers are left in the dark as to which investigation practices are constitutionally acceptable and which are not.[143] Therefore, because of its role as *parens patriae*, the Supreme Court should find that the special needs doctrine applies to investigations of child abuse. By adopting a unified policy regarding the special needs doctrine in the context of child abuse investigations, the Court can ensure that caseworkers are fully informed as to acceptable investigatory practices and encourage proactive investigations, thereby safeguarding children and guarantying their well-being.

A. Background on Parens Patriae

To understand why the Supreme Court should find the special needs doctrine applies to investigations of child abuse, consider the general background on the doctrine of *parens patriae*. *Parens patriae* stems from the British Crown's obligation to protect any of its vulnerable subjects such as the mentally disabled, children, or the handicapped.[144] Courts in

142. *See id.* at 1299.

143. *See* Pie, *supra* note 78, at 566 ("In essence, CPS is flying blindly, hoping that the courts will find their policies satisfactory under the Fourth Amendment.").

144. Gregory Thomas, *Limitations on* Parens Patriae*: The State and the Parent/Child Relationship*, 16 J. CONTEMP. LEGAL ISSUES 51, 51–52 (2005) ("Government's *parens patriae* power—a species of paternalism—derives from the ancient prerogative of the British Crown to act as the guardian of persons such as children and the mentally disabled who were 'legally unable, on account of mental incapacity . . . to take proper care of themselves and their property.' By the 18th Century, the English chancery courts had claimed responsibility to serve as the 'general guardian of all infants, idiots, and lunatics' in various

the United States later adopted the doctrine during the 19th Century to uphold statutes relating to child-neglect and juvenile-delinquency as well as compulsory-education laws.[145] Because of the strong focus on ensuring children's well-being,[146] the doctrine plays an influential role in the family dynamic.[147] Although the courts have been reluctant to interfere in familial decisions regarding some aspects of education,[148] over time courts have asserted custodial authority in areas of custody determinations, child labor, and medical treatment.[149] These three areas

custody-dispute contexts." (first quoting Alfred L. Snapp & Son, Inc. v. P.R. *ex rel.* Baez, 458 U.S. 592, 600 (1982); and then quoting *Developments in the Law–the Constitution and the Family*, 93 HARV. L. REV. 1156, 1221–22 (1980)).

145. *Id.* at 52.

146. *See* Daniel L. Hatcher, *Purpose vs. Power:* Parens Patriae *and Agency Self-Interest*, 42 N.M. L. REV. 159, 164 (2012) (explaining that "[t]he *parens patriae* doctrine was quickly established as providing the foundational authority and duty of states to serve and protect the best interests of children.").

147. *See* Natalie Loder Clark, Parens Patriae *and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children's Welfare*, 6 MICH. J. GENDER & L. 381, 404 (2000) ("[T]he fate of the family . . . became a matter of public regulation. Judges and legislators emerged as custodians of the family, carving out a new legal status for children and married women." (second alteration in original) (quoting KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 167 (1989))).

148. *See* Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (finding that a state law, which prohibited teaching a foreign language to children before ninth grade was invalid because "[a]s the statute undertakes to interfere only with teaching which involves a modern language, leaving complete freedom as to other matters, there seems no adequate foundation for the suggestion that the purpose was to protect the child's health by limiting his mental activities[,]" and "[i]t is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child"); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (finding that a state law which forced children to attend public elementary school up until ninth grade was invalid because it "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control"). *But see* State v. Bailey, 61 N.E. 730, 732 (Ind. 1901) ("The welfare of the child and the best interests of society require that the State shall exert its sovereign authority to secure to the child the opportunity to acquire an education. Statutes making it compulsory upon the parent, guardian, or other person having the custody and control of children to send them to public or private schools for longer or shorter periods, during certain years of the life of such children, have not only been upheld as strictly within the constitutional power of the legislature, but have generally been regarded as necessary to carry out the express purposes of the constitution itself.").

149. *See, e.g.*, Schmehl v. Wegelin, 927 A.2d 183, 197 (Pa. 2007) (Baldwin, J., dissenting) ("The Commonwealth has the power, cloaked in the doctrine of *parens patriae*, to determine in divorce proceedings how, in the best interests of the child, custody should be allocated."); Strain v. Christians, 483 N.W.2d 783, 789 (S.D. 1992) (allowing the state to use its power under *parens patriae* to create child labor statutes regarding dangerous occupation because it "recognize[s] the legislature's goal . . . to protect children from employment in dangerous occupations where, because of their immaturity, they are likely inappreciative of risks and prone to carelessness."); Jehovah's Witnesses of Wash. v. King Cnty. Hosp., 278 F. Supp. 488, 508 (W.D. Wash. 1967) (granting the state's request, under *parens patriae*, to perform

demonstrate the court's ability and authority to step in and protect children, even at the expense of parental and constitutional rights, thereby providing the foundation for the Supreme Court to apply the special needs doctrine to investigations of child abuse.

1. *Parens Patriae* and Custody Determinations

In cases of child custody, the court is often tasked with determining which parent or guardian would better serve the child's best interest.[150] To aid courts in this inherently difficult task, there are some established "tests" upon which courts can rely. For example, the "best interests of the child" test uses a variety of factors to guide the court's decision.[151] The factors consider the characteristics of the child and the parents, the living arrangements for each parent, the child's desire, and any professional opinions.[152] The Uniform Marriage and Divorce Act also provides some factors to consider when determining custody.[153] Some of the factors are similar to those in the "best interest of the child" test, while others consider the child's interactions with other parties such as siblings, the changes to the child's routine, and the physical and mental health of both the child and the parents.[154] Lastly, some courts use the "primary caretaker" standard, which uses factors to determine which parent handles most of the parental responsibilities.[155]

a life-saving blood transfusion to a child over the objection of the child's parents who were Jehovah's Witnesses).

150. Clark, *supra* note 147, at 410 ("The courts decide between the disputing parents on the basis of the child's best interests . . . .").

151. Jo-Ellen Paradise, *The Disparity Between Men and Women in Custody Disputes: Is Joint Custody the Answer to Everyone's Problems?*, 72 ST. JOHN'S L. REV. 517, 531 (1998).

152. *Id.* ("Some of the elements courts examine to determine the best interests of the child include: '(1) the emotional, social, moral, material, and educational needs of the child; (2) the home environment that each parent offers; (3) the characteristics of each parent, including age, stability, and mental and physical health; (4) the child's preference; and (5) the expert's recommendations.'" (quoting Mary Kate Kearney, *The New Paradigm in Custody Law: Looking at Parents with a Loving Eye*, 28 ARIZ. STATE L. J. 543, 549 (1996))).

153. UNIF. MARRIAGE AND DIVORCE ACT § 402 (UNIF. L. COMM'N 1973).

154. *Id.* ("The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including: (1) the wishes of the child's parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest; (4) the child's adjustment to his home, school, and community; and (5) the mental and physical health of all individuals involved.").

155. *See* Kathryn L. Mercer, *A Content Analysis of Judicial Decision-Making–How Judges Use the Primary Caretaker Standard to Make a Custody Determination*, 5 WM. & MARY J. WOMEN & L. 1, 5 (1998) ("[T]o determine who is the primary caretaker, the court is to look at which parent provides the bulk of the nurturing duties. Ten duties are to be considered: (1) who prepares and plans meals; (2) who bathes, grooms and dresses the child;

In determining custody, the court often looks at both the needs of the child, as well as what each parent can provide for the child. In essence, courts are "involved in definitions of good parenting."[156] For instance, in addition to some of the established tests described above, the court might also examine the "moral fitness" of the parents, or the parent's ability to provide necessities to the child such as food and clothing.[157] Thus, despite parents having the ability to direct the upbringing of their children,[158] they must still adhere to some objective standard set by the courts.

In the context of custody, not only does the court judge parents on their parenting ability, but the court may also limit parental decision-making as a result of a custody order. This is primarily a concern in "move-away" cases, in which one custodial parent in a post-divorce couple wants to relocate with a child, making it difficult for the other parent to visit that child.[159] In these types of cases, the parent cannot simply relocate with the child, but rather has to petition the court for permission.[160] The court generally favors the existing custody arrangement rather than modification, and so the relocating parent has a difficult burden to satisfy.[161] The court will only permit relocation with the child if the relocation is "in the child's best interests and promote[s] the child's welfare."[162] In certain cases, the court will "prevent[] the child's removal from the state even by the lawful custodial parent."[163] Thus, by exercising its right under *parens patriae*, the court can effectively limit the parent's parental decisions.

(3) who purchases and cares for the child's clothes; (4) who arranges for and drives the child to medical care; (5) who arranges and transports the child to social activities; (6) who arranges for child care; (7) who puts the child to bed and who wakes the child in the morning; (8) who disciplines the child; (9) who educates the child in religion, culture, etc.; and (10) who teaches the child basic reading, writing and math skills.").

156. *See* Clark, *supra* note 147, at 410–11.

157. Daniel A. Krauss & Bruce D. Sales, *Legal Standards, Expertise, and Experts in the Resolution of Contested Child Custody Cases*, 6 PSYCH. PUB. POL'Y & L. 843, 848 (2000).

158. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925).

159. *See* Kimberly K. Holtz, *Move-Away Custody Disputes: The Implications of Case-by-Case Analysis & the Need for Legislation*, 35 SANTA CLARA L. REV. 319, 321 (1994).

160. *Id.* at 331 ("The parent that wishes to relocate must file an order to show cause for modification of the original custody decree to have the move incorporated into the custody agreement, or the nonmoving party must file an order to show cause that the proposed move constitutes a substantial change in circumstances.").

161. *See id.* at 330–31 ("Once a custody award has been finalized in a court order, the order will typically be upheld in the interest of stability and consistency.").

162. *Id.* at 335.

163. Clark, *supra* note 147, at 411–12.

2. *Parens Patriae* and Labor Laws

The court has long approved of labor laws regulating child labor.[164] For instance, the Fair Labor Standards Act ("FLSA") prohibits children from engaging in dangerous occupations and prohibits employers from using "oppressive child labor."[165] The FLSA also has general guidelines as to the hour and age requirements for children who work.[166] In light of these guidelines, a parent cannot force the child to engage in employment that would violate the FLSA, despite the parent's desires for the child to work. Thus, these governmental guidelines serve as a check on the parent's ability to make parental decisions.

Sometimes the court's regulation of child labor can even supersede First Amendment rights such as the free exercise of religion. This was the case in *Prince v. Massachusetts* where the Court affirmed a parent's conviction for violating state child labor laws when the parent allowed her child to hand out Jehovah's Witness literature on a public highway.[167] In appealing her conviction Mrs. Prince argued both "freedom of religion under the First Amendment" and "parental right as secured by the due process clause of the [Fourteenth] Amendment."[168] While the Court considered both of Mrs. Prince's constitutional arguments, the Court ultimately found that the government had a stronger position to prohibit

164. *See* United States v. Darby, 312 U.S. 100, 115–16, 125–26 (1941) (holding the Fair Labor Standards Act ("FLSA"), which, among other things, sets federal standards for child labor, as constitutional under Congress's commerce power).

165. *See* Jeremy S. Sosin, Note, *The Price of Killing a Child: Is the Fair Labor Standards Act Strong Enough to Protect Children in Today's Workplace?*, 31 VAL. U. L. REV. 1181, 1183–84 (1997) (quoting 29 U.S.C. § 203(l)); *see also* SARAH A. DONOVAN & JON O. SHIMABUKURO, CONG. RSCH. SERV., THE FAIR LABOR STANDARDS ACT (FLSA) CHILD LABOR PROVISIONS 5 (2016), https://fas.org/sgp/crs/misc/R44548.pdf ("The FLSA defines oppressive child labor, generally, as the employment of a child under the age of 16 years in any occupation and the employment of a child under the age of 18 in an occupation determined to be hazardous to children by the Secretary of Labor.").

166. *See* DONOVAN & SHIMABUKURO, *supra* note 165, at 5–15. In terms of age,

> [f]or non-exempt children, the minimum age for employment in non-agricultural occupations is 18 years for occupations determined by the Secretary of Labor to be hazardous to the health and well-being of children (i.e., "hazardous occupations"); 16 years for employment in non-hazardous occupations; and 14 years for a limited set of occupations, with restrictions on hours and work conditions, as determined by the Secretary of Labor.

Id. at 5. Hours for children aged 14 and 15 can be limited by the following requirements: "When school is in session, children may perform no more than 3 hours per day on a school day (including Friday), 8 hours on a non-school day, and 18 hours in one week." *Id.* at 7.

167. Prince v. Massachusetts, 321 U.S. 158, 159–60, 170–71 (1944).

168. *Id.* at 164.

a child from handing out literature on a public highway because of the state's primary goal of protecting the welfare of the child.[169] In balancing Mrs. Prince's constitutional rights and the state's legitimate interest in promoting children's well-being, the Court noted that the state may permissibly limit children's activity as it relates to employment to a larger extent than it could for similar activity conducted by an adult.[170] Given the "emotional excitement and psychological or physical injury" that could occur as a result of the propagandizing, the Court found that the state could legitimately limit such activities to protect children.[171] Therefore, despite Mrs. Prince's parental and constitutional rights, the Supreme Court, using its *parens patriae* authority, found that protecting children in employment was of paramount concern.[172]

3. *Parens Patriae* and Medical Treatment

The court's opinion on medical treatment for children can also trump both parental and constitutional rights. For example, in *Jacobson v. Massachusetts*, the Court upheld a state compulsory small pox vaccination program despite petitioner's objection.[173] The Court found that such a vaccination program, which applied to all residents of the state, was valid because of the legislature's inherent "function to care for the public health and the public safety when endangered by epidemics of disease."[174] The Court noted that many states have statutes that prevent children from attending public school if they are not vaccinated,[175] and such statutes are valid to protect other children attending the school.[176] Thus, the state can intrude on parental decisions in terms of medical treatment to protect the child's welfare.

Further, as seen with child labor laws, the court can also limit a parent's free exercise of religion as it relates to medical treatment if a child's health is at risk. For example, in *In re Clark*, a state court upheld

169. *Id.*

170. *Id.* at 168–69 ("The state's authority over children's activities is broader than over like actions of adults. . . . [L]egislation appropriately designed to reach such evils [of child employment] is within the state's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action.").

171. *Id.* at 170.

172. *Id.* at 168.

173. Jacobson v. Massachusetts, 197 U.S. 11, 12, 39 (1905).

174. *Id.* at 37.

175. *Id.* at 31–32 ("[T]he principle of vaccination as a means to prevent the spread of smallpox has been enforced in many States by statutes making the vaccination of children a condition of their right to enter or remain in public schools.").

176. *Id.* at 34–35; *see also* Viemeister v. White, 72 N.E. 97, 97–98 (N.Y. 1904) (finding that a state regulation that required that all children attending public school be vaccinated and that prohibited unvaccinated children from attending public school was valid).

an emergency order by a hospital seeking to perform a blood transfusion despite the parents', who were Jehovah's Witnesses, objection to such medical treatment.[177] Although the parents based their refusal on their First Amendment right to the free exercise of religion, the Ohio court rejected that argument and claimed that the First Amendment right did not apply when a child's health and well-being were at risk.[178] The court further articulated that the state has a duty to protect children who are at risk of harm as a result of a parent's religious belief.[179] The court noted that when there are conflicts between a parent's religion and the child's health and safety, the child's interests are paramount.[180]

This proposition was also supported in the Tennessee case *In re Hamilton*.[181] In that case, the court found that a child was correctly declared "dependent and neglected" when her father refused to allow necessary medical treatment because of his religious beliefs.[182] The court reasoned that under the doctrine of *parens patriae*, the state had a duty to provide care for the child, over the parents' religious objection.[183] Similar to *In re Clark*, the court in *In re Hamilton* found that religious rights had to give way to the child's well-being.[184] Thus, on multiple occasions, the courts, under their *parens patriae* authority, limited a constitutional right in order to ensure the safety of a child.

B. Why the Supreme Court Should Apply the Special Needs Doctrine to Investigations of Child Abuse

If a court can step in and determine a child's best interest in terms of custody, child labor, and medical treatment over the objections of a parent based on parental and constitutional rights, then a court should be able have the same authority when it comes to investigations of child abuse. In cases regarding a court's authority under *parens patriae,* the courts have been consistently concerned about the well-being of the child,

177. *In re* Clark, 185 N.E.2d 128, 129–30, 132 (Ohio C.P. 1962).

178. *See id.* at 132.

179. *Id.* ("When a religious doctrine espoused by the parents threatens to defeat or curtail such a right of their child, the State's duty to step in and preserve the child's right is immediately operative.").

180. *Id.* ("To put it another way, when a child's right to live and his parents' religious belief collide, the former is paramount, and the religious doctrine must give way.").

181. *In re* Hamilton, 657 S.W.2d 425, 429 (Tenn. Ct. App. 1983).

182. *Id.* at 426–27.

183. *Id.* at 429 ("[T]he state as *parens patriae* has a special duty to protect minors and, if necessary, make vital decisions as to whether to submit a minor to necessary treatment where the condition is life threatening, as wrenching and distasteful as such actions may be.").

184. *Id.* ("A state may reasonably limit the free exercise of religion in such cases.").

and the well-being of a child could not be more paramount than in cases of child abuse.[185] Encouraging caseworkers to proactively investigate without fear of Fourth Amendment violations is a strong step towards combatting child abuse and providing for children's safety.[186] Therefore, to satisfy its role as *parens patriae* and protect children, the Supreme Court should apply the special needs doctrine to investigations of child abuse.

By uniformly holding that the special needs doctrine applies to investigations of child abuse, the Supreme Court can ensure that all children in the United States have the benefit of proactive child abuse investigations. It is immoral that in 2018 the 62,263 abused children in Seventh Circuit states had the aid of the special needs doctrine while the 63,795 children in California (the only state covered by the Ninth Circuit) did not.[187] Why should we as a nation allow that kind of inequity? The Supreme Court, guardian for all the children of the country, must put an end to this contradictory body of law, and create a uniform policy, a policy that would protect all abused children regardless of the circuit in which they live.[188] Only then can caseworkers effectively identify and quickly remedy cases of child abuse.

Further, the Court can fulfill its obligations under *parens patriae* while also satisfying the elements of the special needs doctrine. The special needs doctrine applies when there is "an exercise of governmental authority distinct from that of mere law enforcement," where there is a "lack of individualized suspicion of wrongdoing," and where there is "an interest in preventing future harm."[189] First, a caseworker's primary objective in the investigation is to ensure that the child in question is safe, and as a result, the work has little to do with gathering evidence against and/or punishing the perpetrator.[190] Second, in many

185. Not only are there immediate concerns associated with child abuse, but there are also long-term effects linked to child abuse. CHILD WELFARE INFO. GATEWAY, LONG-TERM CONSEQUENCES OF CHILD ABUSE AND NEGLECT 1 (Apr. 2019), https://www.childwelfare.gov/pubPDFs/long_term_consequences.pdf ("Childhood maltreatment can be linked to later physical, psychological, and behavioral consequences as well as costs to society as a whole.").

186. *See* Jillian Grossman, Note, *The Fourth Amendment: Relaxing the Rule in Child Abuse Investigations*, 27 FORDHAM URB. L. J. 1303, 1335 ("[W]hile employing [a] stricter standard may avoid interventions based on unsubstantiated reports of child abuse, it may also produce an increased likelihood that actual cases of child abuse remain undetected.").

187. *See* CHILD MALTREATMENT 2018, *supra* note 1, at 34.

188. Applying the special needs doctrine to investigations of child abuse in 2018 would have ensured that all 678,000 victims would have receive the benefits, rather than just those whose circuits applied the doctrine. *See id.* at x.

189. Dubbs v. Head Start, Inc., 336 F.3d 1194, 1213–14 (10th Cir. 2003).

190. *See* DEPANFILIS, *supra* note 14, at 10 ("The focus of CPS agencies is to determine if a child is safe and whether there is risk of future maltreatment.").

investigations, either the perpetrator is unknown or at the very least, the complaining parent is not suspected of causing the abuse and so investigations often lack individualized suspicion.[191] Finally, the entire purpose of a caseworker's investigation is to assess the situation of the child and to take necessary remedial steps to ensure that the child will be safe moving forward.[192] Therefore, the Court should rightly find that a caseworker's investigations of child abuse be classified as a "special need."

Additionally, as with any case involving constitutional rights, even when a court exercises its authority under *parens patriae*, it must be justified in limiting such fundamental rights.[193] Although applying the special needs doctrine to investigations of child abuse curtails some Fourth Amendment rights, it validly does so. The Court has previously claimed that Fourth Amendment rights are not absolute.[194] In fact, "the touchstone of the Fourth Amendment is reasonableness."[195] As a result of this reliance on reasonableness, the Fourth Amendment can give way to certain reasonable exceptions.[196]

The court determines reasonableness in the context of special needs by balancing "the need to search" and "the invasion which the search entails."[197] In other words, the court must balance "the government's need for effective methods to deal with breaches of public order" against "the individual's legitimate expectations of privacy and personal security."[198] If the government's need prevails over the individual's

191. For example, in mandatory reporting at schools, an official must report believed child abuse to caseworkers, without necessarily knowing who the perpetrator is. *See* CHILD WELFARE INFO. GATEWAY, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 3 (2019) ("Typically, a report must be made when the reporter, in his or her official capacity, suspects or has reason to believe that a child has been abused or neglected."); *see also* Doe v. Woodard, 912 F.3d 1278, 1286 (10th Cir. 2019) ("DHS did not suspect [the parent] of abuse.").

192. DEPANFILIS, *supra* note 14, at 20 ("CPS conducts an initial assessment/ investigation to determine whether . . . [t]here is a risk of future maltreatment and the level of that risk.").

193. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944); Jacobson v. Massachusetts, 197 U.S. 11, 25–27 (1905).

194. *See, e.g.*, United States v. U.S. Dist. Ct. for E. Dist. of Mich., 407 U.S. 297, 314 (1972) ("[T]he Fourth Amendment is not absolute in its terms . . . ."); Fisher v. United States, 425 U.S. 391, 417 (1976) (Brennan, J., concurring) ("[T]he protection of privacy afforded by the [Fourth Amendment] privilege is not absolute.").

195. United States v. Knights, 534 U.S. 112, 118 (2001).

196. Kentucky v. King, 563 U.S. 452, 459 (2011).

197. New Jersey v. T.L.O., 469 U.S. 325, 337 (1985) (quoting Camara v. Mun. Ct. of S.F., 387 U.S. 523, 536–37 (1967)); *see also supra* Part II.B.

198. *T.L.O.*, 469 U.S. at 337.

constitutional rights, then the court will find that the search was reasonable and that no violation occurred.[199]

In the context of child abuse investigations, a balancing of the two interests weighs in favor of the government's need to search. The government's need is evident because without the caseworker's investigation, hundreds of thousands of children would be subject to abuse without any hope of aid.[200] Potential implications of Fourth Amendment rights pale when compared to the government's need to protect children and ensure their well-being. For instance, with respect to the parent's Fourth Amendment rights, courts have ignored intrusions upon Fourth Amendment rights when they are de minimis.[201] Further, the Court should use the logic articulated in *In re Clark,* which claimed that the "right of [a parent] ends where somebody else's right begins."[202] That is, parents cannot exercise Fourth Amendment rights on behalf of their children. Given that parents cannot exercise Fourth Amendment rights on behalf of their children and that the focus of the caseworker's investigation is primarily on the child, a parent's Fourth Amendment rights in this situation should be considered de minimis. Moreover, in terms of a child's own Fourth Amendment rights, the Court has previously noted its ability to limit children's constitutional rights in certain situations.[203] Therefore, just as the Supreme Court found that the First Amendment right to free exercise of religion had to give way to the Court's obligation to protect the health and safety of a child in the context of child labor and medical treatment,[204] the Court should find that Fourth Amendment rights should give way to caseworkers searches in child abuse investigations because such searches are reasonable.

In sum, by holding that the special needs doctrine applies to investigations of child abuse, the Supreme Court can help caseworkers provide invaluable aid and assistance to abused children. Given the current obstacles caseworkers face on a daily basis,[205] applying the

199. *See id.* at 347.

200. *See supra* Part I.

201. *See, e.g.*, Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977) (finding that requiring a driver of a pulled over car to get out is a de minimis intrusion).

202. *In re* Clark, 185 N.E.2d 128, 132 (Ohio C.P. 1962).

203. *See e.g.*, Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986) (limiting a child's free speech rights under the First Amendment).

204. *See supra* Part IV.A.ii, IV.A.iii.

205. *See* Di Galpin, et al., *Social Workers Are Under Huge Pressure. They Can't Rely on Their Resilience Alone*, GUARDIAN (Mar. 20 2018, 7:28 AM), https://www.theguardian.com/social-care-network/social-life-blog/2018/mar/20/social-workers-resilience-coping-strategies-blame-austerity ("Given the continuing problems of recruitment and retention, it is clear something is required to stem the flow of workers leaving the profession, to slow down the speed of burnout . . . and to reduce the reported increase in numbers taking long-

special needs doctrine to investigations of child abuse would be a step in the right direction by providing caseworkers with a powerful tool to detect and remedy child abuse. Therefore, just as the Court has held that the special needs doctrine applies to school searches[206] and has found, under the doctrine of *parens patriae*, that constitutional rights must take a back seat to protect children's well-being,[207] the Supreme Court should apply the special needs doctrine to investigations of child abuse in order to best serve as protectors of our nation's children.

V. CONCLUSION

Child abuse is an ongoing problem throughout the United States. To combat this serious issue, caseworkers need uniform support and guidance from the courts as to acceptable investigatory methods. The Supreme Court has an obligation to serve as a beacon of hope to abused children and provide protection to them under the doctrine of *parens patriae*. The Supreme Court must fulfill this obligation by finding that the special needs doctrine applies to investigations of child abuse. Through this clarifying and unifying step, the Court can begin to better safeguard our most vulnerable.

term sick leave. . . . [A]n over bureaucratised system, cutbacks and the seemingly consistent condemnation by the media, government and wider society, has had a weakening effect on the profession.").

206. *See* New Jersey v. T.L.O., 469 U.S. 325, 327, 347–48 (1985).

207. *See* Prince v. Massachusetts, 321 U.S. 158, 159, 169 (1944).