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Cover Page Footnote

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I. INTRODUCTION

In December 2014, an anonymous source reported possible signs of abuse on four-year-old I.B.'s body, including bruised knees and small cuts.[1] This prompted an investigation by the Department of Human Services through caseworker April Woodard.[2] Despite only being aware of bruised knees and small cuts on I.B.'s stomach, Woodard fully undressed and photographed I.B.'s private areas without obtaining a warrant or parental consent.[3] I.B.'s parents sued, claiming this was an unreasonable search under the Fourth Amendment.[4] However, I.B. and her family lost this lawsuit and never recovered because the law was unclear about whether a warrant was required or whether the special needs doctrine applied.[5] This uncertainty shielded Woodard from liability under qualified immunity.[6]

To protect children like I.B. from an invasion of privacy through searches like this, the law needs to clearly define when a warrant is required to conduct a strip search of suspected victims of child abuse. This Comment focuses on the special needs doctrine, one of the exceptions to the Fourth Amendment's warrant requirement, and the circuit split over its application. The Tenth Circuit should follow the growing trend in the circuit split to block the special needs doctrine from applying to searches of suspected victims of child abuse for three reasons: (1) the tests used to determine if the special needs doctrine applies are ambiguous and unclear, creating uncertainty in the law; (2) the potential consequences resulting from warrantless searches are severe, so all due process should be afforded; and (3) the special needs doctrine could be abused.

Doe v. Woodard is a significant case because it emphasizes the growing circuit split and the uncertainty social workers face when deciding whether to obtain a warrant.[7] The Tenth Circuit recognized this uncertainty in the law and correctly determined that the law was not "clearly established."[8] When the law is not clearly defined, government employees will not be held liable for actions they did not realize were

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[1] Doe v. Woodard, 912 F.3d 1278, 1285 (10th Cir. 2019).
[2] *Id*.
[3] *Id.* at 1285–86.
[4] *Id.* at 1286.
[5] *Id*. at 1288 (affirming the district court's dismissal of the Fourth Amendment claims for failing to show that a warrant was clearly required).
[6] *Id.* at 1289–90.
[7] Doe v. Woodard, 912 F.3d 1278 (10th Cir. 2019).
[8] *Id.* at 1294.

unlawful.[9] Therefore, victims of invasive searches, like I.B., cannot recover.

Woodard's conduct was not an isolated event, but rather, unwarranted bodily inspections of children are taking place every day. With millions of searches taking place, social workers need to be able to conduct their business knowing whether they are required to obtain a warrant. In 2017, child protection agencies in the U.S. received 2.4 million reports of alleged child abuse.[10] However, of those 2.4 million reports, 1.8 million were screened out as unfounded cases.[11] When narrowing the focus to one state, Kansas, reports show Child Protective Services receives over two-hundred reports a day, with sixty-three percent meeting the criteria to warrant an investigation.[12] As of March 2018, abuse investigators in Kansas were working on twenty-one to twenty-six cases at a time, despite the Child Welfare League of America's recommendation that caseworkers should maintain no more than twelve cases at a time.[13]

With hefty caseloads, defining whether the search of a child's body is a "special need," which does not require obtaining a warrant, is a pivotal question needing a timely response. However, policy and procedure manuals for caseworkers are often lengthy and dense, making it difficult for caseworkers to know proper search boundaries.[14] For example, 91.1% of child abuse allegations in Kansas were found to be unsubstantiated after an investigation.[15] This means that even if 91.1% of

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[9] *Id.* at 1289.

[10] U.S. Dep't. of Health & Hum. Serv's., CHILD MALTREATMENT 6-10 (2017), https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2017.pdf.

[11] *Id.* at 6-7 ("Reasons for screening out a referral vary by state policy, but may include one or more of the following: Does not concern child abuse and neglect; Does not contain enough information for a CPS response to occur; Response by another agency is deemed more appropriate; Children in the referral are the responsibility of another agency or jurisdiction (e.g., military installation or tribe); Children in the referral are older than 18 years.").

[12] *PPS Policy and Procedural Manual,* KAN. DEP'T CHILDREN & FAM., (Jan. 1, 2020), http://www.dcf.ks.gov/services/PPS/Documents/PPM_Forms/Policy_and_Procedure_Manual.pdf.; *Prevention and Prevention & Protection Services: Child Protective Services Reports*, KAN. DEP'T FOR CHILDREN & FAM. (last visited Nov. 10, 2019), http://www.dcf.ks.gov/services/PPS/Pages/CPSReports.aspx.

[13] Devon Fasbinder, *FF12: DCF Child Welfare Investigators Face High Caseloads*, KWCH12 (May 31, 2019), https://www.kwch.com/content/news/FF12-DCF-child-welfare-investigators-face-high-caseloads-510678991.html.

[14] *See e.g.,* PPS Policy and Procedural Manual, *supra* note 12 (the Protection Services Policy and Procedural Manual for Kansas is 851 pages long and has not one mention of "strip search," "undress," or even "warrant.").

[15] Prevention and Prevention & Protection Services: Child Protective Services Reports, *supra* note 12.

the investigations prove no child abuse took place, then each of these children could have been subjected to invasive searches without proper guidance. Perhaps the reason this number is so high is because, without clear legislative guidelines, caseworkers are searching every child, even those for whom the search may not be warranted at all.

The structure of this Comment will proceed in three parts. Section II establishes the context of this issue including background about the Fourth Amendment, the special needs doctrine, and the dispositions of the courts in the circuit split. Section III is an analysis of the Woodard decision and why the special needs doctrine should not apply to searches of children who are suspected victims of child abuse. Section III concludes by outlining proposed legislation clarifying that the special needs doctrine should not apply to searches of suspected victims of child abuse.

II. BACKGROUND

In order to understand the context of *Doe v. Woodard* and how it fits into the larger circuit split, this section outlines the Fourth Amendment and its exceptions, the special needs doctrine's history and tests for application, and the disposition of each case in the circuit split.

A. The Fourth Amendment and its Exceptions

The Fourth Amendment creates a constitutional guarantee for "people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and that "no warrants shall issue, but upon probable cause, supported by Oath or affirmation."[16] Probable cause sufficient to issue a warrant requires "knowledge or reasonably trustworthy information of facts and circumstances."[17] Further, judges must take into account the "totality of the circumstances" when determining whether sufficient probable cause exists to issue a warrant.[18] However, "probable cause" is not clearly defined and there are no rigid boxes to check; rather, probable cause is a flexible term that leaves room for judicial discretion in issuing warrants.[19]

To determine if a search or seizure is within the bounds of the Fourth Amendment, it must be reasonable.[20] A warrantless search is

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[16] U.S. CONST. amend. IV.

[17] Tenenbaum v. Williams, 193 F.3d 581, 603 (2d Cir. 1999).

[18] Lauren Kobrick, *I am Not Law Enforcement! Why the Special Needs Exception to the Fourth Amendment Should Apply to Caseworkers Investigating Allegations of Child Abuse*, 38 CARDOZO L. REV. 1505, 1514 (Apr. 2017).

[19] Tenenbaum, 193 F.3d at 603 (quoting Illinois v. Gates, 462 U.S. 213, 231 (1983)).

[20] Darryl H. v. Coler, 801 F.2d 893, 900 (7th Cir. 1986).

unreasonable under the Fourth Amendment unless it falls within one of the established exceptions.[21] Among these exceptions are: (1) consent; (2) exigent circumstances; and (3) a special need.[22] This Comment focuses exclusively on the special needs exception because it is the issue driving the circuit split.

B. The Special Needs Doctrine

The special needs doctrine is difficult to narrow down to one simple test in one defined set of circumstances. For this reason, it is helpful to understand the evolution of the special needs doctrine, the different tests used to determine whether the special needs doctrine has been correctly applied, and the various circumstances where the use of the special needs doctrine has been upheld.

1. History and Evolution of the Special Needs Doctrine

The seed for the special needs doctrine was first planted in *Camara v. Municipal Court*.[23] In *Camara*, the plaintiff claimed a Fourth Amendment violation occurred when a municipal worker came to perform a housing code inspection without her consent, exigent circumstances, or a warrant.[24] While the U.S. Supreme Court did not explicitly use the phrase "special need" to determine this exception, the Court acknowledged "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search,"[25] and lowered the probable cause standard for obtaining a warrant for a housing inspection.[26]

However, it wasn't until nearly two decades later that Justice Blackmun coined the phrase "special needs doctrine" in his 1985 concurring opinion in *N.J. v. T.L.O.*[27] In *T.L.O.*, a high school principal suspected a student was smoking marijuana at school, and while on public school property, he searched the student's bag without her consent, exigent circumstances, or a warrant.[28] When determining

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[21] Kobrick, *supra* note 18, at 1508.
[22] Doe v. Woodard, 912 F.3d 1278 (10th Cir. 2019).
[23] Camera v. Mun. Ct. of S.F., 387 U.S. 523 (1967).
[24] *Id.*
[25] *Id.*
[26] *Id.* at 538 ("The passage of a certain period without inspection might of itself be sufficient in a given situation to justify the issuance of a warrant. The test of 'probable cause' required by the Fourth Amendment can take into account the nature of the search that is being sought.") (quoting Frank v. Maryland, 359 U.S. 360, 383 (1959) (Douglas, J., dissenting)).
[27] N.J. v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).
[28] *Id.* at 328.

whether the search was reasonable, the majority used a balancing test to weigh the intrusiveness of the search against the government's interest in conducting the search.[29] In a 6–3 decision, the majority reasoned that this was a reasonable search because the school had a reasonable interest in preventing drug use at school and the search was not overly invasive.[30] In his concurrence, Justice Blackmun emphasized that there was a "special need" for the principal to be able to act immediately to protect other school children from actions that could threaten their safety and the educational process itself.[31] Therefore, the Court allowed for a warrantless search when there was a "special need," thus creating an additional exception to the Fourth Amendment's warrant requirement.[32]

In 2001, the Court further developed the special needs doctrine in *Ferguson v. City of Charleston* by emphasizing the importance of the primary purpose of the search.[33] In this case, a hospital conducted drug tests on pregnant women without a warrant or consent and reported positive drug tests to the police.[34] The Fourth Circuit found this testing admissible as a "special need" and upheld the constitutionality of this warrantless search.[35] However, the Supreme Court reversed, holding this was an unreasonable search because the primary purpose of the search was to arrest pregnant women and force them into substance abuse treatment.[36] The Court viewed this purpose as being too intertwined with law enforcement; therefore a warrant was required.[37]

These three cases highlight the evolution of the special needs doctrine. *Camara* introduced the idea that sometimes the burden of obtaining a warrant outweighs the necessity of the search or seizure.[38] *T.L.O.* established the balancing test which weighs the intrusiveness of the search against the government's interest.[39] *Ferguson* established the use of the primary purpose test, which says if the primary purpose of the search furthers law enforcement actions, the special needs doctrine does not apply.[40] While these cases are not an exhaustive history of the special needs doctrine, they highlight the general background of the doctrine and its applicable tests.

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[29] *Id.* at 351.
[30] *See* T.L.O., 469 U.S. 325 (1985).
[31] *Id.* at 353.
[32] *See T.L.O.,* 469 U.S. 325 (1985).
[33] Ferguson v. City of Charleston, 532 U.S. 67 (2001).
[34] *Id.* at 73.
[35] *Id.* at 74.
[36] *Id.*
[37] *Id.* at 85-86.
[38] Camera v. Mun. Ct. of S.F., 387 U.S. 523, 533 (1967).
[39] *T.L.O.*, 469 U.S. 325, 341–43 (1985).
[40] Ferguson*,* 532 U.S. 67, 81–82 (2001).

2. Special Needs Doctrine Tests and Application

Speaking broadly, a search or seizure falls within the special needs doctrine when a state actor's need—beyond that of criminal law enforcement—necessitates an immediate search, but makes the warrant and probable cause requirements of the Fourth Amendment impracticable or irrelevant.[41] If there is entanglement with law enforcement, the special needs doctrine does not apply because there is "a bright line between law enforcement purposes and all other purposes."[42] Courts use the primary purpose test to determine whether there is enough entanglement with law enforcement to block the special needs doctrine's application. If the primary purpose of the warrantless search is to "generate evidence for law enforcement purposes" then the special needs doctrine does not apply.[43] The purpose of this bright-line rule is to prevent law enforcement officials from side-stepping the warrant requirement by collecting information through non-law enforcement individuals under the special needs doctrine.

The Supreme Court has not explicitly defined what qualifies as a "special need."[44] In situations where courts have upheld the application of the special needs doctrine, there is not much of a common thread between people or locations, making it difficult to pinpoint when and where this doctrine applies.[45] For example, the Court has upheld this doctrine in hospitals, public schools, and state agencies;[46] and it has applied to probationers, parolees, student-athletes, students participating in extracurricular activities, people working in highly regulated industries, and federal customs officials.[47] This varied list of people and places does not make defining a "special need" much easier. However, this case law affirms that there is significant room for advocacy to argue for or against a situation being a "special need."[48]

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[41] Kobrick, *supra* note 18, at 1519.

[42] 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, 383 (Dec. 2012) (quoting Justice Blackmun in T.L.O.)

[43] Kobrick, *supra* note 18, at 1509.

[44] *Id.* at 1523.

[45] *See infra* notes 46–48.

[46] Kobrick, *supra* note 18, at 1523.

[47] Adam Pié, 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, 573-74 (Mar. 2012).

[48] *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995) (applying the special needs doctrine to allow drug testing of student athletes); Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 831–32 (2002) (applying the special needs doctrine to allow searches of students involved in extracurricular activities); Ferguson v. Charleston, 532 U.S. 67, 79–81 (2001) (holding the special needs

In the sense that a "special need" makes obtaining a warrant impracticable, applying the special needs doctrine requires that the subsequent search or seizure must still be reasonable to survive a constitutional challenge. Courts use a balancing test to determine reasonableness.[49] This test, as first used in *T.L.O.*, balances the intrusiveness of the search against the state's interest in conducting the search.[50] Another standard used to determine reasonableness is the two-fold inquiry established in *O'Connor v. Ortega*, which asked whether the search was: (1) "justified at its inception," and (2) reasonably related to the circumstances for which the search was generated in the first place.[51] A search is "justified at its inception" if the state had "reasonable grounds for suspecting the search will turn up evidence."[52] Further, a search is reasonably related to the circumstances for which it was generated if the search is not "excessively intrusive in light of the age and sex of the student and the nature of the infraction."[53]

Essentially, the court balances an individual's reasonable expectation of privacy with the government's interest in performing the search.[54] It is important to note that the individual's reasonable expectation of privacy is a subjective interest; whereas the government's interest in the search is an objective one. This further demonstrates the complexity of this rule and how courts can reach varying outcomes when applying the special needs doctrine.

C. The Circuit Split

Due to the complex nature of the special needs doctrine, there is currently a circuit split over whether the special needs doctrine applies when a caseworker searches a child's body for indicia of abuse. Courts today are wrestling with whether qualified immunity applies; whether the law is "clearly established;" and most significantly, whether the special needs doctrine applies to searches of suspected victims of child abuse. To better understand how *Doe v. Woodard* fits into the split, this Section provides a brief overview of each court's disposition on the special needs doctrine's applicability.

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doctrine did not apply because the primary purpose was to collect information for law enforcement purposes); Safford Unified Sch. Dist. No. 1 v. Redding, 129 S. Ct. 2633, 2642–43 (2009) (holding the special needs doctrine did not apply because the scope of the search was too invasive in light of the purpose of the search).

[49] N.J. v. T.L.O., 469 U.S. 325, 341-43 (1985).

[50] *T.L.O.,* 469 U.S. at 341–43; Kobrick, *supra* note 18, at 1520.

[51] Kobrick, *supra* note 18, at 1521

[52] Pié, *supra* note 47, at 572.

[53] Id.

[54] Gupta-Kagan, *surpa* note 42, at 387.

The first two circuits to address this issue were the Fourth and Seventh Circuit Courts, which held that the special needs doctrine should apply.[55] In *Darryl v. Coler*, the Seventh Circuit applied the special needs doctrine and employed the two-fold test of whether the search was "justified at its inception" and reasonable in its scope.[56] While the Seventh Circuit found a warrant was not necessary, they still noted, "we are not convinced, on the basis of the record before us, that the [social worker guideline], as it now exists, ensures that the searches will always be reasonable."[57] Therefore, they found that the allegations of child abuse in the facts and circumstances of the current case constituted a "special need" allowing the search to take place without a warrant.[58] However, they also cautioned against a generalized holding that these searches will always be reasonable.[59]

The Fourth Circuit in *Wildauer v. Frederick County*, was the next to address this matter and they issued a short opinion echoing the sentiment of *Darryl*.[60] The court used the same balancing test and determined the government's interest in protecting foster children outweighed the foster parent's expectation of privacy.[61] This opinion did not directly discuss the special needs doctrine, but applied the same balancing test and cited *Darryl* as its main authority on this point.[62]

In contrast, subsequent cases from the Second, Third, Fifth, and Ninth Circuit Courts held that the special needs doctrine should not apply to caseworkers who conduct bodily examinations of suspected victims of child abuse.[63] This shows that since the decision in *Wildauer* in 1993,

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[55] Darryl H. v. Coler, 801 F.2d 893, 901 (7th Cir. 1986); Wildauer v. Frederick Cnty., 993 F.2d 369, 372 (4th Cir. 1993).

[56] *Coler*, 801 F.2d 893, 903 (7th Cir. 1986). *Coler* consolidated two appeals cases. *Id.* at 894. One involved eight families suing the Department of Child and Family Services for strip searching their children at school after anonymous reports of abuse or neglect without obtaining a warrant. *Id.* at 896. The second case also involved an anonymous report about abuse and neglect of elementary-aged children. *Id.* at 905. The caseworker visited the children at home and saw no signs of abuse or neglect, yet still conducted a strip search of the children the following day at school. *Id.* at 906.

[57] *Id.* at 905.

[58] *Id.* at 901.

[59] *Id.* at 904.

[60] Wildauer v. Frederick Cnty., 993 F.2d 369, 373 (4th Cir. 1993). In *Wildauer*, social workers conducted in-home medical examinations of eleven foster children without first obtaining a warrant after noticing signs of child neglect during an earlier, unrelated home visit. *Id.* at 371, 373.

[61] *Id.* at 373.

[62] *Id.*

[63] Tenenbaum v. Williams, 193 F.3d 581, 604 (2d Cir. 1999); Good v. Dauphin Cnty. Soc. Serv.'s for Child. & Youth, 891 F.2d 1087, 1094 (3rd Cir. 1989); Roe v. Tex. Dep't. of Protective & Regul. Serv.'s, 299 F.3d 395, 407-08 (5th Cir. 2002); Calabretta v. Floyd, 189 F.3d 808, 816 (9th Cir. 1999).

there has been a pattern of courts not applying the special needs doctrine to searches of this type.[64]

The Third Circuit issued the first case which began the rift of what would later become a circuit split in *Good v. Dauphin County Social Services for Children & Youth*. This case is different from *Darryl* and *Wildauer* because the search was conducted at the child's home rather than at school.[65] In *Good*, the Third Circuit held that when social workers examine children for signs of abuse, the special needs doctrine does not apply.[66] Rather, a warrant should be obtained unless there is consent or exigent circumstances.[67]

The Ninth Circuit followed the Third Circuit's holding in *Calabretta v. Floyd*.[68] Similar to Good, this case also involved a social worker coming to the alleged victim's home and conducting a strip search.[69] The Ninth Circuit held without consent or an emergency, a warrant must be obtained, otherwise the search is unconstitutional.[70] The special needs doctrine is not listed as an exception to the warrant requirement in this circumstance.

The Second Circuit in *Tenenbaum v. Williams* recognized the special needs doctrine as an exception to the warrant requirement but declined to decide whether it applied when searching or seizing a suspected victim of child abuse.[71] Instead, the focus was on whether there was an exigent circumstance.[72] This case involved the suspected child being removed from school and taken to the hospital to be examined for signs of abuse at the request of the caseworker.[73] The Second Circuit found that without parental consent or emergency

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[64] Doe v. Woodard, 912 F.3d 1278, 1293 (10th Cir. 2019).

[65] Good, 891 F.2d at 1087. In *Good*, a police officer and social services caseworker showed up after 10:00 PM at the Good home to forcefully conduct a strip search of seven-year-old Jochebed Good without first obtaining a warrant. *Id.* at 1089–90.

[66] *Id.* at 1903.

[67] *Id.*

[68] Calabretta,189 F.3d at 808. In *Calabretta*, a police officer and social worker entered the Calabretta home, despite parental protest and without obtaining a warrant first, and conducted strip searches of the children despite protesting from the children and their mother. *Id.* at 810–12.

[69] *Id.* at 817.

[70] *Id.*

[71] Tenenbaum v. Williams, 193 F.3d 581, 604 (2d Cir. 1999).

[72] *Id.*

[73] *Id.* at 588–92. In *Tenenbaum*, a five-year-old child with elective mutism communicated at one point to her teacher she was being touched inappropriately, but when asked the same questions later by a caseworker, denied being touched inappropriately. *Id.* at 589–90. The caseworker conducted a home search and found no evidence of abuse or neglect, yet the next day had the child taken to the hospital for a sexual assault exam without a warrant or parental consent. *Id.* at 591.

circumstances, a warrant should have been obtained.[74] In this case, the court emphasized the timing of the investigation and reasoned that there was sufficient time to obtain a warrant.[75]

The last Circuit Court opinion in the split, up until *Doe v. Woodard*, is *Roe v. Texas Department of Protective & Regulatory Services*.[76] *Roe* is the only case in the circuit split post-Ferguson, so the Fifth Circuit applied the primary purpose test and found that the caseworker's actions were too intertwined with law enforcement, so a warrant should have been obtained.[77] The Fifth Circuit went on to say that in order for a caseworker to perform a visual body and cavity search on a child they must obtain a warrant, parental consent, or act under exigent circumstances—none of which were present in this case.[78] Notably, the Fifth Circuit did not list the special needs doctrine as one of the exceptions to the warrant requirement.

These cases establish a circuit split over whether caseworkers can perform visual body searches of suspected victims of child abuse without a warrant under the special needs exception. These cases stretched from 1985 to 2002, yet this issue has been left largely unresolved. This confusion was brought to light again in January 2019, when the Tenth Circuit joined the split in *Doe v. Woodard*.[79]

D. *Doe v. Woodard*

Doe v. Woodard is a case about a four-year-old child, I.B., who was undressed and photographed by a caseworker inspecting her for signs of child abuse. To understand how this case furthers the circuit split, this Comment provides a general overview of the facts, claims, and holding of the Tenth Circuit.

In December 2014, an anonymous source called the El Paso County Department of Human Services to report potential signs of abuse on I.B.'s body.[80] The source identified these signs as "bumps on her face, a nickel-sized bruise on her neck, a small red mark on her lower back, two

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[74] *Id.* at 594.

[75] *Id.*

[76] Roe v. Texas Dep't of Protective & Regulatory Servs., 299 F.3d 395, 398 (5th Cir. 2002). In *Roe*, six-year-old Jackie was reported for showing signs of sexual abuse after touching herself and other six-year-olds inappropriately. *Id.* at 398. Following this report, a caseworker conducted a strip search and cavity search of Jackie, which included photographing her vagina and buttocks without first obtaining a warrant. *Id.* at 399.

[77] *Id.* at 407–08.

[78] *Id.*

[79] Doe v. Woodard, 912 F.3d 1278, 1285 (10th Cir. 2019).

[80] *Id.* at 1285.

small cuts on her stomach, and bruised knees."[81] Department of Human Services caseworker, April Woodard, responded to the call by visiting I.B. at school, removing her from class, and taking her to the nurse's office.[82] Woodard removed I.B.'s clothing to visually inspect her body.[83] While I.B. was naked, Woodard took photos of I.B.'s back, stomach, and buttocks on her cell phone.[84] At no time did Woodard have a warrant or parental consent to conduct the search, but she was acting under the "unwritten, but well-established county-wide policy" to conduct these visual inspections without obtaining parental consent or a court order.[85]

The next day Woodard continued her investigation by conducting a home search. Woodard spoke to I.B.'s mother who cooperated with the investigation.[86] However, Woodard did not tell Ms. Doe she had already inspected and photographed I.B.'s body.[87] Woodard closed the investigation of I.B. and reported the case as "unfounded."[88] It was not until after the case was closed that I.B. told her mother about being undressed and photographed at school by Woodard. I.B. said, "she hoped she would not see Ms. Woodard again because 'I don't like it when she takes all my clothes off.'"[89]

After hearing these statements from her daughter, Ms. Doe approached Woodard and asked about the search.[90] At first, Woodard denied the allegations, but, two months later, she admitted she had undressed and photographed I.B. during her investigation.[91] Woodard justified her search by telling Ms. Doe that child abuse investigations take priority over parental rights.[92] Following this, the Does filed a section 1983 claim alleging a violation of I.B.'s Fourth Amendment Rights on the basis of an unreasonable search and seizure, and a Fourteenth Amendment violation of the Does' parental rights.[93] This Comment will focus only on the Fourth Amendment claims.

The Colorado District Court dismissed the Fourth Amendment claims, arguing Woodard was entitled to qualified immunity because the law was not so "clearly established" to "give [Woodard] fair warning

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[81] *Id.*
[82] *Id.*
[83] *Id.* at 1285–86.
[84] *Id.* at 1286.
[85] Doe v. Woodard, 912 F.3d 1278, 1286 (10th Cir. 2019).
[86] *Id.*
[87] *Id.* at 1286.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] Woodward, 912 F.3d 1278, 1286 (10th Cir. 2019).
[92] *Id.*
[93] *Id.*

that the taking photographs of portions of I.B.'s unclothed body required a warrant."[94] Further, the district court held the Does' complaint lacked sufficient allegations to show that, based on the special needs doctrine, the search was "unjustified at its inception" or "improper in scope."[95]

The Does appealed, and the Tenth Circuit reviewed the district court's dismissal of the Does' Fourth Amendment claim based on Woodard's qualified immunity.[96] The Tenth Circuit structured its discussion of the Fourth Amendment by first looking at qualified immunity and what it means for the law to be "clearly established," and second, whether the special needs doctrine applies.[97]

First, the Tenth Circuit decided that the lower court was correct in applying qualified immunity because there was no clearly established law regarding whether a warrant was needed to search I.B.[98] The Does argued on appeal that qualified immunity should not apply because the law was, in fact, clearly established based on existing case law regarding whether a warrant was needed to search and photograph a child.[99] However, the Tenth Circuit addressed each case the Does cited and distinguished them from the facts at hand, reiterating the fact that "clearly established" law is particularized to the facts and cannot be "defined at a high level of generality."[100] The court also acknowledged the circuit split to emphasize the lack of clearly established law.[101]

Next, the Tenth Circuit affirmed the lower court's holding that the appellants failed to show why the special needs doctrine should not apply.[102] The court noted that even if the special needs doctrine applied, it would need to satisfy the two-prong reasonableness test:[103] (1) that the search was "justified at its inception"; and (2) that the search "was reasonably related in scope to the circumstances."[104] However, the appellants "offer[ed] almost no analysis to support their contention" that the search was unreasonable.[105] Therefore, because the law was not

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[94] *Id.* at 1287.
[95] *Id.*
[96] *Id.* at 1288.
[97] Doe v. Woodard, 912 F.3d 1278, 1289-93 (10th Cir. 2019).
[98] *Id.* at 1293–94.
[99] *Id.* at 1292 (addressing argument based on *Franz v. Lytle*, 997 F.2d 784 (10th Cir. 1993), *Dubbs v. Head Start*, Inc., 336 F.3d 1194 (10th Cir. 2003), *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230 (10th Cir. 2003), and *Ferguson v. City of Charleston*, 532 U.S. 67 (2001)).
[100] *Id.* at 1295.
[101] *Id.*
[102] *Id.* at 1296.
[103] N.J. v. T.L.O., 469 U.S. 325, 329 (1985).
[104] Doe v. Woodard, 912 F.3d 1278, 1295 (10th Cir. 2019) (quoting *T.L.O.*, 469 U.S. at 325).
[105] *Id.* at 1296.

clearly established and the appellants failed to show that the special needs doctrine was inapplicable to I.B.'s case, the ruling of the lower court dismissing the Fourth Amendment claims under qualified immunity was affirmed.[106]

Judge Briscoe dissented in part, arguing that the law the Does cited was sufficient to show the law was "clearly established" regarding the application of the special needs doctrine to the search of a child's body.[107] Judge Briscoe argued *Dubbs v. Head Start*[108] and *Safford Unified School District No. 1 v. Redding*[109] are factually similar enough to I.B.'s case to give Woodard notice that her actions were unconstitutional.[110] She argues that because these cases held that searches by adults on school property without parental notification, consent, or presence were unconstitutional, the searches were sufficiently similar to put Woodard on notice that her actions were unconstitutional.[111] Additionally, Judge Briscoe argued even if the special needs doctrine applied, the search was still unreasonable because "the content of the suspicion failed to match the degree of intrusion," and there was ample time to obtain parental consent.[112] Judge Briscoe would reverse and remand all Fourth Amendment holdings.[113]

In *Woodard*, the Tenth Circuit's holding is hinged on its finding that the Does failed to show "clearly established law that the special needs doctrine could not support the search in this case," and also failed to show "that a warrant was clearly required."[114] The majority held that the need to obtain a warrant to search a suspected victim of child abuse was not clearly established because not "every reasonable official would have understood that what he is doing violates that right."[115] In sum, the court notes it is possible that the special needs doctrine could have applied in this case, but it did not reach the doctrine's applicability because Woodard was shielded by qualified immunity.[116]

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[106] *Id.* at 1302.
[107] *Id.* at 1302-03 (Briscoe, J., concurring).
[108] Dubbs v. Head Start, 336 F.3d 1194 (10th Cir. 2003).
[109] Stafford United Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009).
[110] Doe v. Woodard, 912 F.3d 1278, 1303 (10th Cir. 2019) (Briscoe, J., concurring).
[111] *Id.* at 1305–06.
[112] *Id.* at 1307–08.
[113] *Id.* at 1309–10.
[114] *Id.* at 1288.
[115] *Id.* at 1289.
[116] Doe v. Woodard, 912 F.3d 1278, 1292-94 (10th Cir. 2019).

III. ANALYSIS

The Tenth Circuit's decision in *Doe v. Woodard* indicates that the circuit split over whether the special needs doctrine applies to searches of suspected victims of child abuse is becoming more problematic. The Tenth Circuit should block the special needs doctrine from applying as an exception to the Fourth Amendment's warrant requirement when searching suspected victims of child abuse. The special needs doctrine should not apply for three reasons: (1) the doctrine and its accompanying tests are too nuanced and complex for consistent application; (2) the consequences that could result from unconstitutional searches are severe, so all due process should be afforded; and (3) the doctrine could be abused. This Section also includes proposed legislation to "clearly establish" the law in this area. Clarifying the law would prevent qualified immunity from shielding government employees and allow victims of unconstitutional searches to recover.

A. The Special Needs Doctrine is too Complex and Ambiguous to Allow for Consistent Application

The special needs doctrine should not be an exception to the Fourth Amendment's warrant requirement when searching children for indicia of abuse because the doctrine is ambiguous, complex, and leads to inconsistent application and results. Courts have allowed the application of the special needs doctrine to a broad range of situations and locations.[117] Further, if it does apply, the two-fold test to determine reasonableness offers little guidance for consistent application.[118] This leaves ample room for advocacy but produces inconsistent results.[119] Again, when the law is not clearly established, qualified immunity will likely apply, and victims of unconstitutional searches cannot recover. Therefore, the law should be clarified to narrow the circumstances in which a "special need" is apparent; otherwise, the confusion will persist.

When determining if the special needs doctrine applies, it is important to note that there is a bright-line rule that blocks its application

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[117] *See supra* notes 46-47.

[118] Kobrick, *supra* note 18, at 1514.

[119] *See* O'Connor v. Ortega, 480 U.S. 709, 726 (1987) (finding the two-prong reasonableness test was satisfied when searching plaintiff's office without his knowledge after complaints of sexual harassment); *but see* Stafford United Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 369–72 (2009) (finding the two-prong reasonableness test not satisfied because the search was overly intrusive in light of the nature of the infraction when asking a girl to strip down to her undergarments to see if she was hiding drugs in her bra and panties).

when there is a strong law enforcement presence.[120] The rule aims to prevent law enforcement officers from avoiding the warrant requirement by having social workers conduct warrantless searches under the protection of the special needs doctrine. The warrant requirement would be eviscerated if law enforcement officers could gather evidence from the reports of social workers who are not required to obtain warrants as long as there is a "special need."[121] Therefore, if the primary purpose of the search is to gather evidence for law enforcement, the special needs doctrine cannot apply.[122]

Bright-line rules seem as though they would be clear and straightforward; however, it is still difficult to determine whether a search of a suspected victim of child abuse will lead to excessive entanglement with law enforcement. In a situation where there may be an abusive parent, the potential for law enforcement entanglement will always be lurking in the background. Further, determining the "primary" purpose from a series of reasons for conducting a search seems entirely subjective. A social worker may argue the primary purpose was for the protection of the child, a non-law-enforcement purpose. However, it could also be argued the search was conducted to aid law enforcement in arresting abusive parents, which would preclude the special needs doctrine from applying. Between the uncertainties in the seemingly broad application of the special needs doctrine, the difficulty identifying the level of law enforcement entanglement, and isolating the primary purpose of the search, the special needs doctrine should not apply to searches of suspected victims of child abuse.

Even if the court determines the special needs doctrine applies, the test to determine reasonableness is also unclear. The test involves a two-fold inquiry into whether the search was: (1) "justified at its inception" and (2) reasonably related to the circumstances for which the search was generated in the first place.[123] The search is justified if there was reason to believe the search would turn up evidence[124] and it is not "excessively intrusive in light of the . . . nature of the infraction."[125]

These factors are too broad, and the reasoning attorneys can proffer to prove the search was justified and reasonable in scope appear to be entirely subjective, which could lead to inconsistent application of the

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[120] Gupta-Kagan, *surpa* note 42, at 355 (quoting Justice Blackmun in N.J. v. T.L.O., 469 U.S. 325 (1985)).

[121] *Id.* at 400 ("[T]he [bright-line] test also provides a mechanism to ferret out administrative searches used as a subterfuge for criminal investigations.").

[122] Kobrick, *supra* note 18, at 1540.

[123] *Id.* at 1521.

[124] Pié, *supra* note 47, at 572.

[125] *Id.*

test. The first prong, "justified at its inception," is flawed because it focuses only on the mindset of the person conducting the search and whether they believed the search would turn up evidence. This is a problem because one person's subjective belief that they are justified in conducting a search is sufficient, even if any other person would have thought the opposite.

Other objective factors should also be considered when determining whether the search would turn up evidence. For example, a bulge in the person's pocket or an attempt to flee may be objective reasons to believe the search would turn up evidence. By involving objective evidence and not merely the mindset of the searcher, this allows for more concrete evidence suggesting the search would turn up evidence rather than post hoc justifications.

In addressing the second prong, the law should clarify what it means to be "excessively intrusive in light of the age and sex . . . and the nature of the infraction." This standard is problematic because it leaves no guidelines for what is acceptable in light of these factors. There is no way to know at what point a seemingly acceptable search crosses the line into "excessively intrusive." The law should place more specific limits on the scope of the search, such as listing certain infractions that may warrant a bodily search or requiring that searches involving undressing must be conducted by a medical professional. Or perhaps after a certain age, a search should only be conducted by someone of the same sex.[126] By offering more tailored restrictions or examples of what an acceptable search looks like, it could help clarify what searches are reasonable in light of the age, sex, and nature of the infraction of the person to be searched.

In essence, it is unclear when and how the special needs doctrine applies, which leads to inconsistencies in its application, as evidenced by the current circuit split. This creates further confusion and does the opposite of creating "clearly established" law. Therefore, the special needs doctrine should not be applied to caseworkers searching children's bodies for indicia of abuse.

B. The Potential Consequences for Searches of Suspected Victims of Child Abuse are Severe so Full Due Process Should be Afforded

The special needs doctrine should not apply to warrantless searches of suspected victims of child abuse because the potential consequences of these searches could be severe. Therefore, full due process should be afforded by requiring a showing of probable cause to obtain a warrant,

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[126] *See* discussion *infra* Part III.D.

acting under parental consent, or acting under exigent circumstances. A search of this kind could result in one of two findings: the child is being abused, or the child is not being abused. Regardless of the outcome, the child has now experienced being stripped, inspected, sometimes touched, and sometimes photographed by a stranger.[127] Parents now must explain to their child why a stranger was allowed to look at them, touch them, and photograph them while naked. Additionally, the parents could be at risk of losing custody rights, and now their children have to cope with being separated from their parents.[128] With consequences this severe, the special needs doctrine should not be an exception to the Fourth Amendment warrant requirement. Rather, to afford sufficient constitutional protection, a caseworker should be required to show probable cause to obtain a warrant before conducting a search.

The special needs doctrine should not apply in this context because the risk of a parent losing custody of their child is so high, that all due process should be afforded. As Justice Blackmun noted, "there can be few losses more grievous than the abrogation of parental rights."[129] Additionally, Justice Stephens wrote, "[a]lthough both deprivations [a prison sentence and termination of parental rights] are serious, often the deprivation of parental rights will be more grievous than the two . . . . [and] both deprivations must be accompanied by due process of law."[130]

After searching a child for signs of abuse, the possibility of both a child being removed from their parents and the parent being arrested are foreseeable consequences. This is traumatic for both parents and children.[131] No matter the finding, children will likely suffer psychological harm from the invasiveness of these searches. For example, if the child was being abused, not only will they suffer psychological harm from the abuse, but this trauma can be exacerbated when they are removed from their home and their parents.[132] However,

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[127] *See* Doe v. Woodard, 912 F.3d 1278, 1286 (10th Cir. 2019); Calabretta v. Floyd, 189 F.3d 808, 811–12 (9th Cir. 1999); Roe v. Texas Dep't of Protective & Regulatory Servs., 299 F.3d 395, 398–99 (5th Cir. 2002).

[128] *See* Gupta-Kagan, *supra* note 42, at 415–16.

[129] Lassiter v. Dep't of Soc. Serv's, 452 U.S. 18, 40 (1981) (Blackmun, J., dissenting).

[130] *Id*. at 59 (Stevens, J., dissenting).

[131] "The first and most important point in the analysis is that the foreseeable consequence of child protection searches and seizures—removal of children from their parents and placement in state custody—is severe and of immense constitutional magnitude to both parents and children. It directly implicates fundamental constitutional rights of such a pedigree that they trigger many procedural protections." Gupta-Kagan, *supra* note 18, at 422.

[132] *See* Wendy Jennings, *Separating Families Without Due Process: Hidden Child Removals Closer to Home*, 22 CITY UNIV. N.Y. L. REV. 1, 8 (2019) ("research overwhelmingly demonstrates the harmful and emotionally damaging effects of removing children from their parents"); Paul Chill, *Burden of Proof Begone: The Pernicious Effect*

even if the child was not suffering from abuse, the invasiveness of the search can still have lasting effects on the child's psyche.[133]

In order to protect parents and children in these situations, caseworkers should be required to obtain a warrant before conducting a search. To obtain a warrant, a judge must conclude there is enough evidence to support the probable cause that a child is being abused. Probable cause can be shown through witness statements or other evidence, however, suspicion or belief by itself is not sufficient.[134] This is meant as a safeguard to prevent unconstitutional invasive searches from taking place when there is only a suspicion or belief of abuse. Rather, there must be enough evidence for a judge to decide that a child is possibly being abused. Even though the bar for probable cause is low, the procedural requirements to obtain a warrant still afford parents and children more due process than acting on suspicion alone.

The other two exceptions to the warrant requirement previously mentioned (consent, and exigent circumstances) also contain inherent safeguards to afford adequate constitutional protections. Parental consent would afford full procedural protections because it would alert the parent to the accusations against them or others and allow for there to be

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of Emergency Removal in Child Protective Proceedings, 41 FAM. CT. REV. 457, 459 (2003) ("affected families may suffer enduring harm psychologically, financially, and in countless other ways from the stresses of removal and its aftermath"); Nell Clement, Note, *Do "Reasonable Efforts" Require Cultural Competence? The Importance of Culturally Competent Reunification Services in the California Child Welfare System*, 5 HASTINGS RACE & POVERTY L. J. 397, 418-19 (2008) ("Removal of children from their families and cultural community has potentially devastating effects on the identity and psychological health of the removed children . . . . In addition to psychological issues that may arise in children removed from their families . . . children are likely to suffer identity issues").

[133] Steven F. Shatz et al., *The Strip Search of Children and the Fourth Amendment*, 26 UNIV. S. F. L. REV. 1, 13 (1991) ("[E]ven though the strip search might be a one-time occurrence, it can be traumatic and have a long-term negative impact on the child."). Strip searches of children have been characterized as "'demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, and repulsive.'" *Id.* at 2. Courts have recognized the trauma resulting from searches of this type. *See* Flores v. Meese, 681 F. Supp. 665, 667 (C.D. Cal. 1988) ("Children are especially susceptible to possible traumas from strip searches."); Bellnier v. Lund, 438 F. Supp. 47, 53 (N.D.N.Y. 1977) ("[H]umiliation and psychological harms [are] associated with such a search."). Further, psychologists note that strip searches of children have a greater impact because "as children approach adolescence, privacy becomes important as a marker of independence and self-differentiation. Threats to the privacy of school aged children may be reasonably hypothesized to . . . [function as] threats to self-esteem." Shatz et al., *supra,* at 11 (quoting Gary B. Melton, *Minors and Privacy: Are Legal and Psychological Concepts Compatible?*, 62 NEB. L. REV. 455, 488 (1983)).

[134] Aguilar v. Texas, 378 U.S. 108, 114–15 (1964).

consent, and even parental presence at these searches.[135] Exigent circumstances are essentially emergency situations where action can be taken immediately because there is no time to obtain a warrant or consent.[136] Given the seriousness of child abuse allegations, it could well be that there is an emergency situation which could result in harm to the child if action is not taken immediately. However, if the caseworker relies on exigent circumstances to uphold the search, they have the burden to prove that an exigent circumstance existed to justify their warrantless search.[137] Proving exigent circumstances is a higher bar because the caseworker would need to show an emergency existed, rather than merely showing that obtaining a warrant was "impracticable," which is required under the special needs doctrine.

There are circumstances in which the special needs doctrine applies, and the court has upheld in other contexts the necessity of this additional exception; however, searches of a suspected victim of child abuse should not be included amongst these circumstances. The warrantless searches upheld under the special needs doctrine were materially different from the search of a suspected victim of child abuse because the consequences in the former cases were more temporary and minor. For example, being reprimanded at school for smoking in the bathroom[138] or being fined for a housing code violation were consequences of a warrantless search under the special needs doctrine.[139] These consequences, while still injurious for the person being searched,

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[135] Parental presence may be a hinderance to learning the truth if the parent is in fact abusing the child. The abusive parent's presence could prevent the child from speaking openly and truthfully about abuse. However, in order to reap the benefits of having a parent present during an intimate search, parental consent could include the presence of a non-suspect parent or a non-suspect advocate of whom the child knows and will feel comforted by their presence.

[136] "Exigent circumstances [which would justify warrantless search] are those requiring immediate aid or action, and, while there is no definite list of what constitutes exigent circumstances, several established examples include the risk of removal or destruction of the evidence, danger to the lives of police officers or others, and the hot pursuit of a suspect." Stutte v. State, 432 S.W.3d 661, 664 (Ark. Ct. App. 2014). Exigent circumstances arise when the need for prompt action is imperative because a threat of physical harm to innocent individuals exists. Commonwealth v. Copeland, 955 A.2d 396, 400 (Pa. Super. Ct. 2008). *See* Bing ex rel. Bing v. City of Whitehall, Ohio, 456 F.3d 555, 564 (6th Cir. 2006) ("[E]xigent circumstances [as will justify a warrantless search or seizure] exist when an immediate and serious threat to the safety of . . . the public is present."); Hill v. State, 181 S.W.3d 611, 619 (Mo. Ct. App. 2006) ("Exigent circumstances [for a warrantless search] exist if the time needed to obtain a warrant would endanger life.").

[137] *See* People v. Krinitsky, 982 N.E.2d 848 (Ill. App. Ct. 2012); State v. Clayton, 155 So. 3d 290 (Ala. 2014).

[138] N.J. v. T.L.O., 469 U.S. 325 (1985).

[139] Camera v. Mun. Ct. of S.F., 387 U.S. 523 (1967).

are not as severe or as permanent as the consequence of a child being removed from their home or suffering from lasting psychological harm. With an outcome this permanent and harsh, the special needs doctrine is an inappropriate exception to the warrant requirement in the context of searching the bodies of suspected victims of child abuse. Rather, full constitutional protections should be afforded either by obtaining a warrant, parental consent, or proving there was an exigent circumstance that allowed for immediate action.

C. The Special Needs Doctrine Could Be Abused

The special needs doctrine should not apply to searches of suspected victims of child abuse because it could allow for invasive searches to take place with no legal remedy. The person conducting the search could have multiple levels of protection from liability between the special needs doctrine's exception to the warrant requirement, as well as qualified immunity (if they are a government employee).[140] This could prevent those children who were subjected to invasive searches from obtaining a legal remedy.[141] Further, it could allow for abuse of the special needs doctrine by permitting invasive searches with no legal repercussions for the investigator who has violated another's Fourth Amendment rights. This is especially true when recognizing that many families would not have the resources to challenge government action through a civil suit, leaving government misconduct unchecked.

There is potential for abuse of the special needs doctrine because people may continue to conduct invasive searches of children without obtaining a warrant as long as they can show after-the-fact that there was some "special need" that made obtaining a warrant impracticable. This is different from appearing before a judge to show probable cause for a warrant because explaining the "special need" can be a post hoc reasoning. Under the special needs doctrine, no judge is standing by to decide whether a special need exists before the search takes place. Rather, the special needs doctrine is only discussed if there is a resulting lawsuit, at which time the party who conducted the search can put forth an argument that they were acting under the special needs doctrine's exception to the warrant requirement. Therefore, this doctrine is not a procedural safeguard against unreasonable searches; but rather, it is a safety net for those who conducted the test to rely on in case they are sued.

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[140] Doe v. Woodard, 912 F.3d 1278, 1289–93 (10th Cir. 2019).
[141] *Id.*

If government employees continue to be protected both by the special needs doctrine and qualified immunity, due to the lack of clearly established law, then there are no legal repercussions. With no repercussions, this doctrine could be abused and become widely used as a way around the warrant requirement. Thus, the special needs doctrine should not apply to strip searches of children and social workers should be acting either under parental consent, exigent circumstances, or a warrant.

D. Proposed Federal Legislation

As previously noted, a large part of the issue surrounding caseworkers conducting warrantless searches of suspected victims of child abuse is the fact that the law is uncertain. When the law is uncertain and not clearly established, qualified immunity applies to shield government employees, like caseworkers, from liability.[142] This leaves victims of invasive searches with no remedy. In order to prevent victims of invasive searches from being denied a remedy, the law needs to be clarified. By clarifying the law, qualified immunity would not apply because the law would be clearly established. When qualified immunity is taken out of the picture, courts can move on to actually analyze the reasonableness of the search rather than dismissing lawsuits at the onset because of qualified immunity.

There needs to be clear, straightforward legislation defining the scope of these searches so there is no issue over whether the law is "clearly established." By creating clear legislation, caseworkers will have more straightforward guidelines on how to conduct a constitutional search.

While there are federal statutes providing minimum standards for assessing and handling child maltreatment,[143] each state is still responsible for setting its own guidelines and standards.[144] Despite the

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[142] *Id.* at 1289 ("[Q]ualified immunity . . . shields public officials from damages actions unless their conduct was unreasonable in light of clearly established law." (quoting Estate of Booker v. Gomez, 745 F.3d 405, 411 (10th Cir. 2014))

[143] DIANE DEPANFILIS, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CHILD PROTECTIVE SERVICES: A GUIDE FOR CASEWORKERS 19–20 (2018), https://www.childwelfare.gov/pubPDFs/cps2018.pdf. The Child Protective Services has federal guidelines, but states can still adopt their own policies. *Id.* "Each child welfare agency may be organized differently based on state and tribal laws, policies, departmental structures, and geography." *Id.* at 19. "The screener [must] determine[] if the report [of suspected child abuse or neglect] meets the statutory definition of and agency guidelines for child maltreatment in that jurisdiction." *Id.* at 20.

[144] "The primary responsibility for child welfare services rests with the states, each of which has its own legal and administrative structures and programs." *Id.* at 24. There are

existence of federal and state guidelines, there is still significant confusion over the bounds of searches of suspected victims of child abuse, as evidenced by the circuit split.

Therefore, this Comment proposes simplified legislation for states to adopt to clarify the law for caseworkers searching suspected victims of child abuse. First, the special needs doctrine should be prohibited from being applied as an exception to the Fourth Amendment warrant requirement. Second, for caseworkers to inspect a child's body and invade their privacy, the caseworker must obtain a warrant unless there is an exigent circumstance, or they obtain parental consent. Ideally, a caseworker will always obtain a warrant so that these searches cannot be conducted unless probable cause is shown. If there is truly no time for a warrant to be obtained, then an exigent circumstance is likely present, and the caseworker may take immediate action to protect a child from an emergency circumstance.[145] Further, parental consent would also be a valid exception to the warrant requirement because it protects the privacy interests of both the parent and the child.[146]

Once it has been determined that a search can take place, there should be clarifying guidelines for the caseworkers inspecting children's bodies through either obtaining a warrant, obtaining parental consent, or acting under exigent circumstances This Comment proposes clarifying guidelines, which are largely based on criteria the court considered in *Darryl v. Coler* from the Seventh Circuit.[147] In *Darryl*, the Illinois Department of Children and Family Services Child Abuse and Neglect Investigation Decisions Handbook listed four options for a caseworker who deems a physical examination necessary: (1) require the caretaker to take the child to a physician for a physical examination; (2) take the child to a physician for a physical examination; (3) disrobe the child and conduct a cursory physical examination while the caretaker is present; or (4) permit the school nurse to examine the child.[148]

Additionally, the Handbook had three supplementary restrictions: (1) in cases of sexual abuse, a physician shall conduct the examination; (2) an examination of a child over the age of thirteen must be conducted by a caseworker of the same sex; and (3) a severely ill child should immediately be seen by a physician.[149]

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federal statutes regarding child welfare, however the history and extent of these federal statues are beyond the scope of this Comment. For a full discussion, *see Id*. at exhibits 3.1 and 3.2.

[145] *See supra* note 136.

[146] *See supra* notes 132, 133.

[147] Darryl H. v. Coler, 801 F.2d 893, 895–96 (7th Cir. 1986).

[148] *Id.* at 896.

[149] *Id.*

This list is helpful because it is concise, thorough, and easy to understand. These requirements protect the privacy interests of the child by often requiring the caretaker to be present and consent to the search. Additionally, this list pushes for a physician to conduct the search. This is an important safeguard because a caseworker has little, if any, medical training, whereas medical professionals are trained in examining bodies and can form a medical diagnosis. Further, even young children understand doctors are one of the few people who are allowed to undress and inspect their body;[150] therefore, the search is done in a more private and comfortable environment.

While this list creates a strong starting point for proposed legislation, it could be modified. There could be a "step zero" where caseworkers must substantially verify the report of abuse or neglect before conducting a search. This preliminary investigation would require weighing the credibility of the source before taking action. Practically, this may require calling the child's parents or talking to the child's siblings, teachers, or friends to determine whether the allegation is supported by some evidence before diving into a full-scale search and investigation.[151] While this does take time and resources, this additional safeguard is necessary to prevent unsubstantiated searches from taking place. Further, this information can be used to show probable cause when obtaining a warrant.

Part of this "step zero" preliminary investigation should also require children to be briefly interviewed before a physical examination takes place. This would allow the child an opportunity to explain if they were being abused and direct the caseworker to specific parts of their body where they have been hurt. This could lead to a more limited and targeted search rather than asking the child to completely undress. Additionally, this opens a dialogue with the child where the caseworker could explain the search, why it is happening, and attempt to ease the mind of the child.

Finally, there should be more emphasis on the age of the child. For example, any child over the age of five (kindergarten-aged and above) should only be inspected by a person of the same sex, unless that person is a medical professional. School-aged children have a sense of personal autonomy and privacy over their bodies.[152] Additionally, when

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[150] *10 Ways to Teach Your Child the Skills to Prevent Child Abuse*, FAM. & CHILD. SERV. (last visited Nov. 6, 2020), https://www.fcsok.org/10-ways-to-teach-your-child-the-skills-to-prevent-sexual-abuse/ (parents should explain to children that mommy and daddy and the doctor can see the child naked, but not anyone else outside the home).

[151] *See supra* note 135.

[152] *See supra* notes 132-133.

determining if a search is reasonable, courts look to whether the search was appropriate in light of the age and sex of the child.[153] Once the above guidelines have been met, and a body examination is warranted, this would be one additional safeguard to protect the privacy interests of children who are subjected to a visual body search.

Below is a proposed statute that encompasses each of these concerns. This statute could be included in state criminal codes concerning domestic abuse or sex offenses to outline the rights of the person being searched and the limits on the caseworker conducting the search. It could also be published in policy handbooks and manuals for caseworkers in various state and federal departments who investigate child abuse.

> E. Conducting a Search of a Child who is a Suspected Victim of Child Abuse—Conditions for Removing Clothing:
>
> A) If a caseworker objectively believes a physical examination involving the removal of clothing of a minor is necessary to search the child's body for indicia of abuse, the caseworker must:
>
> 1) have a licensed medical professional conduct the examination;[154]
> 2) require a caretaker, not alleged of abuse, to take the child to a physician for an examination;[155]
>
> i. a caretaker could include any adult family member or guardian, or
> ii. an adult of the child's designation with whom they feel comfortable
>
> 3) conduct the examination with a caretaker not alleged of abuse present;[156] or
>
> i. if conducted by a caseworker, the caseworker must identify as the same gender as the child to conduct the search if the child is five years old or older.[157]

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[153] N.J. v. T.L.O., 469 U.S. 325 (1985).

[154] *See supra* notes 148–49 (citing Ill. Dep't of Child. & Fam. Servs., *Child Abuse and Neglect Investigation Decisions Handbook* 66 (1982)).

[155] *See supra* notes 135, 150.

[156] *See supra* note 135.

[157] *See supra* notes 132-33.

4) permit the school nurse to perform the examination without others present unless the child so requests.[158]

B) If the caseworker has reason to believe the child is a victim of sexual assault, the physical examination must:
   1) be conducted by a licensed medical professional;[159] or
   2) be conducted by a school nurse without others present unless the child so requests.[160]

C) Before an examination described in section A or B can take place, the caseworker must:
   3) take appropriate steps to verify the report of abuse or neglect to determine whether, objectively, the test is necessary. Appropriate steps may include, but are not limited to:
      i. determining the identity of the person who provided the tip;
      ii. evaluating the credibility of the person who provided the tip;
      iii. speaking to the child's teacher;
      iv. speaking to the child's friends; or
      v. speaking to the child's family members who are not alleged abusers
   4) speak with the child and ask them specifically about the allegations raised, including but not limited to:
      i. asking the child if they have been touched inappropriately;
      ii. asking the child to indicate where they have been touched or where their body hurts to target specific areas to search; and
      iii. explain the reasons for the search, who will conduct the search, and why the search is taking place.

In sum, the privacy interests of children will be best protected if the special needs doctrine is inapplicable to searches of suspected victims of child abuse. This would require caseworkers to obtain a warrant unless they have received parental consent or are operating under an exigent

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158 *See supra* note 150.
159 *See supra* note 150.
160 *See supra* note 150.

circumstance. Once this hurdle has been passed to allow for a search, a clear, brief, and thorough list of guidelines for caseworkers can help protect the privacy interests of the child. By adopting more straightforward guidelines, it creates "clearly established" law. Clearly established law can prevent caseworkers from being shielded by qualified immunity because if their actions objectively violate clearly established law, they will be held responsible. Additionally, by clarifying the law and proposing this more straightforward legislation, it could help end the uncertainty perpetuating this circuit split.

IV. CONCLUSION

The Tenth Circuit was correct in holding that qualified immunity applied because the law was not clearly defined. However, the Tenth Circuit should follow the growing trend in the circuit split to prevent the special needs doctrine from applying to searches of suspected victims of child abuse. The law should not allow the special needs doctrine to apply because the tests and applications are too vague to produce consistent results, the consequences of these searches can be severe so full due process should be warranted, and the doctrine could be abused. Further, the law should be clarified to prevent the special needs doctrine from being applied, and guidelines for caseworkers need to be more straightforward to sufficiently clarify the law. Doing so will best protect the privacy interests of suspected victims of child abuse.