I AM NOT LAW ENFORCEMENT! WHY THE SPECIAL NEEDS EXCEPTION TO THE FOURTH AMENDMENT SHOULD APPLY TO CASEWORKERS INVESTIGATING ALLEGATIONS OF CHILD ABUSE

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INTRODUCTION

John Doe, a twelve-year-old boy with Down syndrome,[1] was eating breakfast with his father one morning when he spontaneously uttered that "Mr. Hasak" (his paraprofessional aide from school) took out his "peeper" and "made him touch it."[2] John Doe's parents immediately reported the incident to the local police department. John's school administrators, in conjunction with law enforcement, arranged a sexual assault response team (SART) interview.[3] John repeated what he told his parents in the SART interview in the presence of a police detective.[4] The detective concluded John's account was credible and requested a warrant for the teacher's arrest.[5] The State Attorney's Office rejected the warrant application on the grounds that there was insufficient evidence.[6] Why was John's testimony not sufficient? What is the evidentiary threshold to obtain a warrant? And what if John Doe told his teachers first instead of his parents? Would the school administrators and law enforcement be able to conduct a SART

1 Down syndrome is a genetic disorder that occurs when an individual has a full or partial extra copy of chromosome twenty-one. *See What Is Down Syndrome?*, NAT'L DOWN SYNDROME SOC'Y, http://www.ndss.org/Down-Syndrome/What-Is-Down-Syndrome (last visited Jan. 4, 2016). This additional genetic material alters the individual's course of development. *Id.* Individuals with Down syndrome have varying degrees of cognitive delays, which can slow down physical and intellectual development. *Id.*

2 Doe *ex rel.* Doe v. Darien Bd. of Educ., 110 F. Supp. 3d 386, 396 (D. Conn. 2015).

3 *Id.* at 394. Responding to child abuse and sexual assault involves multiple professionals. Communities have developed sexual assault response teams (SARTs) that partner together to provide interagency, coordinated responses that make victims' needs a priority. *See* Office for Victims of Crime, *SART Toolkit: Resources for Sexual Assault Response Teams*, OFF. JUST. PROGRAMS, http://ovc.ncjrs.gov/sartkit/index.html (last visited Jan. 5. 2016). Typically, the SART team is composed of law enforcement officers, forensic medical examiners, and prosecutors. *Id.* The team helps victims by minimizing the traumatization through joint or coordinated interviews to reduce the number of times victims must tell their stories. *Id.*

4 *See Doe*, 110 F. Supp. 3d at 394.

5 *Id.*

6 *Id.*

interview without violating the warrant requirement of the Fourth Amendment?

Every year, more than three million reports of child abuse are made in the United States involving more than six million children.[7] Since 2008, the number of referrals to child protective services (CPS) has increased by over eight percent.[8] In 2014 alone, state agencies found an estimated 702,000 victims of child maltreatment.[9] On average, police officers, child-welfare caseworkers, and social workers remove more than 700 children per day from their parents to protect them from dangerous circumstances, including alleged abuse or neglect.[10] While removal may be a necessary strategy to protect children who are in danger, those who work in the child protective system face a great deal of uncertainty about the constitutional framework applicable to their actions.

In particular, the role of the Fourth Amendment in investigating child abuse and subsequent removal proceedings has proven difficult to define.[11] The intent of the Fourth Amendment is to protect the privacy interests of the people against the federal government, state officials, and state actors.[12] A person's privacy interests include the right to be

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7 *Child Abuse Statistics & Facts*, CHILDHELP, https://www.childhelp.org/child-abuse-statistics (last visited Aug. 5, 2016).

8 *See* Conor Friedersdorf, *In a Year, Child-Protective Services Checked Up on 3.2 Million Children*, ATLANTIC (July 22, 2014), http://www.theatlantic.com/national/archive/2014/07/in-a-year-child-protective-services-conducted-32-million-investigations/374809.

9 *See Child Abuse Statistics & Facts*, *supra* note 7.

10 Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 42 FAM. CT. REV. 540, 540 (2004). *See generally* DIANE DEPANFILIS & MARSHA K. SALUS, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD PROTECTIVE SERVICES: A GUIDE FOR CASEWORKERS 65–68 (2003), https://www.childwelfare.gov/pubPDFs/cps.pdf#page=1&view=Child%20Protective%20Services:%20A%20Guide%20for%20Caseworkers (describing several issues that should be considered during the initial assessment or investigation of a CPS report).

11 *See generally* Kovacic v. Cuyahoga Cty. Dep't of Children & Family Servs., 724 F.3d 687, 699 (6th Cir. 2013) (acknowledging there is an absence of case law applying the Fourth Amendment warrant requirements to social workers, yet applying the warrant requirement to the removal of a suspected child victim of abuse); Southerland v. City of New York, 680 F.3d 127 (2d Cir. 2012) (finding that the caseworker had time to obtain a warrant consistent with the Fourth Amendment); Hernandez *ex rel.* Hernandez v. Foster, 657 F.3d 463 (7th Cir. 2011) (upholding warrantless removal because it was reasonable in light of the facts and circumstances known at the time); Greene v. Camreta, 588 F.3d 1011 (9th Cir. 2009) (refusing to apply the special needs doctrine because of law enforcement's involvement in the search), *vacated in part*, 563 U.S. 692 (2011); Doe v. Heck, 327 F.3d 492 (7th Cir. 2003) (leaving open the possibility of the special needs doctrine); Tenenbaum v. Williams, 193 F.3d 581 (2d Cir. 1999) (upholding a warrantless removal under probable cause, the special needs doctrine, or exigent circumstances); Darryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986) (upholding a caseworker's warrantless search under the special needs doctrine).

12 *See* Katz v. United States, 389 U.S. 347, 351 (1967) ("[T]he Fourth Amendment protects people, not places."); *see also* Mapp v. Ohio, 367 U.S. 643, 654–55 (1961) (extending the

protected against unreasonable searches and seizures.[13] The Fourth Amendment requires the issuance of a warrant based on probable cause before conducting a search or seizure.[14] Removing a child from the home, as well as interviewing a child in school, even in the name of preventing child abuse, is classified as a search and seizure under the Fourth Amendment and, traditionally, a warrant must be obtained.[15] But, if an actor engages in a warrantless search and seizure, a court will determine whether the search or seizure fits into an established exception to the warrant requirement.[16] For purposes of this Note, the only exception to the Fourth Amendment that will be discussed is the special needs doctrine.[17]

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warrant requirement of the Fourth Amendment to states and state actors through the Due Process Clause of the Fourteenth Amendment).

13 U.S. CONST. amend. IV ("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."). The Supreme Court has interpreted the text of the Fourth Amendment to impose two requirements: first, all searches and seizures must be reasonable; and second, a warrant may not be issued unless probable cause is established and the scope of the authorized search is set out with particularity in the warrant. *See* Kentucky v. King, 563 U.S. 452, 459 (2011).

14 U.S. CONST. amend. IV; *see, e.g.*, Illinois v. Gates, 462 U.S. 213 (1983) (holding that a magistrate issues a warrant based on the totality of the circumstances set forth in an affidavit and decides whether there is a fair probability that evidence of a crime will be found in a particular place).

15 *See Greene*, 588 F.3d at 1022 (explaining that holding and interrogating a suspected child abuse victim is a seizure under the Fourth Amendment and, thus, the court analyzes whether the seizure was unreasonable); *Tenenbaum*, 193 F.3d at 600 (determining that removal and examination of a child from school constitutes a seizure and search under the Fourth Amendment).

16 There are three recognized exceptions to the warrant requirement: the special needs doctrine, which will be discussed further in this Note, exigent circumstances, and consent. *See King*, 563 U.S. at 460 (explaining the exigent circumstances exception); Ferguson v. City of Charleston, 532 U.S. 67, 74 (2001) (applying the special needs doctrine to justify a warrantless search to "serve non-law-enforcement ends"); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (defining "consent" as an exception to the warrant and probable cause requirements).

17 The exigent circumstances exception applies "when 'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." *Id.* at 460 (alteration in original) (quoting Mincey v. Arizona, 437 U.S. 385, 394 (1978)). The police must have probable cause and believe a warrantless search or seizure is necessary to prevent harm to officers or other persons. *See id.* at 459–60; Brigham City v. Stuart, 547 U.S. 398, 402 (2006). The difference between the exigent circumstance doctrine and the special needs doctrine is that the special needs doctrine will only apply if the purpose of the warrantless search does not primarily involve law enforcement, whereas the exigent circumstance exception permits law enforcement officers to engage in a warrantless search. *Compare Ferguson*, 532 U.S. at 88 (refusing to apply the special needs doctrine because of law enforcement's integral role in the warrantless search), *with King*, 563 U.S. at 460 (noting the exigent circumstances exception applies when law enforcement is necessarily involved in the warrantless search). Since the exigent circumstances exception justifies law enforcement's actions and this Note focuses on the actions of social workers, the special needs doctrine will be the main focus. *See* Darryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986) (applying the special needs

At its inception, the special needs doctrine was an exception to the warrant requirement when "special needs," beyond the normal need for law enforcement, make the warrant requirement impracticable.[18] The Supreme Court has employed the special needs doctrine in different contexts for administrative search cases, but has yet to apply the doctrine explicitly in child abuse cases.[19] In *Ferguson v. City of Charleston*,[20] the Supreme Court created a primary purpose test under the special needs doctrine. The primary purpose test looks at the immediate objective of a warrantless search and asks whether the objective was to generate evidence for law enforcement purposes, or if the party conducting the search identified a need beyond the normal need for law enforcement.[21] The latter of which would justify a departure from the traditional Fourth Amendment warrant requirement.[22] This Note proposes that the primary purpose test should apply to child abuse cases when a caseworker or social worker conducts in-school interviews of children suspected of being abused and removes a child in the absence of a warrant but in accordance with state statutory

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doctrine to caseworkers). Another exception to the warrant requirement is consent. Consent will justify a warrantless search or seizure when it is "freely and voluntarily given." *Schneckloth*, 412 U.S.
at 222 (quoting Bumper v. North Carolina, 391 U.S. 543, 548 (1968)). Consent cannot be the product of duress or coercion, expressed or implied, and is determined from the totality of the circumstances. *Id.* at 227. Consent can be used as an exception when given freely to either law enforcement or caseworkers. *See id.* at 222. This Note is focusing on situations where consent was not obtained before the search and seizure occurred.

18 *See* New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). In applying the special needs doctrine, courts balance the government's interests against the individual's privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context. *See id.* at 351–52. Scholars have criticized the doctrine as incoherent and unclear in child abuse cases. *See, e.g.*, 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, 417 (2005) ("[T]he special needs standard is effectively the child welfare exception to the Fourth Amendment . . . as it may permit warrantless intrusions on the basis of no, mere, or reasonable suspicion."); Adam Pié, Note, *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, 580 (2012) ("Given the legitimate interests of the state, parents, and child, as well as the Supreme Court's lack of guidance, it would not be surprising if the federal circuits were divided on how the special needs doctrine applies to child abuse investigations.").

19 *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (upholding a public school district's student athlete drug policy under the special needs doctrine); Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 620 (1989) (special needs doctrine justified drug and alcohol testing of railroad employees); New York v. Burger, 482 U.S. 691 (1987) (upholding an inspection of a junk yard without a warrant under the special needs doctrine).

20 *Ferguson*, 532 U.S. 67.

21 *Id.* at 81–84.

22 *Id.* at 83–84.

procedures.[23] Referring back to John Doe's case in the beginning of the Note, if John had simply made his statements about the alleged abuse to his teacher or a caseworker instead of his parents first, and an interview was conducted, the interview may have been considered a violation of the Fourth Amendment without the special needs exception.

This Note will proceed in five parts. Part I provides a background on child abuse investigations. It explores the role of law enforcement agents and non-law enforcement agents, such as CPS and social workers, and the circumstances that generate child removal. Part II discusses the Fourth Amendment's warrant requirement based on probable cause and the factors considered in a magistrate's decision to issue a warrant. Part III analyzes the special needs doctrine, how the doctrine originated, and cases where it has been applied. Part IV discusses the circuit courts' application of the special needs doctrine in child abuse cases and the controversy that varying applications have generated. Part V examines the Supreme Court's decision in *Ohio v. Clark* to apply a primary purpose test to the Sixth Amendment in the context of child abuse cases. The adoption of a primary purpose test to child abuse cases under the Fourth Amendment would be analogous to this decision.

I. CHILD ABUSE INVESTIGATIONS AND THE ROLE OF LAW ENFORCEMENT

A. *The Investigation Process*

Professionals involved in child abuse investigations have recognized the need for a collaborative, multidisciplinary team approach to investigate allegations.[24] CPS and social workers have significant experience interviewing children, working with the family, arranging for examinations, and navigating the child welfare system. Law

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23 *Compare* Illinois v. Gates, 462 U.S. 213, 230 (1983) (articulating that a magistrate issues a warrant based on the totality of the circumstances), *with Ferguson*, 532 U.S. at 81 (describing how the Court considers all of the available evidence to determine the relevant primary purpose of the policy in question). Applying the special needs doctrine in this context would be consistent with the warrant requirement of the Fourth Amendment because the analysis takes into account the totality of the circumstances that generated the search and seizure, as does the general requirement for a warrant. See *infra* Part II for a more detailed explanation regarding the standard for probable cause and *infra* Part V for an analysis of how adopting a primary purpose test in the child abuse context would be consistent with the Supreme Court's decision to apply a primary purpose test to the Sixth Amendment in the context of child abuse cases. *See* Ohio v. Clark, 135 S. Ct. 2173 (2015) (articulating the primary purpose test).

24 *See Child Abuse Statistics & Facts*, *supra* note 7.

enforcement brings proficiency in collecting and preserving evidence, crime scene examination, and taking statements and confessions.[25]

Mandatory reporting statutes have increased the involvement of social workers at schools.[26] A mandated reporter is an individual required by state statute to report suspected child abuse and neglect to CPS or law enforcement agencies (or the proper authority designated under state statute).[27] Reporters include educators, school personnel, social workers, childcare providers, and law enforcement officers.[28] Each state regulates the agency that will receive the reports of suspected child abuse and neglect. This can either be the state's department of social services, CPS, or law enforcement and the district attorney's office.[29] For example, New York requires a mandatory reporter to call the New York Statewide Central Register of Child Abuse and Maltreatment and speak to the local CPS.[30] CPS begins an investigation and evaluates the safety of the child and the risk to that child if they remain in the home.[31] It is

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25 *Id.* Social workers support thousands of children who are victims of child abuse and are on the front line protecting children and assisting them in finding safe living situations. They help families by identifying and addressing the child, familial, and community dynamics. *See Social Work & Child Abuse and Neglect*, NAT'L ASS'N SOC. WORKERS, http://www.socialworkers.org/advocacy/briefing/ChildAbuseBriefingPaper.pdf (last visited Aug. 10, 2016).

26 *See* CYNTHIA CROSSON-TOWER, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE ROLE OF EDUCATORS IN PREVENTING AND RESPONDING TO CHILD ABUSE AND NEGLECT 30 (2003), https://www.childwelfare.gov/pubPDFs/educator.pdf. The increased involvement of schools in reporting child abuse has been long recognized in the federal government. *See, e.g.*, Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (codified as amended in scattered sections of 20 U.S.C.). The Federal Family Educational Rights and Privacy Act of 1974 provides standards and regulations to educators for reporting child abuse and neglect by governing the release of information from school records to determine if a report of suspected child abuse and neglect should be made. *Id.*

27 *See* CROSSON-TOWER, *supra* note 26, at 61. All states have reporting statutes for child abuse and neglect. *See* CHILD WELFARE INFO. GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD (2016), https://www.childwelfare.gov/pubPDFs/best_interest.pdf. The statutes outline who is a mandated reporter, where reports are reported to, and the form and content of the report. *See id.* For more information about the individual state statutes, see *id.*

28 *See* CROSSON-TOWER, *supra* note 26, at 61. In New York, mandated reporters are required to report suspected child abuse or maltreatment "when, in their professional capacity, they are presented with reasonable cause to suspect child abuse or maltreatment." *Who Are Mandated Reporters?*, MANDATED REP. RESOURCE CTR., http://www.nysmandatedreporter.org/MandatedReporters.aspx (last visited Feb. 17, 2017). Mandatory reporters in New York include, but are not limited to: physicians, medical examiners, social workers, school officials (teachers, guidance counselors, nurses, administrators), day care workers, and police officers. *Id.*

29 *See* CROSSON-TOWER, *supra* note 26, at 30.

30 N.Y. SOC. SERV. LAW §§ 415, 422 (McKinney 2010).

31 *Id.* § 424(6)(a); *see Who Are Mandated Reporters?*, *supra* note 28; *see also Frequently Asked Questions: What Happens After I Make a Report?*, N.Y. ST. OFFICE CHILD. & FAM. SERVICES, http://ocfs.ny.gov/main/cps/faqs.asp#after_report (last visited Nov. 25, 2016).

the duty of CPS to offer or provide services to suspected victims of child abuse to reduce the risk of future abuse or neglect.[32]

The CPS investigation consists of multiple steps, including, but not limited to, interviewing: the reporter of the abuse, the child, adults who work with the child, parents/caretakers, and the suspect.[33] The interview process for the child is unique for a few reasons. First, a child's memory is susceptible to forgetfulness and change, and, thus, children can have difficulty recalling specifics.[34] This is heightened by the fact that the abuse may not be reported right away because children do not know what abuse is or are scared of the repercussions.[35] If an outside party reports allegations of abuse, children may refuse to cooperate for fear of getting in trouble, shame, and, in some situations, because of love of the abusers.[36] Thus, the interview of the child is typically held somewhere where the child feels comfortable.[37] This is one of the reasons why social workers, or another member of CPS, typically interview children in school.[38]

CPS is responsible for receiving and evaluating the reports of suspected child abuse and assessing the total picture to decide whether there is an opportunity for the child to be seriously harmed if there is no immediate intervention.[39] During this process, CPS engages in a collaborative, coordinated effort that involves multiple community agencies and professionals to ensure effective child protection.[40] This

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32 *See* CROSSON-TOWER, *supra* note 26, at 36.

33 *See* DONNA PENCE & CHARLES WILSON, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE ROLE OF LAW ENFORCEMENT IN THE RESPONSE TO CHILD ABUSE AND NEGLECT 13–16 (1992), https://www.childwelfare.gov/pubPDFs/law.pdf.

34 *See* Jennifer Anderson et al., *The CornerHouse Forensic Interview Protocol: RATAC®*, 12 T.M. COOLEY J. PRACT. & CLINICAL L. 193, 205–08 (2010); *see also* Meridith Felise Sopher, Note, *"The Best of All Possible Worlds": Balancing Victims' and Defendants' Rights in the Child Sexual Abuse Case*, 63 FORDHAM L. REV. 633, 644–45 (1994); Henry Weinstein, *Child Sex Abuse Cases Pose Dilemma for Prosecutors*, L.A. TIMES (Sept. 19, 1993), http://articles.latimes.com/1993-09-19/news/mn-36921_1_child-abuse-case.

35 *See* Weinstein, *supra* note 34.

36 *See* Jennifer Long et al., *10 Strategies for Prosecuting Child Sexual Abuse at the Hands of a Family Member*, STRATEGIES (AEquitas, Washington, D.C.), Sept. 2011, at 1, 2. Children's statements may be inconsistent because of their lack of understanding of the criminal justice system and the investigatory process. CPS helps in this respect because they are trained to work with children and know how to foster a conversation, in contrast to the training of law enforcement personnel.

37 *See* Anderson et al., *supra* note 34, at 263.

38 *See* CROSSON-TOWER, *supra* note 26, at 26.

39 *See generally* DEPANFILIS & SALUS, *supra* note 10, at 25–30.

40 *See* JILL GOLDMAN ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., A COORDINATED RESPONSE TO CHILD ABUSE AND NEGLECT: THE FOUNDATION FOR PRACTICE 7 (2003), https://www.childwelfare.gov/pubPDFs/foundation.pdf. CPS, along with law enforcement, health care providers, mental health professionals, educators, and legal and court system personnel are involved in responding to child abuse and neglect and providing needed services. *Id.* at 61–63.

community-based child protection plan inevitably includes involvement of law enforcement personnel and gives rise to the issue of distinguishing law enforcement from non-law enforcement purposes under the Fourth Amendment analysis.

B. *Removal of a Child Suspected of Being Abused*

CPS is permitted to take a child into custody if the caseworker believes that it is necessary to protect the child from further abuse.[41] In some states, the court becomes involved at this point in the investigation process.[42] The process of removal involves multiple agencies of the government. For example, in New York City, once the Statewide Central Register (SCR) receives a phone call about suspected abuse or neglect, SCR conducts an initial screening of the call, typically from mandatory reporters, to ensure the identifying information is sufficient to begin an investigation.[43] Then, the report is transmitted to New York City's Administration for Child Services (ACS).[44] Subsequently, ACS assigns a child protective manager (CPM) to oversee the investigation team and approve of major decisions, such as removal of a child from the home.[45] In addition to assigning the case to a CPM, ACS may also commence child protective proceedings in Family Court.[46] Once the petition is filed, the court has the power to order removal of the child if it is necessary to avoid imminent risk to the child's life or health.[47] But, if ACS has "reasonable cause to believe" that there is not time to obtain even an expedited preliminary order, it may remove a child without a court order.[48]

Removal also has an effect on caseworker safety. In a guide designed for CPS, there is a list of preventative measures caseworkers should take before making home visits. These include: being sure a supervisor knows the caseworker's schedule, following one's instincts

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41 CPS has the authority to remove a child under state statutes that give family and juvenile courts authority to determine if removal promotes the best interest of the child. *See id.* at 55.

42 *See* CROSSON-TOWER, *supra* note 26, at 36.

43 *See* N.Y. SOC. SERV. LAW § 422 (McKinney 2010).

44 *See id.*; *see also* Nicholson v. Scoppetta, 344 F.3d 154, 158–59 (2d Cir. 2003).

45 *See* SOC. SERV. § 422; *see also Nicholson*, 344 F.3d at 159.

46 *Nicholson*, 344 F.3d at 159. The collaboration between ACS, CPM, and the court in New York is an example of the multi-disciplinary approach among multiple entities of the government that is typically used in investigating child abuse cases. *See* Greene v. Camreta, 588 F.3d 1011, 1029 (9th Cir. 2009) (discussing the entanglement between law enforcement and caseworkers as an effective way to both protect children and arrest and prosecute child abusers), *vacated in part*, 563 U.S. 692 (2011).

47 *See Nicholson*, 344 F.3d at 159–60.

48 *Id.* at 160.

about fear or safety, being parked in a manner that facilitates a quick escape, carrying a cell phone, and learning how to decline offers of food and other refreshments.[49] These precautionary measures are necessary because a CPS worker has the potential for an unexpected confrontation during an initial assessment, investigation, or when major actions are taken (such as the removal of a child).[50] Thus, it is understandable why a law enforcement officer may accompany a caseworker during this process. The mere presence of law enforcement does not mean an arrest or conviction is imminent, but is instead to ensure the safety of both the caseworker and the child.

Bearing this all in mind—the interaction between school officials and caseworkers when reporting abuse, and the overlap among the courts, law enforcement agents, and caseworkers in deciding whether removal is warranted—it is not surprising that deciphering the primary purpose of an investigation is difficult. To resolve the primary purpose of a warrantless search or seizure, courts must analyze the totality of the circumstances that led to the caseworker's actions.[51] This type of totality analysis under the special needs doctrine is consistent with the Supreme Court's adoption of a totality of the circumstances test when a magistrate grants a warrant under the Fourth Amendment.[52]

II. THE FOURTH AMENDMENT

A. *The Origins of the Warrant Requirement and Probable Cause*

The Fourth Amendment protects people from unreasonable searches and seizures by requiring a showing of probable cause before a search or arrest warrant may be issued.[53] Probable cause exists where the facts and circumstances within the officer's knowledge are based on reasonably trustworthy information and are sufficient to warrant a

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49 *See* DEPANFILIS & SALUS, *supra* note 10, at 66.

50 *See id.* at 109; *see also* PENCE & WILSON, *supra* note 33, at 7 ("Law enforcement officers may accompany CPS caseworkers based on the location of investigation, the time of night, or history of the subjects involved. Failure to have proper backup has unfortunately resulted in the deaths of several CPS caseworkers and injuries to many others.").

51 *See* Ferguson v. City of Charleston, 532 U.S. 67 (2001) (applying the special needs doctrine and looking at the totality of the evidence to determine the primary purpose of the hospital's policy); *see also* Southerland v. City of New York, 680 F.3d 127 (2d Cir. 2012) (looking at the totality of the circumstances to determine if a caseworker had adequate time to obtain a warrant before ordering the removal of child suspected of abuse).

52 *See* Illinois v. Gates, 462 U.S. 213 (1983) (adopting a totality of the circumstances approach to establish probable cause to obtain a warrant).

53 *See supra* note 13 and accompanying text.

reasonable belief that a crime has been or is being committed.[54] The police apply to a magistrate for a warrant and, under oath, provide the magistrate with the information in their possession that they believe justifies the issuance of a warrant.[55]

In *Aguilar v. Texas*[56] the Supreme Court held that probable cause can be satisfied by information from an anonymous informant as long as the police support the information with underlying circumstances that indicate how the informant obtained his knowledge and how the officer determined the informant was credible or reliable.[57] The Court explained that it is the officer's duty to describe to a magistrate why the informant's information is reliable and should be considered in the determination of probable cause.[58] The two-prong test in *Aguilar* became known as the basis of the knowledge requirement and the veracity requirement.[59]

The two-prong test was short-lived and was abandoned in *Illinois v. Gates.*[60] The Court adopted a "totality of the circumstances"[61] approach to establish probable cause to issue a warrant. In *Gates,* the police obtained an anonymous letter about a couple's drug trafficking

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54 *See* JOSHUA DRESSLER & GEORGE C. THOMAS, III, CRIMINAL PROCEDURE: INVESTIGATING CRIME 151 (5th ed. 2010); *see also* Weeks v. United States, 232 U.S. 383, 391–92 (1914) ("The effect of the 4th Amendment is to put . . . [f]ederal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law."), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

55 *See* DRESSLER & THOMAS, III, *supra* note 54, at 151.

56 378 U.S. 108 (1964), *abrogated by Gates*, 462 U.S. 213. In *Aguilar* the Supreme Court addressed whether probable cause can be established by an informant's tip. *Id.* The Court held an anonymous tip may be sufficient to establish probable cause based on the corroborating circumstances. *Id.* In the context of child abuse cases, an essential step in the intake process of CPS is whether the information is consistent and accurate. *See* DEPANFILIS & SALUS, *supra* note 10, at 36. Caseworkers question the validity of the report if it is influenced by a contentious divorce, custody battle, or bad relationship with neighbors. But typically, regardless of suspicions about the motives of the reporter, if the allegations meet statutory and agency guidelines, the case is accepted. *See id.*

57 *Aguilar*, 378 U.S. at 114.

58 *Id.* at 111–15.

59 *Id.* In *Spinelli v. United States*, the Supreme Court applied the two-prong test and held that an officer's affidavit failed to establish probable cause because the tip needed further support as to why the informant was reliable, either from a law enforcement investigation or background information. 393 U.S. 410, 415–16 (1969), *abrogated by Gates*, 462 U.S. 213.

> In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.

Id. at 416.

60 *Gates*, 462 U.S. at 237–38.

61 *Id.* at 230–34.

plan.[62] The police independently examined the couple's financial records, followed their travels, and arranged for surveillance of their flight.[63] The Supreme Court of Illinois, applying *Aguilar* and *Spinelli*, held that standing alone the letter did not provide a basis for the magistrate's issuance of a warrant and there was insufficient probable cause to believe drugs would be found in the home.[64] The letter did not demonstrate the author was honest, credible, or reliable; the court ruled that something more was required.[65]

However, on appeal, the Supreme Court of the United States decided that the stringent two-prong analysis should not be an entirely separate and independent requirement that has to be met in every case.[66] Instead, the Court reasoned that the prongs should be intertwined into an overall analysis to help guide a magistrate's determination of whether there is probable cause.[67] The Court characterized probable cause as a fluid concept that should be based on assessing probabilities in a variety of contexts, not based on a rigid set of legal rules.[68] The task of a magistrate in issuing a warrant is a practical, common-sense decision given all the circumstances set forth before her. A magistrate may consider the affidavit, the veracity and the basis of knowledge (the two prongs of the *Aguilar-Spinelli* test), other indicia of reliability and/or unreliability, and relevant factors closely intertwined that might be useful in determining whether probable cause exists.[69] Before issuing the warrant, a magistrate needs to find there is a fair probability that evidence of a crime will be found in a particular place.[70]

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62 *Id.* at 225.

63 *Id.* at 226–27. The police submitted their independent record, plus the anonymous letter to a magistrate to obtain a warrant to search the residence. *Id.* at 226.

64 *Id.* at 216–17.

65 *Id.* at 227–29. Information that may help establish the "something more" requirement includes independent corroborative facts about the informant's basis of knowledge, the veracity of the informant's information, and/or reliability of the informant. *Id.* at 228–29.

66 *Id.* at 230 ("[T]hey should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place.").

67 *Id.* at 237–39.

68 *Id.* at 232 ("As these comments illustrate, probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.").

69 *Id.* at 230–33 (abandoning further the two-prong test and explaining that a deficiency in one prong may be compensated by a strong showing as to the other, or by some other indicia of reliability).

70 *Id.* at 238.

B. *The Warrant Requirement in Child Abuse Cases*

The totality of the circumstances test to determine whether there is sufficient probable cause to issue a warrant has been applied in child abuse cases. In *J.B. v. Washington County*,[71] an eyewitness reported to the deputy sheriff that she witnessed a father abusing his child.[72] The sheriff applied to the magistrate for a warrant to remove the child from the home in order to interview the child, and it was granted.[73] The interview was conducted, no evidence of abuse was discovered, and there was insufficient evidence to continue an investigation.[74] The parents sued the county and claimed, among other things, that the magistrate's warrant was not supported by probable cause and the magistrate failed to act detached and neutral.[75]

The Tenth Circuit applied *Gates* and affirmed the district court's holding that under the totality of the circumstances approach, there was probable cause for the magistrate to issue a warrant.[76] The informant's identity was known, the informant provided an eyewitness account, and the magistrate questioned the officer under oath before granting the warrant.[77] Even though the information provided by the witness was ultimately incorrect, the Tenth Circuit explained that the "incorrect information was immaterial to the allegations of sexual abuse."[78] As long as the magistrate, acting in her judicial capacity and not as an adjunct law enforcement officer, believed the citizen's tip was truthful and sufficient for probable cause, the magistrate's decision to issue a warrant is given great deference and often upheld.[79] Further, the Tenth Circuit affirmed the district court's reliance on *Gates* in concluding that even though the tip turned out to be incorrect, the magistrate made a practical, common sense decision, given all of the circumstances presented to her, that there was probable cause.[80]

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71 127 F.3d 919 (10th Cir. 1997).

72 *Id.* at 922.

73 *Id.*

74 *Id.* at 922–23. L.B. was removed from her home, taken to a prearranged shelter home, and interviewed the next morning. She was released to her parents seventeen and a half hours after she was taken from her home. *Id.* at 923.

75 *Id.* at 928. The parents claimed the county's employees violated their rights under the Fourth Amendment to be secure against unreasonable seizures because the removal was "a reckless and deliberate interference with familial associational rights." *Id.* at 923.

76 *Id.* at 928–30.

77 *Id.* at 930.

78 *Id.*

79 *Id.* at 930–31; *see also* Illinois v. Gates, 462 U.S. 213, 236–37 (1983) (explaining that determinations of magistrates are afforded deference consistent with the purposes of the warrant procedure).

80 *J.B.*, 127 F.3d at 929–30.

Turning back to John Doe's case presented at the outset of the Note, should the magistrate have used this totality of the circumstances approach and given more weight to the statements made by John? Even though his statements did not include specific details, such as the date, time, or location, the source (John) was known, so the veracity and source of knowledge requirements were both satisfied. Moreover, under the totality of the circumstances approach, the magistrate may consider John's disability. Although John did not use explicit language and precise details, he gave the best account he could, given the nature of his disability, and his statements in the interview were consistent with those he made to his parents.[81] Thus, if the magistrate had decided to give more weight to John Doe's statements and issue a warrant, there arguably would not have been a violation of the Fourth Amendment because the issuance of the warrant would have been consistent with the broad scope of the totality of the circumstances approach.[82]

III. AN EXCEPTION TO THE FOURTH AMENDMENT: THE SPECIAL NEEDS DOCTRINE

The special needs doctrine is an exception to the Fourth Amendment's warrant requirement based on probable cause before

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81 Children with disabilities often do not report abuse because they lack understanding as to what constitutes abuse or what acts are abusive. *See* Leigh Ann Davis, *Abuse of Children with Intellectual Disabilities*, ARC (Mar. 1, 2011), http://www.thearc.org/document.doc?id=3666. Communication problems are also inherent in many disabilities and make it difficult for children to communicate or verbalize episodes of abuse. *Id.* Issues with communication give rise to the possibility that children with disabilities may not be believed when they do report abuse (as in John Doe's case). In one instance, "[t]wo boys, 11 and 13, told the authorities about sexual misconduct in the home. Unlike allegations by boys in the past, theirs were believed, mostly because the boys did not have severe disabilities or emotional problems." Nikita Stewart & Joseph Goldstein, *Long Island Abuse Case Reveals Risks of Out-of-State Foster Care*, N.Y. TIMES (Sept. 13, 2016) (quoting Detective Lt. Robert Donohue, commander of Suffolk County's special victims unit), http://www.nytimes.com/2016/09/14/nyregion/long-island-abuse-case-reveals-risks-of-out-of-state-foster-care.html. Furthermore, children that require disability-specific services are at a heightened risk of being victims of sexual abuse. *See also* NANCY SMITH & SANDRA HARRELL, VERA INST. OF JUSTICE, SEXUAL ABUSE OF CHILDREN WITH DISABILITIES: A NATIONAL SNAPSHOT 4 (2013), http://archive.vera.org/sites/default/files/resources/downloads/sexual-abuse-of-children-with-disabilities-national-snapshot.pdf. Such children may be denied the ability to say no to everyday choices, such as what they will wear or eat, leaving them unequipped to say no when someone is trying to abuse them. *See id.* at 6. Further, since children with disabilities may be in isolated settings with adults throughout the day for their services, such children are vulnerable targets to perpetrators, who have learned that communication disabilities often prevent these children from reporting sexual abuse to authorities. *See id.* at 7.

82 *See, e.g.*, *Gates*, 462 U.S. 213; Doe *ex rel.* Doe v. Darien Bd. of Educ., 110 F. Supp. 3d 386 (D. Conn. 2015).

conducting a search or seizure.[83] A search or a seizure may fall within the special needs doctrine when a perceived need, beyond the normal need for criminal law enforcement, makes the warrant and probable cause requirements of the Fourth Amendment impracticable or irrelevant.[84] In analyzing these cases, courts make a distinction between a search or seizure conducted by police and a search or seizure conducted by other public officials in a non-law enforcement capacity.[85]

There are situations where the warrant requirement is not satisfied and a caseworker conducts an interview of a child suspected of being abused or removes a child from the home without a court obtained warrant. Some circuit courts have been more lenient in cases of child abuse when applying the Fourth Amendment and have found warrantless searches to be constitutional.[86] One way some circuit courts have upheld warrantless searches is under the special needs doctrine. The Supreme Court has not held that the special needs doctrine *cannot* apply to cases of child abuse and, thus, circuit courts have relied on a series of factors to determine if the warrantless search is consistent with the Fourth Amendment. Factors taken into consideration include the location of the search, the involvement of law enforcement officers, and the intrusiveness of the search.[87]

A. *The Origins of the Special Needs Doctrine*

The first discussion of the special needs doctrine in a Supreme Court decision was in Justice Blackmun's concurring opinion in *New Jersey v. T.L.O.*[88] In *T.L.O.*, two public school students were caught smoking on school grounds in violation of school rules.[89] When one student denied smoking, the vice principal demanded, and subsequently opened, the student's purse, observed a package of cigarettes, and then

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83 *See* O'Connor v. Ortega, 480 U.S. 709, 720 (1987); New Jersey v. T.L.O, 469 U.S. 325, 351–54 (1985) (Blackmun, J., concurring).

84 *See* DRESSLER & THOMAS, III, *supra* note 54, at 422.

85 *See id.* at 421.

86 *See, e.g.,* Doe v. Bagan, 41 F.3d 571 (10th Cir. 1994); Wildauer v. Frederick County, 993 F.2d 369 (4th Cir. 1993); Darryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986). *See generally* Pié, *supra* note 18, at 580–85 (contrasting the circuit courts that apply the special needs doctrine to child abuse investigations with those that do not).

87 *See* Pié, *supra* note 18, at 595; *see also* Coleman, *supra* note 18, at 416–17 (recognizing the federal circuit split on whether investigations of child abuse require a showing of probable cause and a warrant, or whether they constitute a special needs exception to the traditional warrant requirement).

88 *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

89 *Id.* at 328 (majority opinion).

proceeded to conduct a full search of the purse.[90] In Justice Blackmun's concurrence, he explained the warrantless search did not violate the Fourth Amendment because it was conducted in a circumstance without typical law enforcement personnel, making the warrant and probable cause requirements impractical for the vice principal of the school to be forced to abide by.[91] Justice Blackmun employed a balancing test that looked at the circumstances of the search.[92] In this case, the circumstance was a "special need" because of the school's interest in maintaining a drug-free and safe environment conducive to learning.[93] Because of the school's heightened obligation to safeguard the students, greater flexibility needed to be given to the circumstances of the search.[94] Therefore, a warrantless search of the student's purse did not violate the Fourth Amendment.[95]

The majority opinion in *T.L.O.* did not formally adopt a special needs doctrine, but established a balancing test that lowered the requirements of the Fourth Amendment when there is a demonstrated interest that would be unduly hindered by the warrant requirement.[96] The majority balanced the intrusiveness of the search against the state's interest in conducting the search.[97] As a result, in *T.L.O.*, the public school was allowed to search the student's purse without a warrant because there were reasonable grounds for suspecting the search would turn up evidence once initiated.[98] This test significantly lowered the requirements demanded by the Fourth Amendment and created a

90 *Id.* at 325. The student moved to suppress evidence of marijuana, a pipe, money, and an index card containing a list of students found in her purse on the grounds that the warrantless search was unlawful under the Fourth Amendment. *Id.* at 328–29.

91 *Id.* at 351–54 (Blackmun, J., concurring).

92 *Id.*

93 *Id.* at 353.

94 *Id.* at 352–53.

95 *Id.* at 353. The majority did recognize the need for a different analysis of the Fourth Amendment in the context of a school but did not refer to it explicitly as a special needs exception, as did Justice Blackmun. *See id.* at 341–42 (majority opinion).

96 *Id.* at 337.

97 *Id.* at 341–44. The Supreme Court first used this type of balancing test in *Camara* when it struck down warrantless administrative searches by health and safety inspectors because such searches, when balanced against an individual's Fourth Amendment protections, constituted significant intrusions requiring probable cause and a warrant for the inspections to be constitutional. *See* Camara v. Mun. Court, 387 U.S. 523 (1967).

98 *See T.L.O.*, 469 U.S. at 347; *see also* Josh Gupta-Kagan, *Beyond Law Enforcement:* Camreta v. Greene*, Child Protection Investigations, and the Need to Reform the Fourth Amendment Special Needs Doctrine*, 87 TUL. L. REV. 353, 385 (2012). Gupta-Kagan argues that the majority's decision in *T.L.O.* may have been based on the absence of a law enforcement purpose in the limited intrusion. *Id.* However, the Court did not explain in *T.L.O.* what it is about normal law enforcement searches that trigger the Fourth Amendment's warrant requirement. *See id.*

reduced expectation of privacy for students in public schools and later to individuals in different capacities.[99]

B. *The Balancing Test*

In *O'Connor v. Ortega*,[100] the Supreme Court explicitly created the special needs doctrine and applied it to a search of a government employees' office. The Executive Director of a state hospital, Dr. O'Connor, placed Dr. Ortega (the Chief of Professional Education) on administrative leave in light of recent charges against him for sexual harassment of employees.[101] During the absence, Dr. O'Connor spearheaded a search of Dr. Ortega's office a number of times and seized several items from his desk and cabinets.[102] Subsequently, Dr. Ortega commenced an action against Dr. O'Connor, as the state hospital director, alleging that the search of his office violated his Fourth Amendment rights.[103]

The Supreme Court applied the balancing test under the special needs doctrine, balancing the employer's interests in efficiency and proper operation of the workplace against the privacy interests of government employees and the type of the intrusion. The intrusion was for non-investigatory, work-related purposes based on work-related misconduct.[104] The balancing took into account all the circumstances and asked whether the search was reasonable under a twofold inquiry developed from prior case law: first, whether the search was "justified at its inception"; and second, whether the search was reasonably related to the circumstances which generated the search in the first place.[105] The Court ruled the search should be evaluated by a standard of reasonableness under all the circumstances and remanded to determine whether the search was "reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct]."[106]

The Court's analysis of an exception to the warrant requirement, when the interests of the party conducting the search are not criminal in

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99 *See* Pié, *supra* note 18, at 572.

100 480 U.S. 709 (1987).

101 *Id.* at 712.

102 *Id.* at 713. All of the items seized from his office—both hospital- and personal-related items—were later used in a proceeding against Dr. Ortega. *Id.*

103 *Id.* at 714.

104 *Id.* at 719–23.

105 *Id.* at 725–26 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).

106 *Id.* at 726 (alterations in original) (quoting New Jersey v. T.L.O., 469 U.S. 325, 342 (1985)).

nature, reflects a narrow interpretation of the Fourth Amendment.[107] The Court explained that to require non law-enforcement officers to follow ordinary law enforcement requirements under the Fourth Amendment would impose intolerable burdens and prevent the non-law enforcement officers from taking necessary action, or render such action ineffective.[108] In these situations, the Fourth Amendment's requirements do not apply and the analysis of the search is subject to less stringent reasonableness requirements.[109]

C. *The Primary Purpose Test*

The Court refined the special needs doctrine in *Ferguson v. City of Charleston* and held that if a search is in furtherance of a subsequent criminal prosecution, it does not fall within the special needs exception.[110] The special needs doctrine is inapplicable when a search's primary purpose is to generate evidence for law enforcement purposes.[111] In *Ferguson,* a state hospital performed diagnostic drug testing on pregnant women without their consent and without a warrant.[112] The hospital turned the results over to law enforcement agents, again, without the knowledge or consent of the patients.[113] The "special need" asserted as justification for the warrantless search by the hospital was to protect the health of both mother and child and get the mothers into substance abuse treatment.[114] The Court considered the totality of the evidence and determined that the ultimate purpose of the hospital's policy was to obtain evidence of criminal conduct for a future prosecution.[115]

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107 *See id.* at 721. The special needs doctrine may apply when the party conducting the search does not have interests that are criminal in nature. *See* Ferguson v. City of Charleston, 532 U.S. 67 (2001). This is similar to upholding a warrantless search by police when they are acting in their community-caretaking role. *See* Pié, *supra* note 18, at 574–75; *see also* Brigham City v. Stuart, 547 U.S. 398 (2006). In *Brigham City v. Stuart*, for example, the Court held that there was no violation of the Fourth Amendment's knock-and-announce rule after police observed a fight inside a home. 547 U.S. at 406–07. Part of the Court's reasoning rested on the fact that the officer's primary purpose in entering the house was preventing violence and restoring order under a community caretaking function. *Id.*

108 *See O'Connor*, 480 U.S. at 724.

109 *See id.* at 720–21.

110 Ferguson v. City of Charleston, 532 U.S. 67, 84–85 (2001).

111 *Id.* at 85.

112 *Id.* at 70–71.

113 *Id.* at 77.

114 *Id.* at 81–82.

115 *Id.* at 84. Charleston law enforcement (prosecutors and police officers) were involved daily in the warrantless searches. *Id.* at 82. They received the drug test results, helped decide

The Court held that even though the ultimate goal of the program may have been to help get women into substance abuse treatment, the immediate objective of the search was to generate evidence *for law enforcement purposes* and, thus, the searches could not be justified under the special needs doctrine.[116] The Court found this distinction—between the ultimate and immediate purpose—to be crucial.[117] Because law enforcement always serves some broader social purpose, a search cannot be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than its immediate, purpose.[118] The Court found the primary purpose of the hospital program was to use the threat of arrest and prosecution to force women into treatment and hospital personnel involved law enforcement at every stage of the policy.[119] This case did not fit into the category of special needs and a warrant was necessary.[120] The Fourth Amendment's prohibition against nonconsensual, warrantless, and suspicion-less searches to obtain evidence of criminal conduct rendered the warrant and probable cause requirements of the Fourth Amendment applicable in this setting.[121]

The evolution and application of the special needs doctrine has not been consistent. The Court has not explicitly explained what "special needs" are. Instead, the doctrine spans cases that take place in hospitals, public schools, and other state agencies where a lowered standard is used to judge the intrusiveness of a search.[122] The Supreme Court has refrained from deciding categorically whether warrantless searches and seizures of children suspected of being abused are a special needs situation and, without a mandate, circuit courts have differed in their application of the doctrine.[123]

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procedures to be followed inside the hospital, had access to the nurse's files, and received copies of documents discussing the patients' progress. *Id.* at 82–85.

116 *Id.* at 82–84.

117 *Id.* at 83–84 ("The threat of law enforcement may ultimately have been intended as a means to an end, but the direct and primary purpose of MUSC's policy was to ensure the use of those means. In our opinion, this distinction is critical.").

118 *Id.* at 84.

119 *Id.* at 84–86.

120 *Id.* at 84–85.

121 *Id.* at 84–86.

122 *See* William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 553–55 (1992). Stuntz argues the right model for the special needs cases is a rule that would reflect the parties' understanding of the *whole* relationship between all the people involved (students, children, caseworkers, government employees, law enforcement, etc.), rather than solely on the search rule itself. *Id.* at 555; *see also* Gupta-Kagan, *supra* note 98, at 357 (arguing that the Supreme Court has not explained how a line defined by law enforcement needs differentiates between searches and seizures requiring a showing of probable cause and a warrant from those that do not).

123 *See* Camreta v. Greene, 563 U.S. 692 (2011). The Supreme Court did not reach the Fourth Amendment question in the case: whether the warrant requirement or the special needs

IV. THE APPLICATION OF THE SPECIAL NEEDS DOCTRINE IN CHILD ABUSE CASES

In child abuse cases, the application of the *T.L.O.* precedent led to a balancing test that compared the interests of the child and the parent against the State's interests in protecting and ensuring the safety of its children.[124] While seemingly straightforward, the *T.L.O.* precedent has resulted in inconsistent results across the circuits regarding when the special needs doctrine is applicable.[125] In particular, the Second and Seventh Circuits have been hesitant to adopt the special needs doctrine categorically to child abuse cases.[126] But, post-*Ferguson*, the primary purpose test may provide clearer guidance to courts about situations where the special needs doctrine applies.[127] The next Section begins by discussing the approaches taken by the Second and Seventh Circuits and concludes with a discussion of a recent case from the Ninth Circuit, where the court applied the primary purpose test in the context of a warrantless interview of a child suspected of being abused.[128] A primary purpose test that looks at whether a situation has a special need separate from law enforcement purposes will lead to consistent application among the circuit courts and a coherent interpretation of the special needs doctrine.

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doctrine may apply in seizures of potentially abused children. *Id.* Instead, it found the case moot. *Id.*; *see also* Southerland v. City of New York, 680 F.3d 127 (2d Cir. 2012); Tenenbaum v. Williams, 193 F.3d 581 (2d Cir. 1999) (hesitating to adopt the special needs doctrine categorically to child abuse cases). *But see* Doe v. Heck, 327 F.3d 492 (7th Cir. 2003); Darryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986) (leaving open the possibility of using the special needs doctrine as an exception to the warrant requirement in child abuse cases).

124 *See* Pié, *supra* note 18, at 572–73.

125 *See generally Southerland*, 680 F.3d 127 (refraining from adopting the special needs doctrine); Greene v. Camreta, 588 F.3d 1011 (9th Cir. 2009) (applying the special needs doctrine but finding it inapplicable given the facts of the case), *vacated in part*, 563 U.S. 692 (2011); *Heck*, 327 F.3d 492 (leaving open the possibility of applying the special needs doctrine with different facts); *Darryl H.*, 801 F.2d 893 (applying the special needs doctrine to investigations of child abuse).

126 *See Southerland*, 680 F.3d 127; *Heck*, 327 F.3d 492; *Tenenbaum*, 193 F.3d 581; *Darryl H.*, 801 F.2d 893.

127 The *T.L.O.* balancing test and the *Ferguson* primary purpose test may also work together. If the Court finds the search or seizure serves a special need apart from law enforcement purposes, then the Court will balance an individual's expectation of privacy with the government and public interests in the challenged action or policy. *See* Gupta-Kagan, *supra* note 98, at 387.

128 *Greene*, 588 F.3d 1011.

A. *The Second Circuit's Approach*

In *Tenenbaum v. Williams*, a caseworker from the New York City Child Welfare Administration (NYC CWA) removed five-year-old Sarah from her kindergarten class based on her teacher's report without a court order and without notifying or receiving authorization from Sarah's parents.[129] Before removing Sarah, no one made an attempt to obtain parental consent for an examination or seek a court order.[130] The caseworkers contended this was an emergency situation to determine whether Sarah had been sexually abused and, if they decided to keep her following the removal from class, then court action would have been sought.[131] The doctors did not find any signs of abuse, and the case was abandoned as "unfounded."[132] Subsequently, the parents brought suit against NYC CWA and its employees, alleging the examination infringed on their daughter's right to be free from unreasonable searches under the Fourth Amendment because the caseworkers did not have a warrant or its equivalent authorizing Sarah's removal.[133]

The Second Circuit agreed with the district court's finding that the removal complied with the Fourth Amendment despite the absence of a warrant because there were indications of probable cause, reasonable suspicion, and exigent circumstances.[134] By combining all three analyses, the Second Circuit sidestepped the definitive application of the special needs doctrine and its reasonableness standard.

The Second Circuit discussed the *O'Connor* and *T.L.O.* decisions to determine if the removal of Sarah was a special needs situation since the

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129 193 F.3d at 587. Sarah was a student with developmental disabilities and had limited verbal communication. *Id.* at 588. Sarah was sleeping in class and awoke crying. *Id.* Her teacher asked if she was ok and whether something happened at home. *Id.* Sarah said yes, and when asked if it was her father, she shook her head yes and started to cry. *Id.* The teacher asked Sarah to indicate on a doll where Sarah was being hurt, and she pointed to the doll's groin area. *Id.* The teacher reported Sarah's behavior to her supervisors, who then reported the matter to the New York State Department of Social Services' Central Register of Child Abuse and Maltreatment as required by law. *Id.* at 588–89.

130 *Id.* at 590; *see also* N.Y. FAM. CT. ACT § 1021 (McKinney 2010) (requiring parental consent for a physical examination or a court order for removal); *id.* § 1022(a)(i) ("[Under certain circumstances] [t]he family court may enter an order directing the temporary removal of a child from the place where he or she is residing.").

131 *Tenenbaum*, 193 F.3d at 590–91.

132 *Id.* at 587.

133 *Id.*

134 *Id.* at 605. The Second Circuit upheld the caseworker's actions because based on the information the caseworker had, a person of reasonable caution may believe the child was subject to danger or abuse if not removed before court authorization. *Id.* The court also said the exigent circumstances doctrine permits removal without a warrant equivalent and without parental consent in this situation. *Id.*

caseworker was a non-law enforcement officer.[135] But the Second Circuit refrained from deciding categorically whether the warrantless removal of a suspected child victim is a special needs situation since there may be circumstances in which obtaining a warrant does work effectively in the child removal or child examination context.[136] The court went on to explain if caseworkers did have a special need in this case, that did not give them freedom from *ever* obtaining a court order; the individual facts of each case will dictate the conclusion.[137] The court concluded that Sarah's removal could be analyzed under the special needs doctrine, the typical probable cause analysis, or the exigent circumstances doctrine of the Fourth Amendment.[138]

The Second Circuit in *Tenenbaum* was hesitant to adopt the special needs doctrine in part because of case law from other circuits at the time, which held emergency removal of a child by caseworkers did not constitute a special needs situation.[139] The Second Circuit was faced with this issue again in *Southerland v. City of New York*,[140] and decided not to adopt the special needs doctrine because the facts of the case did not impose a burden on the officer to obtain a warrant, meaning the warrant process would not have prevented the officer from taking necessary action to protect the child.[141]

In *Southerland,* a caseworker was assigned to investigate a child-abuse report by a school counselor. The caseworker subsequently obtained an order from family court authorizing entry into the Southerland family's apartment.[142] Based on observations from the investigation, the caseworker ordered the removal of the children into custody, but without an authorized warrant.[143] The Southerlands brought suit and claimed the caseworker violated their Fourth Amendment right to be free from unreasonable searches of their

135 *Id.* at 603.

136 *Id.* at 604.

137 *Id.*

138 *Id.* at 603–05.

139 *Id.* at 603; *see, e.g.*, Good v. Dauphin Cty. Soc. Servs. for Children & Youth, 891 F.2d 1087, 1095 (3d Cir. 1989) (rejecting the special needs doctrine for a warrantless search in favor of an objective reasonableness standard that looks at whether a reasonable person in the circumstances could have believed there was imminent danger of serious bodily injury and whether the intrusion was reasonably necessary to avert that injury); Donald v. Polk County, 836 F.2d 376 (7th Cir. 1988) (upholding a warrantless seizure only on the basis of probable cause).

140 680 F.3d 127, 159–60 (2d Cir. 2012).

141 *Id.* at 158–60. The Second Circuit noted: "We did not decide in *Tenenbaum* which of those three standards [exigent circumstances, probable cause, or special needs] should apply as the constitutional floor in child-removal cases—i.e., the standard below which an officer could not go without violating the Fourth Amendment." *Id.* at 158.

142 *Id.* at 131.

143 *Id.*

home.[144] The Second Circuit reiterated that it has yet to articulate a definitive legal standard that applies to a Fourth Amendment unlawful seizure claim in the context of child abuse cases.[145] But, the Second Circuit did eliminate the applicability of the special needs doctrine to uphold the search in *this case*.[146] Given the timeline, obtaining a warrant was practicable, as it was not going to impose an intolerable burden on the officer or the court, prevent the officer from taking necessary action, or render his action ineffective.[147] The Second Circuit may have been willing to adopt the special needs doctrine but did not have enough evidence to sustain its applicability to the facts of the case. However, a footnote in *Southerland* displays the Second Circuit's reliance on other circuits' analyses of the special needs doctrine.[148] The court cited case law from the circuits, subsequent to *Tenenbaum* and prior to *Southerland*, that refused to apply the special needs test in this context.[149]

Since the *Tenenbaum* and *Southerland* decisions, subsequent lower court cases within the Second Circuit have employed a standard that resembles the special needs doctrine without explicitly adopting the doctrine.[150] The courts analyze a caseworker's *or* law enforcement personnel's action under an objective reasonableness standard that looks at the nature of the belief that prompts removal without a court order.[151] This reasonableness standard closely resembles the justification

144 *Id.* at 131–32. When a child is taken into custody, the child is seized for Fourth Amendment purposes and can assert a claim that the seizure was unreasonable. *See id.* at 143.

145 *Id.* at 157.

146 *Id.* at 158 ("[T]his case does not present circumstances in which the 'special needs' test applies, if ever it does in the child-removal context.").

147 *Id.* at 159.

148 *Id.* at 159 n.27 ("Case law from our sister circuits, subsequent to *Tenenbaum*, concludes that the 'special needs' test is never applicable in this context."). The Second Circuit cited cases from the Seventh, Eight, and Fifth Circuits to support its conclusion. *Id.*

149 *Id.*

150 *See, e.g.*, P.A. v. City of New York, 44 F. Supp. 3d 287, 301 (E.D.N.Y. 2014) (remanding to determine whether removal without a warrant was necessary under an objectively reasonable standard); Estiverne v. Esernio-Jesnssen, 833 F. Supp. 2d 356, 376 (E.D.N.Y. 2011) (explaining that the Second Circuit has yet to adopt an appropriate standard to assess the reasonableness of a warrantless seizure in the context of child abuse cases). In *Estiverne*, since there was a genuine dispute as to whether, absent a medical purpose, the defendants had a sufficient reasonable basis for seizing and removing the child without a warrant, the motion for summary judgment was denied. 833 F. Supp. 2d at 376.

151 The objective reasonableness standard derives from a separate line of cases pre-existing *Tenenbaum* and *Southerland*. *See* Wilkinson *ex rel.* Wilkinson v. Russell, 182 F.3d 89, 104–05 (2d Cir. 1999) (holding that the two defendants involved, the officer and caseworker, needed an objectively reasonable basis for removing the child without obtaining a court order). The reasonableness standard takes into consideration multiple circumstances that affect a caseworker in these situations, such as the presence of alternative solutions and the possibility of conflicting information. *Id.* at 105. Courts give caseworkers considerable discretion and

for the special needs doctrine.[152] Yet, the cases do not explicitly adopt a primary purpose test. This is consistent with the confusion among the courts in the special needs doctrine's application.[153] The Tenth Circuit has described the special needs doctrine as a list of examples from the Supreme Court rather than a determinative set of criteria.[154] But, it is still not clear what constitutes a special need, how courts should employ the balancing test set forth in *T.L.O.* and its progeny, and if the special needs doctrine has any place in child abuse cases. The Seventh Circuit's back-and-forth approach to this question is a prime example of the confusion in applying the doctrine.

B. *The Seventh Circuit's Approach*

In *Darryl H. v. Coler*, the Seventh Circuit was the first circuit to affirmatively apply the special needs doctrine to investigations of child abuse.[155] *Darryl H.* was the consolidation of two cases where a caseworker conducted a visual inspection and physical examination of two children's bodies for evidence of abuse.[156] The district court held that a caseworker could conduct a physical examination of a child as part of the investigation without violating the Fourth Amendment, and

judicial deference in handling these claims. *Id.* at 106; *see also* Gottlieb v. County of Orange, 84 F.3d 511, 520 (2d Cir. 1996) (upholding summary judgment in favor of the defendants because the investigation gave them reasonable ground to believe there existed circumstances warranting immediate separation of the child from the parent); E.D. *ex rel.* V.D. v. Tuffarelli, 692 F. Supp. 2d 347, 360 (S.D.N.Y. 2010) (applying the *Wilkinson* test for reasonableness and affirming summary judgment in favor of the defendant ACS employee), *aff'd*, 408 F. App'x 448 (2d Cir. 2011).

152 *See infra* notes 161–63 and accompanying text.

153 *See* Pié, *supra* note 18, at 576. The Sixth Circuit also explicitly noted the lack of guidance in this area and inconsistency among the circuit courts and, as a result, concluded a reasonable social worker would not have known that the conduct in question, interviewing a child in school without obtaining a court order or consent, violated clearly established law. Barber v. Miller, 809 F.3d 840, 844–47 (6th Cir. 2015). Thus, the social worker was entitled qualified immunity from Fourth Amendment claims. *Id.* at 847.

154 Dubbs v. Head Start, Inc., 336 F.3d 1194, 1213 (10th Cir. 2003) (citing the Supreme Court's examples of situations falling within special needs, such as: principal's search of a student's purse for drugs, public employer's search of an employee's desk, probation officer's search of a probationer's home, railroad administration requiring employees to submit blood and urine tests, and school's random drug testing of athletes).

155 801 F.2d 893, 901 (7th Cir. 1986) ("In determining whether an investigative search in the child abuse context must meet the warrant or probable cause requirement, we must follow the methodology established by the Supreme Court of 'balancing the need to search against the invasion which the search entails.'" (quoting T.L.O. v. New Jersey, 469 U.S. 325, 337 (1985))); *see also* Pié, *supra* note 18, at 581 (explaining the Seventh Circuit's application of the special needs doctrine in child abuse investigations was based on where the search or seizure occurs).

156 *Darryl H.*, 801 F.2d at 900.

neither a warrant nor probable cause was necessary.[157] On appeal, the Seventh Circuit employed the balancing test from *T.L.O.* and weighed an individual's interest—a nude physical examination is a significant intrusion into a child's privacy—against the state's interest and obligation to young children.[158] The Seventh Circuit decided that the balancing favored the state because of the state's responsibility to prevent child abuse, child injuries, and deaths from abuse.[159] Due to the nature of child abuse investigations, the need to remove the child as soon as possible, and the limited time allotted to the state in investigating such allegations, applying the balancing test from *T.L.O.* was appropriate to uphold the constitutionality of such child abuse investigations.[160] The Seventh Circuit decided that the safety of the child may outweigh the Fourth Amendment's formal warrant and probable cause requirements as long as a search is conducted reasonably.[161]

Another important aspect of the *Darryl H.* decision is that the Seventh Circuit distinguished between the primary and secondary purpose of the caseworker's warrantless searches.[162] The court noted that even though a visual inspection *may* lead to criminal prosecution, that is of secondary importance to the caseworker at the time of the search because the safety of the child is the first priority.[163] This is significant because in *Ferguson*, almost fifteen years later, the Supreme Court looked at whether the primary purpose of the search was to protect the children or gather evidence to support a future criminal conviction.[164] The Seventh Circuit's reasoning regarding how the special

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157 *Id.* at 901.

158 *Id.* at 901–03.

159 *Id.* at 901–02. "In 1982, seventy-one children in Illinois died as a result of child abuse." *Id.* at 902.

160 *Id.* at 901–04. *Darryl H.* was decided one year after the Supreme Court adopted a balancing test in *T.L.O.* The balancing test, as coined by Justice Blackmun in his concurrence, has become the analysis under the special needs doctrine. *See supra* notes 91–97 and accompanying text.

161 *Id.* at 904. The Seventh Circuit explained that warrantless searches and seizures conducted by caseworkers may be justified under *T.L.O.*'s balancing test as long as the search and seizure are done reasonably under the circumstances. *Id.* at 902–04. The caseworker was acting pursuant to Illinois Department of Children and Family Services Child Abuse and Neglect Investigation Decisions Handbook. *Id.* at 895–96. The Seventh Circuit was not convinced that the Handbook adequately ensured the searches would be carried out reasonably and determined that this was a matter to be addressed at trial. *Id.* at 905. But, the Seventh Circuit's reasoning paved the way for warrantless searches and seizures to be justified under the special needs doctrine in the context of child abuse cases. *See id.* at 902–04.

162 *Id.* at 902.

163 *Id.* ("[W]hile the visual inspection of the child's body *may* eventually result in a criminal prosecution against a child abuser, that contingency is certainly of secondary importance to the DCFS at the time the search is conducted. Of prime importance is the safety of the child, and the stabilization of the home environment.").

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

needs doctrine may apply in child abuse cases is consistent with *Ferguson* because the health and protection of the children was the alleged primary purpose of the warrantless search.[165] Therefore, a search conducted without a warrant may be upheld under the special needs doctrine.

The Seventh Circuit revisited the special needs doctrine in the context of child abuse in *Doe v. Heck*, where children were interviewed at school by caseworkers about allegations of abuse without a warrant or consent.[166] Once again, employing the *T.L.O.* balancing test, the Seventh Circuit weighed the degree to which the search intruded upon privacy and the degree to which the search was needed in furtherance of legitimate governmental interests.[167] The court held that the warrantless seizure of the children was presumptively unreasonable but could still be upheld if the search fell within the special needs doctrine.[168] The search may be justified if the government could prove it had special needs that made obtaining a warrant impractical because it would frustrate the government's purpose behind the search.[169] However, the government failed to make an attempt to argue that the search or seizure fell within the special needs doctrine.[170] Even though the doctrine was not argued, the court left open the possibility that it could apply to future child abuse cases.

Following *Doe v. Heck*, the Seventh Circuit has continued to use *T.L.O.* balancing and an assessment of reasonableness when evaluating warrantless searches and seizures in the context of child abuse cases.[171] Thus, in light of the Supreme Court's lack of guidance on the concrete applicability of the special needs doctrine, both the Second Circuit and Seventh Circuit have adopted their own less-stringent standard of

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165 *Id.* at 81. In *Ferguson*, the hospital argued that the primary purpose of the warrantless search was to protect the health of both the mother and child. *Id.* However, the Court rejected this argument because the warrantless searches actually had the primary purpose to provide the police with evidence of criminal conduct. *Id.* at 86. The health and safety of the child was not the direct and primary purpose and, thus, the special needs doctrine did not justify the warrantless search. *Id.* at 82–84.

166 327 F.3d 492, 510 (7th Cir. 2003).

167 *Id.* at 510–11.

168 *Id.* at 513.

169 *Id.*

170 *Id.*

171 *See, e.g.*, Hernandez *ex rel.* Hernandez v. Foster, 657 F.3d 463 (7th Cir. 2011) (holding warrantless removal of a child is constitutional if the removal was done reasonably in light of the facts and circumstances known to the defendants at the time of the removal and noting that courts look at the totality of the circumstances in making this objective determination); Siliven v. Ind. Dep't of Child Servs., 635 F.3d 921, 926–28 (7th Cir. 2011) (analyzing a warrantless removal as reasonable only if there was probable cause or exigent circumstances and finding probable cause existed and no violation of the Fourth Amendment).

reasonableness.[172] However, the Supreme Court's decision in *Ferguson* lends support for the circuit courts' application of the primary purpose test to child abuse cases. The primary purpose of seizing a child based on alleged abuse is to protect the child. If the Supreme Court affirmatively adopts the primary purpose test in this context, it would be able to articulate guidelines to ensure the doctrine abides by Fourth Amendment protections. Recently, on an appeal from the Ninth Circuit, the Supreme Court had the opportunity to answer this question, but considered the case moot.[173] A discussion of the Ninth Circuit's decision is below and it demonstrates how the confusion still exists among the circuits almost twenty years after the Seventh Circuit's decision in *Darryl H.*

C. *The Ninth Circuit's Approach*

In *Greene v. Camreta*, Camreta, a caseworker from the Oregon Department of Human Services (DHS), discovered a father was released after being arrested for allegations of abuse and was having unsupervised contact with his daughters.[174] Camreta was assigned to assess the girls' safety and after hearing about the release, visited S.G.'s (one of the daughters) elementary school to interview her. Camreta explained he chose to interview S.G. at school because it is a place where children feel safe and there would be an absence of the potential influence of suspects, including her father.[175] He did not obtain a warrant or court order before the interview and explained that conducting interviews at the school was of standard practice.[176] A deputy sheriff accompanied Camreta during the interview.[177] The sheriff

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172 *See supra* notes 151, 171 and accompanying text.

173 Camreta v. Greene, 563 U.S. 692, 698 (2011) (finding the case moot because the child had grown up and would never be subject to the in-school interviewing practices), *vacating in part* 588 F.3d 1011 (9th Cir. 2009). Thus, the Court did not reach the Fourth Amendment question in the case—whether the warrant requirement or the special needs doctrine may apply in seizures of potentially abused children. *Id.*

174 588 F.3d 1011, 1016 (9th Cir. 2009), *vacated in part*, 563 U.S. 692.

175 *Id.* at 1016–17.

176 *Id.* at 1017. Camreta testified that "[i]nterviews of this nature, on school premises, are a regular part of [child protective services] practice and are consistent with DHS rules and training." *Id.* at 1016 (alterations in original); *see also* Barber v. Miller, 809 F.3d 840, 842–45 (6th Cir. 2015) (describing how Michigan's state statute authorizes CPS to conduct in-school interviews of suspected child-abuse victims without parental consent). In *Barber*, a declaratory judgment to strike down Michigan's state statute as facially unconstitutional under the Fourth Amendment was denied because the father lacked standing. *Id.*; *see also* MICH. COMP. LAWS. ANN. § 722.628 (West 2011).

177 *Green*, 588 F.3d at 1017.

did not ask any questions during the interview or speak to S.G.[178] S.G. was interviewed for two hours, and based on the interview and corroborative information, Camreta believed S.G. was sexually abused.[179]

The precise issue presented to the district court and on appeal to the Ninth Circuit was whether an in-school seizure and interrogation of a suspected child-abuse victim is permissible under the Fourth Amendment without probable cause and a warrant.[180] Camreta argued the special needs doctrine should excuse the warrantless search because protecting children from acts of sexual abuse justifies a departure from the warrant and probable cause requirements.[181] The court relied on *Ferguson* and rejected Camreta's argument on the grounds that law enforcement was too intertwined in the seizure to justify applying the doctrine.[182] The Ninth Circuit explained that the presence of law enforcement objectives was clear: the police were in the midst of an ongoing investigation of the alleged abuser, the officer's presence may have facilitated the interview and helped gather evidence, the school likely did not say no to the removal of the child because of the officer's presence, and the officer's presence may also have provided leverage to make the child feel compelled to speak truthfully.[183] For these reasons, the Ninth Circuit ruled the seizure was sufficiently entangled with law enforcement to trigger the traditional Fourth Amendment warrant requirement rather than the special needs doctrine.[184]

Even though the Ninth Circuit declined to apply the special needs doctrine in this case, the court implied in a footnote that the special

178 *Id.*

179 *Id.* at 1017–18.

180 *Id.* at 1022. The Ninth Circuit had a previous case, *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999), where it held a warrantless, non-emergency search and seizure of an alleged victim of child sexual abuse *at the home* violated the Fourth Amendment. *Green*, 588 F.3d at 1022. There, a neighbor claimed to have been awakened at night by a child screaming "No, Daddy, no." *Id.* A social worker, accompanied by a police officer, visited the home without a warrant. *Id.* The court in *Calabretta* held that the Fourth Amendment protections apply to child abuse investigations and a family's right to be free of warrantless searches and seizures in the *home* even in the context of child abuse investigation. *Id.* at 1022–23. The court decided that the case did not control directly in *Greene*, but played a significant role. *Id.* at 1022–23.

181 *Id.* at 1026 ("Although defendants acknowledge that neither the Supreme Court nor this court has applied the 'special needs' doctrine to searches or seizures of children during a child abuse investigation, they argue that the government's 'special need' to protect children from sexual abuse justifies a departure from both the warrant and probable cause requirements in a case such as this one.").

182 *Id.* at 1027. The court did not apply the special needs doctrine to justify the warrantless seizure because a police officer was present at the interview and there was an ongoing, active police investigation into the alleged child abuse. *Id.*

183 *Id.* at 1027–28.

184 *Id.* at 1028.

needs doctrine could potentially apply to an in-school interrogation given a different set of facts when there is no involvement of law enforcement personnel.[185] This footnote suggests that if Camreta went to the school *alone*, the seizure may have fallen within the special needs doctrine and, thus, would be a permissible exception to the Fourth Amendment. This supports explicitly adopting the primary purpose test under the special needs doctrine for caseworkers because it would aid in the clarification of the doctrine. There is no basis to believe that a caseworker knows she is violating the Constitution based on the mere presence of a law enforcement officer who does not speak or participate during the interview. The hesitancy of the Ninth Circuit to explicitly apply the special needs doctrine in this context is consistent with the hesitancy of all the circuits' in the absence of guidance from the Supreme Court. Unfortunately, the Supreme Court declined to decide this question notwithstanding that it granted certiorari and heard the case.[186]

V. THE PRIMARY PURPOSE TEST AND THE SIXTH AMENDMENT

Applying a primary purpose test under the special needs doctrine in cases of child abuse may be the logical outgrowth of the primary purpose test employed by the Supreme Court in its Confrontation Clause analysis.[187] The Confrontation Clause of the Sixth Amendment protects the rights of a criminal defendant through the requirement that a defendant be confronted with the witnesses against him by cross-

185 *See id.* at 1027 n.12 ("The facts of this case do not require us to decide whether the 'special needs' doctrine would apply to an in-school interrogation of a child where there is no direct law enforcement purpose and no involvement of law enforcement personnel.").

186 *See supra* note 173 and accompanying text. Even though the issue was ultimately decided on jurisdictional grounds, during oral argument the Justices suggested some dissatisfaction with the extensive focus on law enforcement entanglement to argue against applying the special needs doctrine. *See* Gupta-Kagan, *supra* note 98, at 374–75 (stating that the oral argument ended with several Justices hinting that the special needs framework may not suffice to answer Fourth Amendment questions in child protection cases). The question is still left open.

187 The Supreme Court applies a primary purpose test to the Confrontation Clause to determine whether out-of-court statements are admissible without violating the Sixth Amendment's Confrontation Clause. *See* Davis v. Washington, 547 U.S. 813 (2006). The test looks objectively at the circumstances and whether out-of-court statements were made with the primary purpose of meeting an ongoing emergency or to prove past events potentially relevant to a later criminal prosecution. *See* Michigan v. Bryant, 562 U.S. 344, 358–59 (2011). If the statement's primary purpose is investigating crime, the statements are testimonial and inadmissible unless the defendant has the opportunity to cross-examine the witness, or had a prior opportunity to do so. *See* Crawford v. Washington, 541 U.S. 36 (2004).

examination.[188] Consequentially, the admissibility of hearsay statements[189] comes in direct conflict with the requirements of the Confrontation Clause.[190] However, the Supreme Court has held the Confrontation Clause does not apply when out-of-court statements are non-testimonial and the primary purpose of the statement is not to gather evidence for a future criminal prosecution.[191]

In *Ohio v. Clark*,[192] the Supreme Court recently expanded on situations in which the Sixth Amendment's Confrontation Clause does not apply. In *Clark*, the Court was confronted with statements made by a three-year-old boy, L.P., to his teacher, which identified Clark, his mother's boyfriend, as his abuser.[193] A grand jury subsequently indicted Clark on five counts of felonious assault, two counts of endangering children, and two counts of domestic violence.[194] At Clark's trial, the State introduced L.P.'s statements to his teachers as evidence of Clark's guilt, but L.P. did not testify.[195] Clark moved to exclude the out-of-court statements under the Confrontation Clause.[196] The Supreme Court held that the out-of-court statements did not violate the Confrontation Clause because of the primary purpose of the conversation between L.P. and his teacher.[197]

The Court explained that the primary purpose of L.P. and his teacher's conversation was not to gather evidence for Clark's prosecution.[198] It was clear that the teacher's objective in questioning L.P. was to protect him and determine how best to secure his safety.[199] The Court found the conversation was informal and spontaneous

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188 U.S. CONST. amend VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.").

189 Hearsay is defined as a statement that a declarant does not make while testifying at the current trial or hearing and a party offers the statement into evidence at the current trial to prove the truth of the matter asserted in the statement. *See* FED. R. EVID. 801(c).

190 Since, by definition, hearsay is a statement not made at the current trial, it conflicts with the Confrontation Clause's requirement that the accused be "confronted with the witnesses against him" at the trial. *Id.*; *see also* U.S. CONST. amend VI; *supra* text accompanying note 188.

191 *See Davis*, 547 U.S. 813.

192 135 S. Ct. 2173 (2015).

193 *Id.* at 2177.

194 *Id.* at 2178.

195 *Id.* The Ohio Rules of Evidence allow the admission of reliable hearsay by child abuse victims if the statements bore sufficient guarantees of trustworthiness. *See* OHIO R. EVID. 807. The Ohio Supreme Court found L.P.'s statements met this criterion. *Clark*, 135 S. Ct. at 2178–79.

196 *Clark*, 135 S. Ct. at 2178.

197 *Id.* at 2181.

198 *Id.*

199 *Id.*

because the teachers were asking about bruises on L.P.'s face, questions the Court thought "any concerned citizen" would ask a child.[200] The teacher did not inform L.P. that his statements would be used to arrest or punish his abuser by police or prosecutors.[201] Further, the Court stressed the fact that L.P. was speaking to his teachers, not law enforcement personnel who are principally charged with uncovering and prosecuting criminal behavior.[202] The Court distinguished the relationship between a student and a teacher from that of a citizen and police.[203] Since law enforcement and future prosecution was of a secondary nature and the interests of the child were of primary importance, the statements were not prohibited by the Sixth Amendment.[204]

The chain of reasoning employed by the Court in *Clark* is very similar to many of the circuit courts' language when analyzing the special needs doctrine in cases of child abuse.[205] A caseworker's primary purpose of seizing a child is the protection and safety of the child, whether the child is being removed from the home temporarily or removed from the classroom to conduct an interview about abuse. By applying the primary purpose test in *Ferguson* and drawing a distinction between a caseworker's primary purpose and law enforcement purposes, the special needs doctrine can justify a warrantless search and seizure when conducted by a caseworker in the pursuit of preventing future abuse. Analogously, the primary purpose of L.P. and his teacher's conversation was to protect L.P.—to ensure that when the school day was over, L.P. was not sent home to an abusive home and put in danger. The Court recognized that even though the conversation did identify the abuser and subsequently lead to a criminal prosecution, this was not the primary purpose of the teacher's conversation.[206] The teacher was not concerned with criminal implications, just as the caseworkers are not focusing on possible future criminal proceedings in the moment they remove or interview a child suspected of being abused.

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200 *Id.*

201 *Id.*

202 *Id.* at 2182.

203 *Id.* ("Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers.").

204 *Id.* at 2181–82.

205 *See, e.g.*, Darryl H. v. Coler, 801 F.2d 893, 901–02 (7th Cir. 1986) (explaining that even though a visual inspection may lead to criminal prosecution, that is of secondary importance to the caseworker at the time of the search because the safety of the child is the first priority).

206 *Clark*, 135 S. Ct. at 2181.

VI. PROPOSAL TO APPLY A PRIMARY PURPOSE TEST TO WARRANTLESS SEARCHES AND SEIZURES CONDUCTED BY CASEWORKERS IN CHILD ABUSE CASES

Courts should apply a primary purpose test, similar to the Confrontation Clause analysis and as articulated in *Ferguson*, to special needs cases under the Fourth Amendment. Thus, caseworkers investigating allegations of child abuse should be justified to conduct a warrantless search or seizure under the special needs exception to the Fourth Amendment's warrant requirement. Just as the Confrontation Clause analysis looks at the primary purpose of the out-of-court statements, the primary purpose test of the special needs doctrine would look at the primary purpose of the warrantless search and seizure. The test makes a clear distinction between whether law enforcement was an integral part of the warrantless action or whether there is a separate special need to justify the warrantless entry, such as an imminent risk of harm to a child who allegedly has been abused. The latter should be an exception to the warrant requirement of the Fourth Amendment and is constitutional under the special needs doctrine.

Critics of the special needs doctrine argue that child abuse searches and seizures should not be an exception to the warrant requirement. Instead, state personnel should adhere to the Fourth Amendment because the invasiveness of a search triggers a child's constitutional protections of privacy and liberty.[207] While children undoubtedly have Fourth Amendment protections, they also have a right to be free from abuse and neglect and a right to adequate care and supervision. CPS intervenes after a privacy interest has already been invaded, namely the child's interest to have her body be free from abuse. A caseworker conducts a warrantless search or seizure only when parents cannot or will not protect, by their acts or omissions, their children's basic safety needs.[208]

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207 *See* Coleman, *supra* note 18, at 417–18. Coleman argues that warrantless investigations violate children's fundamental values of privacy, dignity, and personal security. *Id.* at 418; *see also* Gupta-Kagan, *supra* note 98, at 359. Gupta-Kagan argues that the problem with the special needs doctrine in this context is that it does not account for constitutional consequences beyond those of the criminal justice system. *Id.* Instead, the analysis should look at whether the warrantless search or seizure implicates fundamental constitutional rights and, if so, procedural protections of the Fourth Amendment are required regardless of the involvement of law enforcement. *See id.*

208 *See* DEPANFILIS & SALUS, *supra* note 10, at 9–11. The basis for CPS action is a concern for the care of children. *Id.* CPS focus is *not* on infringing on protections of privacy and liberty. *Id.* The "philosophical tenets" of CPS include: ensuring children grow up in a safe home, helping parents develop the strength and capacity to care for their children, and intervening on behalf of the child when parents cannot fulfill their responsibilities to protect their children. *Id.*

When the special needs doctrine is used to uphold warrantless searches and seizures, the *Ferguson* primary purpose test has been criticized as inapplicable in a child abuse context because of the collaborative approach between CPS and law enforcement during investigations.[209] It is argued that the dual purpose of investigations between CPS and law enforcement is analogous to the civil and criminal purposes in *Ferguson*, and the Court refused to uphold the searches in *Ferguson* under the special needs doctrine.[210] This argument categorizes child health and safety as the ultimate purpose of the warrantless search and the process of gathering evidence against the abuser as the immediate purpose.[211] This argument is further supported by the current trend in state legislatures to merge CPS and law enforcement into a united investigation because of their similar and highly important purposes.[212]

However, this argument disregards the distinction the Court made in *Ferguson* regarding the overlap of law enforcement purposes and those purposes that justify the special needs exception.[213] The Court recognized in *Ferguson* that there is a crucial distinction between the

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209 *See* Coleman, *supra* note 18, at 492–97. For a discussion about the collaborative process between CPS and law enforcement when investigating allegations of child abuse, see *supra* Part I.

210 *See* Coleman, *supra* note 18, at 492–97. In *Ferguson*, the argument on behalf of the hospital to uphold the search under the special needs doctrine was a concern about damage to children in utero from exposure to drugs being taken by their mothers. Ferguson v. City of Charleston, 532 U.S. 67, 81 (2001). But the Court found 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." *Id.* at 80.

211 *See* Coleman, *supra* note 18, at 496–97 ("[C]hild welfare investigations, including home visits and unsupervised examinations of children, have as their ultimate purpose the safety and health of children. More immediately, however, like the investigation in Ferguson, their purpose is to gather evidence to determine if parents are violating laws prohibiting maltreatment.").

212 *Id.* at 492–93; *see also* Gupta-Kagan, *supra* note 98, at 378 (pointing out that the trend to merge the purposes of CPS and law enforcement into one investigatory process is the correct way to protect the child and minimize the number of interviews of potential child victims). In *Greene v. Camreta*, the Ninth Circuit acknowledged the entanglement between law enforcement and caseworkers in this process and noted "fostering coordination and collaboration between caseworkers and law enforcement officers is an effective way both to protect children and to arrest and prosecute child abusers—each, of course, governmental activity of the highest importance." 588 F.3d 1011, 1029 (9th Cir. 2009), *vacated in part*, 563 U.S. 692 (2011). Looking back at New York's social service laws as an example, a mandatory reporter speaks first to CPS. *See supra* notes 30–32 and accompanying text. CPS begins an investigation into the allegation. CPS's investigation is case specific and law enforcement may never be involved in the process. *See supra* notes 10, 40 and accompanying text. If it got to the point where New York merged CPS into the police department, that would become a different problem. But currently, there is a discernable difference between the job responsibilities of CPS and the New York Police Department, which allows the special needs doctrine and the primary purpose test to be applied in this context.

213 *Ferguson*, 532 U.S. at 82–84.

ultimate and immediate purpose of a policy or action.[214] Law enforcement's ultimate purpose is always a broader social purpose or objective that is beneficial to society and any search would be immunized under the special needs doctrine if it is defined solely in terms of its ultimate, rather than immediate, purpose.[215] Thus, even though critics contend that the dual purpose of CPS renders the special needs doctrine inapplicable, the Court already reconciled this point by stating that the purposes obviously overlap, but that this is not where the inquiry ends.[216] The immediate purpose is discerned by: a close review of the scheme, whether the purpose can be distinguishable from the general interest in crime control, and how involved law enforcement officials are at every stage of the proceedings.[217]

When CPS responds to a report of child abuse, a caseworker's initial actions and assessments may not involve law enforcement at all.[218] Once a caseworker receives a report, the caseworker first decides if the report meets the statutory criteria for child abuse or neglect, then investigates to ascertain if abuse or neglect can be substantiated.[219] CPS further looks into whether the child is safe at home and if there is a risk that maltreatment may occur in the future.[220] In some situations, the court *may* become involved if the child is removed from the home or, in a case of sexual abuse, death, or extreme physical abuse, complaints are filed in criminal court by the district attorney as a result of CPS investigations.[221] This process does not involve law enforcement at every stage, as in *Ferguson*, and may not involve law enforcement at all

214 *Id.*

215 *Id.*

216 *Id.*

217 *Id.* at 81–84. In *Ferguson*, "prosecutors and police were extensively involved in the day-to-day administration of the policy." Police and prosecutors decided who received reports of drug screens, law enforcement officials determined the procedures to be followed when performing the screens, and the police had access to a nurse's medical files and coordinated the arrests with the hospital staff. *Id.* at 80–82.

218 CPS first and foremost evaluates the safety of the child and potential risk of future abuse or neglect if the child remains in a home. *See* CROSSON-TOWER, *supra* note 26, at 16–17; *see also supra* Section I.A.

219 *See Supra* Section I.B.

220 *See* DEPANFILIS & SALUS, *supra* note 10, at 37–38.

221 CPS assesses the risk to and safety of children, arranges for services to achieve safe conditions, engages community partners to support families and protect children, and provides child-centered services through other community agencies. *Id.* at 25. After CPS facilitates community collaborations and assesses the risk to and safety of children, if families are unable or unwilling to keep children safe, CPS may petition "juvenile or family court on the child's behalf either to recommend strategies to keep children safe at home or to be placed in out-of-home care." *Id.* This process does not involve law enforcement at the forefront of the investigation as suggested by critics of the special needs doctrine and the primary purpose test. *See id.*

depending on the nature of the report and the subsequent information CPS acquires.

Finally, the counterarguments to applying the special needs doctrine also overlook the origins of the doctrine. The special needs doctrine was created to apply to administrative searches when it was impracticable for non-law enforcement officers to follow law enforcement requirements.[222] The Second Circuit, which has been most hesitant about adopting the special needs doctrine in child abuse situations, even recognized that there are circumstances in which obtaining a warrant does not work effectively in the child removal or examination context.[223] The Second Circuit reasoned that it depends on the circumstances of each case, and whether it would be impractical for the caseworker to obtain a warrant and prevent the caseworker from being able to take necessary actions to protect the child.[224] When a child abuse investigation is "sufficiently disentangled from general law enforcement purposes," there is a "valid administrative purpose" of protecting children from abuse, and the special needs doctrine can be applied consistently with its original purposes.[225]

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222 *See* New Jersey v. T.L.O., 469 U.S. 325, 340 (1985) (holding that "school officials need not obtain a warrant before searching a student who is under their authority" because the burden of obtaining a warrant may frustrate the purpose behind the search); *see also* O'Connor v. Ortega, 480 U.S. 709, 722 (1987) (holding that the imposition of a warrant requirement in work-related searches would conflict with "the common-sense realization that government offices could not function if every employment decision became a constitutional matter" (quoting Connick v. Myers, 461 U.S. 138, 143 (1983))).

223 *See* Tenenbaum v. Williams, 193 F.3d 581, 604 (2d Cir. 1999).

224 *Id.* Using a fact-intensive procedure to discern whether it is impracticable to obtain a warrant and to determine if law enforcement was entangled with the warrantless search is consistent with the analysis employed by many of the circuit courts. *See, e.g.*, Southerland v. City of New York, 680 F.3d 127 (2d Cir. 2012); Greene v. Camreta, 588 F.3d 1011 (9th Cir. 2009), *vacated in part*, 563 U.S. 692 (2011); *Tenenbaum*, 193 F.3d at 604–05; Darryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986). Critics of the primary purpose test argue that a fact-intensive analysis will lead to inconsistent results based on how courts weigh the evidence differently and which facts are emphasized or downplayed. *See* Joseph S. Dowdy, Recent Development, *Well Isn't that Special? The Supreme Court's Immediate Purpose of Restricting the Doctrine of Special Needs in* Ferguson v. City of Charleston, 80 N.C. L. REV. 1052, 1064–65 (2002). For example, in *Ferguson*, the district court found that the goal of the search was to protect the mother and child, whereas the Supreme Court found that the immediate purpose of the search was to gather evidence for the arrest and prosecution of pregnant women. *Id.* However, using fact-intensive inquiries to uphold a search, seizure, or even a warrant, is what the court does. *See, e.g.*, Illinois v. Gates, 462 U.S. 213 (1983) (articulating that the magistrate looks at the totality of the circumstances in deciding whether there is probable cause to issue a warrant). Given the individuality of each case in child abuse investigations, such a specific factual inquiry is necessary.

225 *See* Gupta-Kagan, *supra* note 98, at 376 (quoting 5 WAYNE R. LAFAVE, SEARCH & SEIZURE § 10.3 (4th ed. Supp. 2010)).

CONCLUSION

Caseworkers' rights to conduct warrantless investigations and remove a child in abuse cases should be formally justified under the primary purpose test of the special needs doctrine. By applying the special needs doctrine, the original purpose of the Fourth Amendment will still be preserved. The court will look at the totality of the circumstances to discern the primary purpose of the search or seizure. As long as the primary purpose of the warrantless search or seizure is not to generate evidence for a criminal prosecution by law enforcement, but instead to protect a child victim from abuse, there is no violation of the Fourth Amendment.[226] Caseworkers are carrying out their duty and mission to protect child victims of abuse who may be scared, traumatized, and in desperate need of help. 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. The Supreme Court has frequently recognized limitations on the protections afforded by the Bill of Rights when the welfare of a child is at stake,[227] and the special needs doctrine exception to the Fourth Amendment should be no different.

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226 Although abuse of power is a hypothetical concern, a caseworker acting alone cannot abuse the system for criminal prosecutions. If a caseworker is investigating a case, that does not give the caseworker the authority to start a criminal proceeding against an alleged abuser, a prosecutor only has the authority to do that.

227 *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 626 (2008) (affirming the prohibition on carrying firearms in schools); Maryland v. Craig, 497 U.S. 836 (1990) (holding the Confrontation Clause is not violated when a special procedure is used for child witnesses in a child abuse case to testify outside of the defendant's physical presence); FCC v. Pacifica Found., 438 U.S. 726 (1978) (holding that government can regulate vulgar speech when the speech reaches children's ears); *see also* Kovacic v. Cuyahoga Cty. Dep't of Children & Family Servs., 724 F.3d 687, 707–08 (6th Cir. 2013) (Sutton, J., dissenting) ("The Free Speech Clause forbids punishing a person for what he reads at home—but not if he's looking at child pornography." (citation omitted)).