

Case Number 37-07

OTTERY ST. CATCHPOLE DEPARTMENT OF  
CHILDREN & FAMILY SERVICES, and its subordinate  
bureau, Child Welfare Bureau,  
Appellants,

-against-

LUCIUS MALFOY, et al.,  
Appellees.

MEMORANDUM OF LAW

Prepared by  
Hannah Menda

## STATEMENT OF FACTS

Xenophilius Lovegood (“Mr. Lovegood”) is a radical journalist and editor-in-chief of the publication *The Quibbler*. He resides in the Old York neighborhood of Ottery St. Catchpole with his daughter, Luna Lovegood (“Miss Lovegood”). Mr. Lovegood has been raising his daughter as a single parent ever since his wife died when Miss Lovegood was nine years old.

Miss Lovegood began exhibiting odd behavior once Mr. Lovegood adopted a new household regimen he labeled the “Master Cerebral Cleanse.” The Master Cerebral Cleanse required that the person eat only eight radishes a day, which could be minimally supplemented with chia seeds, sardines, wheat germs, and wheatgrass. Mr. Lovegood, in an article for *The Quibbler*, wrote: “And while there’s no magic pill to bring us back to the height of our cognitive powers, there *are* some foods that have been shown to improve brain function, protect against age-associated cognitive decline, and encourage focus and clarity.” The supposed positive effects of this course of treatment have been sharply disputed by nutritionists, medical personnel, and child-food experts.

The headmaster of Hogwarts High School, Professor Albus Dumbledore (“Prof. Dumbledore”), was concerned that Miss Lovegood drastically lost weight and became “physically weak and frail” over a few months. Her physical condition had apparently deteriorated as a result of the Cleanse. Members of the Hogwarts faculty met to discuss the situation before deciding whether to alert the authorities. They asked Mr. Lovegood to attend their meeting and shared with him their concerns. Mr. Lovegood stated that choosing to have his daughter follow the Master Cerebral Cleanse was a personal lifestyle choice he elected to make as a parent and that, as a caretaker, he remained well within his rights. He compared the Master Cerebral Cleanse to keeping a vegetarian or vegan household, arguing that his case is no different from that of a parent who chooses to have a child drink only soy milk, rather than cow’s milk, despite the benefits associated with drinking cow’s milk.

The faculty remained convinced that Mr. Lovegood was causing physical and emotional harm to his daughter, even if he were doing so unknowingly. Worried about the welfare of the rest of Hogwarts’s students and concerned that other parents might adopt the Master Cerebral Cleanse, Prof. Dumbledore enacted a new school policy that applied to all students and their families (“Educational Decree No. 23”). To that end, Prof. Dumbledore had the school nurse, Madame Pomfrey (“Madame Pomfrey”), conduct a physical examination of all Hogwarts students, including Miss Lovegood. The examination, which Prof. Dumbledore described as “akin to a lice check,” consisted of Madame Pomfrey’s weighing the students and collecting urine samples from them. In addition, the faculty crafted a survey that all students were required to fill out. The survey asked the students about their diets and home life and asked for a specific list of all the foods they were eating. For four weeks, the students were required to keep and update food diaries, which they would then hand into their homeroom teachers. See Compl. ¶ 17.

After reviewing students’ food diaries, the Hogwarts faculty decided it was time to verify that the students were providing them with accurate information. They reached out to the Ottery St. Catchpole Department of Children and Family Services (the “Department”) and apprised them of the new school policy. Prof. McGonagall suggested that the Child Welfare Bureau

conduct random visits to the students' family homes to check the food cabinets and speak with the parents. Prof. Dumbledore said that they were looking for child abuse but had no particular reason to suspect that any such abuse was taking place.

Social workers from the Department conducted the first round of searches, visiting forty-seven homes in three days (there are about one thousand students at Hogwarts, and approximately 600 households). The same authorities conducted a second round of searches a few days later, visiting another fifty-two households. The searches were all executed according to the same protocol, and the officials conducting the searches underwent two weeks of training specifically related to the searches. The number of homes visited was determined by the number of personnel available to conduct the searches and the resources at their disposal. The order of the searches and the homes that were visited were generated randomly by a government computer system.

During the first search, the Child Welfare Bureau visited the Weasley family at their home ("the Burrow") in Ottery St. Catchpole. During the second search, the authorities visited the home of the Malfoy family, Malfoy Manor. Lucius Malfoy ("Mr. Malfoy") is married to Narcissa Malfoy ("Mrs. Malfoy") and they have one son, Draco Malfoy, who is a student at Hogwarts. During the second search, the authorities also visited Mr. Lovegood's houseboat. In his kitchen cabinets, they found only the few food items allowed by the Master Cerebral Cleanse in very small quantities. Before making the decision to remove the child from her home against Mr. Lovegood's will, the authorities proposed a voluntary plan whereby Mr. Lovegood would give his consent to remove Miss Lovegood from his care for a limited period of time. Mr. Lovegood was charged with one count of negligent child abuse on the basis of the search. Authorities removed Miss Lovegood from her home and placed her in the care of the Lovegoods' family friends, the Weasleys, at their home.

In response to the searches and the Department's official course of action, Mr. and Mrs. Malfoy brought 42 U.S.C. § 1983 claims against child welfare workers, the Ottery St. Catchpole Department of Children and Family Services, and its subordinate bureau, the Child Welfare Bureau, alleging various violations of the Fourth Amendment. The Malfoys claimed that the following policies violated the family's constitutional right to be free from unreasonable searches and seizures: (1) Educational Decree No. 23 (the initial school policy regarding medical examinations and urine analysis); (2) the survey and food diaries; and (3) the searches conducted in their homes by the Department. In response, the Hogwarts staff stated that, due to the doctrine of *in loco parentis*, the faculty and the school have a legal responsibility to take on some of the functions and responsibilities of a parent and to act in the best interests of the students as they see fit. However, the Malfoys' attorney responded that this doctrine does not allow what would be considered violations of the students' civil liberties. The Department and its Bureau contended that the warrantless search of the Malfoys' home was justified by the "special needs" exception to the general Fourth Amendment's warrant requirement.

At trial, both the plaintiffs and the defendants moved for summary judgment. The district court found that there was insufficient probable cause for the search and that the motivation behind the search did not constitute a "special need" such that a warrant was not required. The court therefore granted plaintiffs' motion. The defendants now appeal to the United States Court

of Appeals for the Fourteenth Circuit.

QUESTION PRESENTED

Whether the “special needs” exception to the warrant requirement applies to searches and seizures in a child abuse investigation.

SUMMARY

The “special needs” doctrine applies to cases in which there are special needs, beyond the normal need for law enforcement, that make the warrant or probable cause requirement of the Fourth Amendment impracticable and which call for immediate action. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 829 (2002) (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)); O'Connor v. Ortega, 480 U.S. 709, 720 (1987); New Jersey v. T.L.O., 469 U.S. 325, 351 (1985). Home visits that are conducted as part of a child welfare investigation, like other official intrusions into the home, must pass Fourth Amendment requirements. In a non-investigative pathway, child welfare services are voluntary to the families, meaning that the services offered by the child protective services (“CPS”) agency are not imposed on the family by law. Families can give their consent to allow the CPS agency to conduct an investigation or they can accept or refuse the offered services if there are no safety concerns. See Nina Williams-Mbengue, et. al., National Conference of State Legislatures, Differential Response Approach in Child Protective Services: An Analysis of State Legislative Provisions 2–9 (2009), available at <http://perma.cc/LV29-XKKJ>. In practice, child welfare agency visits and even investigations in the home are conducted routinely without warrants, justified constitutionally by one of several exceptions to the warrant requirement, including the special needs exception. Determining the applicable constitutional test for a social worker’s investigative home visit is an issue over which several circuit courts are divided.

The Fourteenth Circuit is a “special needs” jurisdiction. In “special needs” jurisdictions, where a non-investigation pathway does not involve law enforcement agencies, a warrant may not be required for a search if (1) the state demonstrates a special need discrete and superior to the general interest in law enforcement, and (2) the search itself is reasonable. See Tenenbaum v. Williams, 193 F.3d 581, 593–94 (2d Cir. 1999). The Supreme Court has found that a special need exists where the government can demonstrate that: (a) it is impracticable to obtain a warrant; (b) the governmental interest provides sufficient justification and outweighs the intrusion; and (c) the immediate objective of the search is not to generate evidence for law enforcement purposes. Ferguson v. City of Charleston, 532 U.S. 67, 76 (2001); Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995). Once a special need has been found to exist, the Supreme Court applies a balancing test that looks to the nature of the privacy interest, the character of the intrusion, and the nature and immediacy of the government’s legitimate interest. See Samson v. California, 547 U.S. 843, 843 (2006); Earls, 536 U.S. 822, 843 (2002); United States v. Knights, 534 U.S. 112, 113 (2001); United States v. Alvarez-Tejeda, 491 F.3d 1013, 1016 (9th Cir. 2007).

An important issue that has not been conclusively decided among the courts of appeals is whether, in applying the doctrine, child abuse or neglect investigations constitute a special need.

Gates v. Tex. Dep't of Protective & Regulatory Servs., 537 F.3d 404, 425 (5th Cir. 2008) (citing Roe v. Tex. Dep't of Protective & Regulatory Servs., 299 F.3d 395, 401 (5th Cir. 2002)). The circuits are also split on what facts are necessary or what circumstances must be taken into account in order to make a search reasonable under the second part of the special needs analysis. See Tenenbaum, 193 F.3d 581, 593–94 (2d Cir. 1999) (collecting cases). Courts in various jurisdictions have reached different conclusions when considering whether traditional child welfare investigations fall under the “special needs” exception. See, e.g., Roe, 299 F.3d at 401 (holding that the special needs exception was not applicable); Wildauer v. Frederick Cnty., 993 F.2d 369, 372 (4th Cir. 1993) (applying the special needs doctrine to the child abuse investigation); Darryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986) (holding that the special needs exception applied to a search).

It is “well established . . . that the Fourth Amendment regulates social workers' civil investigations.” Gates, 537 F.3d at 420 (citing Roe, 299 F.3d 395 at 401). “Warrantless searches of a person's home are presumptively unreasonable unless the person consents, or unless probable cause and exigent circumstances justify the search.” Id. (quoting United States v. Gomez–Moreno, 479 F.3d 350, 354 (5th Cir. 2007)). However, the special needs justification may apply when CPS social workers enter a home without a warrant or court order. Thomas v. Tex. Dep't of Family & Protective Servs., 427 F. App'x 309, 314 (5th Cir. 2011).

Finally, in those circuits which have found that a special need exists, the appropriate test is “the standard of reasonableness under all of the circumstances.” Roe, 299 F.3d at 404 (quoting O'Connor, 480 U.S. at 725–26). The Supreme Court has stressed that, because the Fourth Amendment prohibits only unreasonable searches, reasonableness is the benchmark for permissible searches. United States v. Jacobsen, 466 U.S. 109, 113 (1984). In determining the reasonableness of a special needs search conducted pursuant to a child abuse investigation, “courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.” Bell v. Wolfish, 441 U.S. 520, 559 (1979). While some courts are willing to engage in a reasonableness analysis, still other courts apply the same level of scrutiny to social workers as is applied to police officers, requiring either probable cause, a warrant, or exigent circumstances. See Calabretta v. Floyd, 189 F.3d 808, 813 (9th Cir. 1999); Good v. Dauphin Cnty. Soc. Servs. for Children & Youth, 891 F.2d 1087, 1094–95 (3d Cir. 1989). Refusing to apply the special needs doctrine, these circuits have found the searches per se unreasonable because of the lack of adherence to traditional Fourth Amendment standards.

The set of cases in which the Supreme Court has announced some ruling regarding the special needs doctrine share these features: (1) an exercise of governmental authority distinct from that of mere law enforcement—such as the authority as employer, the *in loco parentis* authority of school officials, or the post-incarceration authority of probation officers; (2) a lack of individualized suspicion of wrongdoing, and a concomitant lack of individualized stigma based on such suspicion; and (3) an interest in preventing future harm, generally involving the health or safety of the person being searched or of other persons directly touched by that person's conduct, rather than of deterrence or punishment for past wrongdoing.<sup>1</sup> T.L.O., 469 U.S. 325,

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<sup>1</sup> At this stage in development of the doctrine, the “special needs” category is defined more by a list of examples than by a determinative set of criteria. Among the cases said by the Court to involve “special needs” are: a

337 (1985); Dubbs v. Head Start, Inc., 336 F.3d 1194, 1212–14 (10th Cir. 2003).

## DISCUSSION

### I. THE FOURTH AMENDMENT PROTECTS AGAINST UNREASONABLE SEARCHES AND SEIZURES

The standard of review in child abuse investigation cases may determine the constitutionality of the search. In order to pass constitutional muster in jurisdictions that use the “special needs” approach, a child welfare investigation must first qualify as a “special needs” search, which removes the warrant or probable cause requirement, and the search must be reasonable. The Supreme Court has not yet addressed the applicability of the “special needs” doctrine to child abuse or neglect investigations. See Tenenbaum v. Williams, 193 F.3d 581, 593–94 (2d Cir. 1999) (collecting cases).

Justice Blackmun first coined the term “special needs” in his concurrence in New Jersey v. T.L.O., 469 U.S. 325, 351 (1985). The Court thereafter adopted the terminology in O'Connor v. Ortega, 480 U.S. 709, 720 (1987), and Griffin v. Wisconsin, 483 U.S. 868, 873 (1987), concluding that “in limited circumstances, a search unsupported by either warrant or probable cause can be constitutional when ‘special needs’ other than the normal need for law enforcement provide sufficient justification.” Ferguson v. City of Charleston, 532 US 67, 76 (2001). The basic framework of the balancing test, which was developed in the context of a public school setting, went as follows: (1) How credible/reasonable the school's suspicion is that the student has something dangerous on their person; (2) the imminence of the danger posed; and (3) whether there are any reasonable alternatives to the search. This was the origin of the special needs doctrine, but the case law has continued to develop since T.L.O.

Appellees maintain that the Ottery St. Catchpole Department of Children and Family Services policy (“Policy No. 47” or the “Policy”), which permits caseworkers to enter into students’ homes to conduct inspections and search for signs of abuse, violated their constitutional right to privacy because the search was conducted without a warrant, probable cause, or exigent circumstances and was highly intrusive and offensive to Fourth Amendment notions of privacy. Appellants argue that the special needs doctrine applies to the Department’s search because child abuse constitutes a special need under the facts of this case and because the searches should be considered reasonable.

### II. CIRCUIT COURTS HAVE SPLIT OVER WHETHER THE SPECIAL NEEDS DOCTRINE APPLIES TO CHILD ABUSE INVESTIGATIONS.

Circuits applying the special needs test have consistently relied on a series of factors to determine how it should apply to a specific case. These include: the location of the search, the

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principal's search of a student's purse for drugs in school; a public employer's search of an employee's desk; a probation officer's warrantless search of a probationer's home; a Federal Railroad Administration regulation requiring employees to submit to blood and urine tests after major train accidents; drug testing of United States Customs Service employees applying for positions involving drug interdiction; schools' random drug testing of athletes; and drug testing of public school students participating in extracurricular activities.

involvement of law enforcement officers, the intrusiveness of the search, and the existence of discretion-limiting statutes or regulations. See generally Doe v. Heck, 327 F.3d 492 (7th Cir. 2003); Doe v. Bagan, 41 F.3d 571 (10th Cir. 1994); Franz v. Lytle, 997 F.2d 784 (10th Cir. 1993); Wildauer v. Frederick Cnty., 993 F.2d 369 (4th Cir. 1993); Darryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986).

The circuits appear to be divided into three basic approaches. The first approach was originally created by the Seventh Circuit and was later adopted by the Fourth and Tenth Circuits. These circuits hold that child abuse investigations qualify as a “special need” for purposes of the doctrine. See Heck, 327 F.3d at 494; Bagan, 41 F.3d at 572; Franz, 997 F.2d at 791; Wildauer, 993 F.2d at 372; Darryl H., 801 F.2d at 905.

A warrantless search may be conducted by social services agency workers in cases in which the state demonstrates a “special need” discrete and superior to the general interest in law enforcement. See O'Connor v. Ortega, 480 U.S. 709, 725–26 (1987); New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (applying the “special needs” doctrine to a warrantless search of a high school student's purse).

The second approach, adopted by the Second, Third, Fifth, and Ninth Circuits, holds that child abuse investigations do not qualify as a special need, particularly when the search is in the home or involves law enforcement. See generally Roe v. Tex. Dep't of Protective & Regulatory Servs., 299 F.3d 395 (5th Cir. 2002); Tenenbaum v. Williams, 193 F.3d 581 (2d Cir. 1999); Calabretta v. Floyd, 189 F.3d 808 (9th Cir. 1999); Good v. Dauphin Cnty. Soc. Servs. for Children & Youth, 891 F.2d 1087 (3d Cir. 1989). These courts apply the same level of scrutiny to social workers as is applied to police officers, requiring either a warrant or exigent circumstances. See Calabretta, 189 F.3d at 813; Good, 891 F.2d at 1094–95.

The third approach, developed when the Seventh Circuit revised its position, creates a jurisdictional element that determines the appropriateness of applying the special needs doctrine to child abuse investigations based on where the search or seizure occurs. See Heck, 327 F.3d at 494. Under this approach, cases often turn on whether the search occurred in a public school, a private school, or the home. Id. at 498.

A. The Fourth, Seventh, and Tenth Circuits Have Upheld the Constitutionality of Searches Conducted Under a Child Abuse Investigation on the Basis of the Special Needs Exception to the Warrant Requirement.

The circuits that apply the special needs doctrine to child abuse investigations have acknowledged the application of the doctrine in three cases with significant factual differences.

1. The Seventh Circuit laid the foundation for other circuits to apply the special needs doctrine to child abuse investigations.

In Darryl H., 801 F.2d at 905, the Seventh Circuit became the first court to affirmatively recognize the applicability of the special needs doctrine to investigations of child abuse and laid

the foundation for other circuits to apply the special needs doctrine to child abuse investigations. Under Illinois Department of Children and Family Services policy, a caseworker could interview the child and caretaker, observe the home environment, and potentially perform a physical examination of the child.

After finding that the visual inspection of the children clearly implicated the Fourth Amendment as a search, *id.* at 899, the Seventh Circuit addressed the essential issue of whether a caseworker following the agency policy could constitutionally conduct a nude body search of a child “without meeting the strictures of probable cause or the warrant requirement.” *Id.* at 901. Applying the balancing test set out by the Supreme Court in *T.L.O.*, the court recognized the significant intrusion posed by the search itself and the “closely related legitimate expectations of the parents or other caretakers . . . that their familial relationship will not be subject to unwarranted state intrusion.” *Id.* Despite these strong interests, the court recognized that the state's need was substantial and multifaceted.

The court found that, due to the nature of child abuse investigations and the need to remove a child from a dangerous home as quickly as possible, a physical inspection is the quickest way to assess the credibility of an abuse allegation. *Id.* at 903. The court reasoned that although the evidence from the search could eventually be used in a criminal investigation, that fact was secondary to protecting the child. As such, child abuse investigations such as this one qualified as a special need. *Id.*

2. The Fourth Circuit adopted the Seventh Circuit’s rationale.

In *Wildauer*, 993 F.2d at 372, the Fourth Circuit adopted the application of the special needs doctrine to child abuse investigations. In that case, the caseworker, responding to a neglect allegation, entered and searched the family home to “investigate [the children's] medical histories, medications, and schooling.” *Id.* at 371. The case is unique because it involved a foster parent who did “not have a constitutionally protected liberty interest in a continued relationship with [her] foster child.” *Id.* at 373.

While relying largely on *Darryl H.*, the Fourth Circuit based its decision on two additional factors. First, the Fourth Circuit interpreted an earlier Supreme Court decision to stand for the proposition that home visits by social workers are subject to less scrutiny than criminal investigations. *Id.* at 372 (citing *Wyman v. James*, 400 U.S. 309, 318 (1971)). Second, the court reasoned that since *Darryl H.* held that the state interest in a child abuse investigation supersedes the natural parents' interests, it must then supersede a foster parent's attenuated interest as well. *Id.* at 373.

3. The Tenth Circuit conducted the special needs balancing test without explicitly endorsing the special needs doctrine.

The Tenth Circuit became the third circuit to apply the special needs doctrine to child abuse investigations, even if indirectly. *Bagan*, 41 F.3d at 572. Notably, just one year earlier, the Tenth Circuit had rejected the special needs doctrine in a case where the court was concerned about the involvement of the police. *Franz*, 997 F.2d at 791 (reasoning that this distinction was

important given T.L.O.'s rationale that non-law enforcement officials require the protection afforded by special needs because they are not fully versed in the subtleties of probable cause like police officers). The court recognized that when the investigation's "focus was not so much on the child as it was on the potential criminal culpability of her parents," a finding of special needs is not appropriate because the search is primarily for law enforcement purposes. Id. It was on those grounds that the court refused to apply the special needs exception.

Bagan can be distinguished from most other special needs cases because the child examined was not the victim but the alleged perpetrator. Bagan, 41 F.3d at 574. The Tenth Circuit applied the T.L.O. balancing test to the interview, as opposed to the traditional Fourth Amendment special needs standard.<sup>2</sup> Id. at 572. The court determined that the in-school interview was a "temporary seizure" that was reasonable.

In a later case, the Tenth Circuit suggested that this balancing test might also apply when a social worker removes a child from "parents' custody at a public school." Jones v. Hunt, 410 F.3d 1221, 1228 (10th Cir. 2005). In both Bagan and Hunt, the court applied the traditional special needs test while at the same time refusing to label the cases as "special needs cases."

B. The Second, Third, Fifth, and Ninth Circuits Have Rejected the Application of a Special Needs Exception to Searches Conducted by Caseworkers in Child Abuse Investigations.

1. The Third Circuit refused to apply the special needs doctrine.

In Good v. Dauphin County Social Services for Children & Youth, 891 F.2d at 1094–95, the Third Circuit refused to consider the special needs doctrine where a caseworker and a police officer conducted a home visit in response to an anonymous tip that a young girl was being abused. The Good case is particularly telling for the Third Circuit's view of the special needs doctrine in connection with child abuse investigations because it does not even address the applicability of the doctrine on the facts of that case. After deciding that the state lacked probable cause, the court proceeded to the traditional Fourth Amendment defenses of consent and exigent circumstances. The Third Circuit rejected the special needs doctrine entirely, arguing that the court found "no suggestion . . . that the governing principles [of the Fourth Amendment] should vary depending on the court's assessment of the gravity of the societal risk involved." Id. at 1094. The Third Circuit expressed this view despite the Supreme Court's majority and concurring opinions in T.L.O. recognizing that exceptional circumstances may authorize a more lenient Fourth Amendment test. The court also expressed concern over the lack of any "established guidelines" curbing the officer's discretion, the officer's forced entry into the home in the middle of the night, and the intrusive strip search. Id. at 1096.

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<sup>2</sup> Although T.L.O. was the first case to introduce the concept of "special needs," it did not apply the test in its modern formulation. Modern case law seems to draw a distinction between the modern "special needs" doctrine and the original T.L.O. standard, with courts saying that they are applying one test rather than the other. Although the legal terminology has evolved, in practice, the application does not lead to different results in the analyses. See, e.g., Neumeyer v. Beard, 421 F.3d 210, 214 (3d Cir. 2005).

2. The Ninth Circuit refused to find a “special need” due to the criminal nature of the investigation.

In Calabretta v. Floyd, 189 F.3d 808, the Ninth Circuit expressed many of the same concerns as the Third Circuit did in Good. Troubled by the presence of a police officer during the search and the fact that the search occurred in the child’s home, the Calabretta court held that when there is a “criminal aspect to the investigation,” the search moves beyond the realm of special needs and into the realm of traditional law enforcement purposes. Id. at 810. The Ninth Circuit additionally held that T.L.O.’s special needs test applies only to searches conducted in the special environment in schools and not to searches of children in general.

In considering the application of the special needs doctrine to strip searches in child abuse cases, the court acknowledged the existence of the state’s important interest in protecting children, but explained that the interest “include[s] not only protection against child abuse, but also ‘the child’s psychological well-being, autonomy, and relationship to the family or caretaker setting’” and their “interest in the privacy and dignity of their homes.” Id. at 820 (quoting Franz, 997 F.2d at 792–93). Unlike the Seventh and Third Circuits, the Ninth Circuit considered the interests of the child and the parents to be substantially greater than the state’s interests. Finally, the court recognized that the child and the parent have an essential interest “in the privacy of their relationship with each other.” Id. at 820.

The Ninth Circuit’s decision in Greene v. Camreta, 588 F.3d 1011, 1016 (9th Cir. 2009), further narrowed the scope of the special needs doctrine as it had been applied in Calabretta, which concerned non-consensual, in-home strip searches. The Greene court held that T.L.O. should be limited only to searches and seizures conducted by teachers and administrators in the school environment. Additionally, the court found that the involvement of the deputy sheriff in the search foreclosed the possibility of finding that a special need existed because the search was not conducted absent the “presence of law enforcement objectives.” Id. at 1027. However, the court did qualify this seemingly sweeping statement by limiting its holding to cases with the “*direct* involvement of law enforcement.” Id. at 1030 (emphasis added) (quoting Ferguson v. City of Charleston, 532 U.S. 67, 74 n.7 (2001)).

3. The Second Circuit refused to apply the special needs exception despite balancing many competing interests.

In Tenenbaum v. Williams, 191 F.3d at 593, the Second Circuit focused much of its analysis on the competing interests of the parents, the child, and the state. The court conceded that the state had “a profound interest in the welfare of the child,” id. at 593–94, and also recognized the fundamental right of parents to raise their children free from the intrusion of the state. Id. at 593. The court adopted the Tenth Circuit’s rationale in Franz, reasoning that the interests of the child include the interest to be free from not only physical abuse but also unwarranted assaults by the state against the child’s “psychological well-being, autonomy, and relationship to the family.” Id. at 595 (quoting Franz, 997 F.2d at 792–93). Despite these profound interests, however, the court stated that “[w]hen child abuse is asserted, the child’s welfare predominates over other interests of her parents and the State.” Id. at 595.

Although it balanced the competing interests in this case, the Second Circuit refused to apply the special needs doctrine, finding that requiring the state to seek judicial or third-party authorization “makes a fundamental contribution to the proper resolution of the tension among the interests of the child, the parents, and the State.” *Id.* at 604. However, the holding that the special needs doctrine did not apply was limited to the facts of the particular case. The Second Circuit “refrain[ed] from deciding categorically” that suspicion of child abuse is not a “special needs” situation due to the fact that there may be circumstances in which the law of warrant and probable cause “established in the criminal setting does not work effectively in the child removal or child examination context.” *Id.* at 604.

4. The Fifth Circuit has thus far declined to categorize child abuse investigations as a special needs situation but has not conclusively foreclosed that categorization.

In Roe v. Texas Department of Protective & Regulatory Services, 299 F.3d at 401, the Fifth Circuit held that the special needs doctrine did not apply to strip searches. However, the court also limited its inquiry to the nude body search at issue in the case. In reaching its conclusion, the court reasoned that while none of the Supreme Court's special needs cases “involved strip searches or nudity, the [C]ourt has long held that citizens have an especially strong expectation of privacy in their homes.” *Id.* at 404–05. Still, the Fifth Circuit did not straightforwardly endorse a position on the issue of special needs in the context of child abuse investigations.

The Fifth Circuit’s opinion included a very detailed discussion of Supreme Court special needs precedent. The Roe court found Wyman v. James, 400 U.S. 309 (1971), and Griffin v. Wisconsin, 483 U.S. 868 (1987), to be equally unresponsive of the state’s position. It distinguished the Supreme Court’s holding in Griffin as a case in which the special need was supported primarily because “probationers waive many of their privacy rights and have a much lower subjective expectation of privacy in the home.” Roe, 299 F.3d at 405. The Fifth Circuit held that “[t]he [C]ourt has never upheld a ‘special needs’ search where the person's expectation of privacy was as strong as [the child’s] interest in bodily privacy.” *Id.* In any case, the Fifth Circuit held, Ferguson required a ruling in favor of the child and the family because “special needs can only be applied where the need is divorced from the state's general interest in law enforcement.” *Id.* at 406.

The Second and Fifth Circuits have not taken as hard a line on the issue of special needs in the context of child abuse as some of the other rejecting circuits. Their wavering has created considerable confusion among lower courts as to what standard binds child abuse investigations, specifically those involving forced or coercive home entries. While both circuits are concerned about the intrusiveness of the search and the entanglement of law enforcement, it is possible the circuits will rule in favor of special needs for less intrusive home or school inspections by caseworkers who have no involvement with the police. The confusion in the Second and Fifth Circuits shows potential overlap between the seemingly split circuits, since the analysis in both the accepting and rejecting circuits is particularly fact-based and the various holdings could be considered limited to the particular facts of each case.

C. The Seventh Circuit Refined Its Approach and Adopted a Jurisdictional Approach to Analyzing Special Needs Searches.

Years after its holding in Darryl H., the Seventh Circuit cut back on its broad holding by adding a jurisdictional element to the analysis that focused on the geographic location in which the search was performed and the state’s authority to conduct a search in that area. See Doe v. Heck, 327 F.3d at 494. The Seventh Circuit noted the distinct difference between searches conducted on private property and searches conducted on public property (for example, a search in a public school setting). Id. at 502 (holding that “a warrantless search or seizure conducted on private property is presumptively unreasonable” regardless of whether the search is administrative or criminal).

The state did not ask for application of the special needs doctrine in Doe v. Heck. Even so, the Seventh Circuit noted that the private/public distinction would have made the special needs argument baseless, because requiring some form of a warrant before a search occurs at a private school preserves the constitutional rights of the child and his or her parents. Id. at 512 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 at 654–55) (equating the rights of students in a private school to the rights they have at home); but see Michael C. v. Gresbach, 526 F.3d 1008, 1011–12 (7th Cir. 2008) (placing less importance on the parents’ heightened privacy interests in the private sphere). However, because the state did not argue the special needs doctrine as part of its defense, the jurisdictional test was not central to the court’s holding and is arguably dictum rather than binding precedent.<sup>3</sup>

III. THE SEARCH MUST SERVE A “SPECIAL NEED” BEYOND THE NORMAL NEED FOR LAW ENFORCEMENT AND ITS CIVIL PURPOSE MUST BE SUFFICIENTLY DIVORCED FROM THE STATE’S GENERAL INTEREST IN LAW ENFORCEMENT.

The government’s “general interest in crime control” does not qualify as a special need. City of Indianapolis v. Edmond, 531 U.S. 32, 121 (2000); Gates v. Tex. Dep’t of Protective & Regulatory Servs., 537 F.3d 404 (5th Cir. 2008). If the need to enter a family’s home were sufficiently divorced from the state’s general interest in law enforcement, there could be a special need that justified the entry. Gates, 537 F.3d at 420. However, the Fifth Circuit recently concluded that a home visit to investigate the possibility of child abuse and the safety of the child was not “separate and apart from general law enforcement” and therefore “the special needs doctrine cannot be used to justify the warrantless entry.” See Thomas v. Tex. Dep’t of Family & Protective Servs., 427 F. App’x 309, 314 (5th Cir. 2011).

In Ferguson v. City of Charleston, 532 U.S. 67, 85 (2001), hospital employees undertook to “obtain such evidence from their patients for the specific purpose of incriminating those patients.” Even if, as citizens not involved in any law enforcement activities, the hospital employees would have had a duty to turn over evidence of crime to the authorities, the Supreme

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<sup>3</sup> Because the court’s discussion regarding the private/public distinction in Doe v. Heck is not binding precedent, the fact that the Department’s search was conducted in a private home does not preclude a finding that there was a special need. However, Plaintiff can still use the Seventh Circuit’s reasoning in the case to support its argument that the search was unreasonable.

Court in Ferguson drew a distinction between this general duty and the employees' specific purpose. Although the ultimate goal of the policy was to treat the female patients' substance abuse, "the immediate objective of the searches was to generate evidence for law enforcement purposes in order to reach that goal." Id. at 83. This immediate purpose distinguished Ferguson from past cases in which the Supreme Court upheld warrantless searches under the "special needs" doctrine. This suggests a particularly fact-based approach to the assessment of whether there was some special need being served separate and apart from general interest in crime control.

In Ferguson, the Court held that a state hospital's practice of drug-testing urine samples of maternity patients without their consent did not fall under the special needs exception, but rather required a warrant because of the "extensive involvement of law enforcement at every stage of the policy." Id. at 76. Because the results of the drug tests were turned over to the district attorney and the patients who tested positive were threatened with prosecution if they did not agree to undergo treatment, the Court judged that the hospital's civil purpose was not sufficiently divorced from the State's general interest in law enforcement.

In order to apply the special needs exception, the particular law and/or policy must be designed to promote or ameliorate the special need. Marchwinski v. Howard, 113 F. Supp. 2d 1134, 1141–44 (E.D. Mich. 2002) (holding that the government could not rely on a correlation between the "special need" of preventing child abuse and random drug tests since the government assistance programs at issue were not designed to ameliorate child abuse). In addition, there must be a lack of individualized suspicion of wrongdoing. See United States v. Amerson, 483 F.3d 73, 76 (2d Cir. 2007).

In addition to the inquiry into the *purpose* of the policy, part of the calculus in determining whether a special need is sufficiently divorced from general law enforcement goals is the degree of involvement of law enforcement *personnel*. The special needs doctrine has been judged not to apply where law enforcement personnel and purposes were too deeply involved in carrying out the policy. See Greene v. Camreta, 588 F.3d 1011, 1027 (9th Cir. 2009) (where police were conducting an ongoing investigation of allegations of sexual abuse against a child's father, a caseworker had requested that a deputy sheriff, who was a uniformed officer carrying a visible firearm, accompany him to an interview); see also Ferguson, 532 U.S. at 83 ("In this case . . . the central and indispensable feature of the policy from its inception was the use of law enforcement at every stage of the policy to coerce the patients into substance abuse treatment.").

IV. IF THE SEARCH IS DEEMED TO SERVE A "SPECIAL NEED," THE SEARCH MUST ALSO BE REASONABLE TO PASS CONSTITUTIONAL MUSTER.

When a search serves a goal other than general law enforcement (defined as "ordinary crime-detection activities"), a courts balance private and public interests to determine whether the search meets the constitutional requirement of reasonableness. MacWade v. Kelly, 460 F.3d 260, 268–96 (2d Cir. 2006). When deploying the special needs balancing test, courts weigh the need for a search against the *offensiveness* of the intrusion. Courts applying the special needs doctrine in warrantless searches in the child welfare context use a general reasonableness test

that balances the need of the government against the intrusion on the privacy interest caused by the search. Ferguson v. City of Charleston, 532 U.S. 67, 68 (2001).

A. Courts Balance the Public Interests Against the Private Interests.

The nature and immediacy of the governmental concern at issue, and the efficacy of the means for meeting it, influence the reasonableness calculus. Moreover, home visits are considered less intrusive when policies are narrowly tailored to address situations in which the risk of physical danger is high. However, the Fourth Amendment does not require that the “least intrusive” search be conducted. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 647 (1995). Physical entry into the home has been described as the “chief evil against which the wording of the Fourth Amendment is directed,” and numerous lower court cases have applied the Fourth Amendment’s warrant requirements to physical entries of homes in connection with traditional child abuse investigations. See Payton v. New York, 445 U.S. 573, 585 (1980) (quoting United States v. U.S. Dist. Court for the Eastern Dist. of Mich., S. Div., 407 U.S. 297, 313 (1972)).

Choices about marriage, family life, and the upbringing of children are rights that the Supreme Court has ranked as “of basic importance in our society” and sheltered against the state’s “unwarranted usurpation, disregard, or disrespect.” M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (internal citation omitted); Tenenbaum v. Williams, 193 F.3d 581, 593 (2d Cir. 1999). Parents therefore have a constitutionally protected liberty interest in the care, custody, and management of their children. See Santosky v. Kramer, 455 U.S. 745, 753 (1982); Hurlman v. Rice, 927 F.2d 74, 79 (2d Cir. 1991); Van Emrik v. Chemung Cnty. Dep’t of Soc. Servs., 911 F.2d 863, 867 (2d Cir. 1990); see also Stanley v. Illinois, 405 U.S. 645, 649–52 (1972) (rights to conceive and raise one’s children have been deemed “essential” and “basic civil rights of man”); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (the custody, care, and nurture of the child reside first with the parents); Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) (recognizing the right of the family “to remain together without the coercive interference of the awesome power of the state”).

Courts specifically tackling the question of whether the special needs doctrine applies to child abuse investigations have recognized that children have an interest “in the privacy and dignity of their homes.” Calabretta v. Floyd, 189 F.3d 808, 820 (9th Cir. 1999). Child and parent also have an essential interest “in the privacy of their relationship with each other,” “bodily integrity,” and the right to be free from psychological intrusions that can leave long-lasting emotional trauma. Id. at 813; Tenenbaum v. Williams, 193 F.3d at 593.

These privacy interests must be balanced against the state interest in preventing harm to members of society that are not always able to help or protect themselves. Courts grant parents deference in most child-rearing decisions but also recognize that the State has legitimate authority to interfere with parental rights if the child is in danger. Familial rights are weighed against the government’s need to investigate and protect children from abuse. See Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 824 (2002); Vernonia, 515 U.S. 646, 656 (1995).

B. Various Factors Affect the Reasonableness Calculus on a Case-by-Case Basis.

A court's inquiry turns on the "objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." Pearson v. Callahan, 555 U.S. 223, 244 (2009) (quoting Wilson v. Layne, 526 U.S. 603, 614 (1999)); see also Anderson v. Creighton, 483 U.S. 635, 640 (1987). The parents-plaintiffs bear the burden of demonstrating that the right allegedly violated was clearly established at the time of the incident. See Galen v. Cnty. of L.A., 477 F.3d 652, 665 (9th Cir. 2007); see also Wallis v. Spencer, 202 F.3d 1126 (9th Cir. 2000) (finding that this burden was satisfied where children were seized or searched in their home). Because the legal rule regarding application of the special needs doctrine to child abuse investigations was not clear in the Fourteenth Circuit at the time of the search, this should affect the reviewing court's reasonableness analysis.

Reasonableness is based on factors such as (but not limited to): the alternatives available to the social workers and whether those were more or less intrusive; the age of the child and his or her cognitive abilities; the potential for humiliation of the parents; the duration of the search; whether the state actors infiltrated more personal parts of the home (such as a bedroom or living room, as opposed to a kitchen); whether the social workers superficially observed the home environment or whether they rummaged through drawers and/or cabinets; whether the child was searched alone and by people he or she did not know; and whether there was a police officer in tow.

1. The degree of risk affects whether the decision to institute a search policy was reasonable.

Analysis of searches conducted in connection with a non-investigation pathway will vary according to the practices of the jurisdiction and the particular facts of a case. The primary focus will usually be on the scope of the search and then turn to the individual's privacy expectations, considering both subjective and reasonable societal expectations of personal privacy implicated in the particular search. Merely having a high privacy interest is not enough to bar a search, unless "the content of the suspicion fail[s] to match the degree of intrusion." Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 375 (2009). Redding makes clear that the scope of the search must relate not only to the state's interest in performing the search but also to the knowledge that justified the search. The content of the suspicion or knowledge that justified the search in this case would be the communications made by Prof. Dumbledore to Department officials regarding the possibility of child abuse and the abuse asserted (i.e., neglect or failure to provide adequate nutrition). The search of a residence or of a child's body involves high levels of intrusion. Id. However, calling in advance to explain the process and to make an appointment for a time convenient for the family (as is done in some jurisdictions) could be found to lower the level of intrusiveness. If a caseworker knocks on the door unexpectedly as a family is eating dinner, on the other hand, a court could consider that to be a much higher level of intrusion. Similarly, a caseworker who sits in one room with the family and simply discusses their situation may be intruding less than one who inspects multiple parts of the family home to determine what services a family might need. See Nina Williams-Mbungue et. al., National Conference of State Legislatures, Differential Response Approach in Child Protective Services: An Analysis of State

Legislative Provisions 2–9 (2009), available at <http://perma.cc/LV29-XKKJ>.

Courts will examine the nature of the neglect alleged to determine whether the decision to initiate the search was reasonable. Regarding the justification for initiating a search, if cases have been assigned to the non-investigation pathway (where law enforcement are not involved) because they are considered to be “low risk,” a court may find that the search was not reasonable precisely because of the “low risk” factor. However, this creates a paradox because then a case assigned to the law enforcement investigation pathway would be considered “high risk” and would require a search warrant, leaving no room for argument that there exists a special need since the authorities likely had probable cause to initiate the investigation in the first place. Courts will judge the risk factor by considering the type and extent of abuse or neglect alleged that led to the CPS agency’s involvement. Bukovinsky v. Sullivan Cnty. Div. of Health & Family Servs., 408 F. App'x 406, 407 (2d Cir. 2010); Wilkinson ex rel. Wilkinson v. Russell, 182 F.3d 89, 104 (2d Cir.1999).

For example, a search of a home that is alleged to be a filthy or unlivable environment might be considered justified, whereas allegations that a child has repeatedly missed school might not justify a home search. Although the manner of conducting a search under a non-investigation pathway will likely be equally or less intrusive than searches used in traditional investigations, the justification for conducting a search may be less pressing. Agencies working with families through the non-investigation pathway should, therefore, attempt to obtain knowing and voluntary consent of the parents prior to initiating agency involvement and avoid excessive coordination with law enforcement in order to avoid offending the Fourth Amendment.

Courts should assess the efficacy of the challenged search in meeting the state’s child protection goals. However, this requirement is “not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative[] . . . techniques should be employed to deal with a serious public danger.” Cassidy v. Chertoff, 471 F.3d 67, 85 (2d Cir. 2006). Rather, the choice among such reasonable alternatives “remains with the governmental officials who have a unique understanding of, and responsibility for, limited public resources.” Id.; see also Michigan Dep’t of State Police v. Sitz, 496 U.S. 444 (1990); Mollica v. Volker, 229 F.3d 366, 370 (2d Cir. 2000).

### Conclusion

In order to establish a constitutional violation, Appellant must establish that both prongs of the two-step inquiry were satisfied.

APPELLANTS' ARGUMENT

I. THE DEPARTMENT'S SEARCH FALLS UNDER THE "SPECIAL NEEDS" EXCEPTION TO THE WARRANT REQUIREMENT.

The special needs doctrine is a vital tool to the state when the nature of a governmental concern requires immediate attention. As the law in this field develops, an increasing number of circuits continue to hold that child abuse investigations satisfy the special needs doctrine. See, e.g., Doe v. Heck, 327 F.3d 492, 494 (7th Cir. 2003); Doe v. Bagan, 41 F.3d 571, 572 (10th Cir. 1994); Wildauer v. Frederick Cnty., 993 F.2d 369, 372 (4th Cir. 1993); Franz v. Lytle, 997 F.2d 784, 791 (10th Cir. 1993); Darryl H. v. Coler, 801 F.2d 893, 905 (7th Cir. 1986).

In deciding whether to apply the special needs doctrine, the Supreme Court's primary focus has been on the language articulated in Justice Blackmun's concurrence in New Jersey v. T.L.O., 469 U.S. 325, 351 (1985), that the government must show a substantial need "beyond the normal need for law enforcement." Child abuse is a pervasive problem in the United States that creates a compelling need for the state. See generally 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, 453 (2005); Mark R. Brown, Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process, 65 Ohio St. L.J. 913, 943 (2004). In enacting its Policy and trying to prevent child abuse from occurring, the Department's primary concern was prevention of potential child abuse and not law enforcement.

The complex nature of competing interests between the state, parents, and child means that CPS agencies often face the difficult task of protecting the child from abuse while preserving familial privacy. See Tenenbaum v. Williams, 193 F.3d 581, 593 (2d Cir. 1999) (where the court recognized that the state has a "profound interest in the welfare of the child"). However, "[w]hen child abuse is asserted, the child's welfare predominates over other interests of her parents and the State." Id. at 595; see also Roska ex rel. Roska v. Peterson, 328 F.3d 1230, 1240 (10th Cir. 2003); Franz, 997 F.2d at 785. The Second Circuit in Tenenbaum did not find a special need on the facts of the specific case, but made no general ruling that would be binding on future cases where a special need is asserted. When the Department carried out the home visits in the instant case, it was attempting only to safeguard the multifaceted interests of ensuring the child's well-being, preserving parental privacy and familial relations, and fulfilling the agency's governmental function and calling.

A. The Government's Substantial Interest Would Be Unduly Hindered by the Warrant and Probable Cause Standard.

The high number of abuse cases creates a compelling interest for the state, and the state needs to be on alert for potential cases of child abuse. Croft v. Westmoreland Cnty. Children & Youth Servs., 103 F.3d 1123, 1125 (3d Cir. 1997). The size and the nature of the child abuse epidemic poses major challenges for the state. The problems created by child abuse investigations exist primarily because these cases involve three separate parties (the state, the child, and the parents), each with strong and legitimate interests in the way the state conducts the investigation. These interests often conflict, leading to difficulties.

It becomes very difficult for the state to gather the requisite information needed to protect the child when the child is either too young or too scared to talk. Often, these are children who cannot protect themselves, and the parents may face a conflict of interest in trying to maintain privacy. This conflict of interest stems from the possibility that the parents trying to shield their child from a search may be the actual perpetrators of the abuse. It is difficult for the state to substantiate the reports of others when the individual who is allegedly conducting the abuse controls access to the home and the child. Sometimes it is impossible to differentiate between a parent's dual interests in protecting the child's privacy and in keeping information away from the state, yet the state still has the responsibility to care for and shield victims of abuse. Frequently, victims are too young to call out for help and adults are unaware that they are witnessing abuse, leaving the state unaware of the abuse and unable to intervene. 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, 564 (2012).

The Fourth, Seventh, and Tenth Circuits are all special needs jurisdictions and have held that child abuse investigations qualify as a special need for purposes of the test. *See, e.g., Heck*, 327 F.3d at 513–15; *Bagan*, 41 F.3d at 572–74; *Wildauer v. Frederick County*, 993 F.2d at 370–71; *Darryl H.*, 801 F.2d at 905. In *Darryl H.*, 801 F.2d at 905, the Seventh Circuit affirmatively recognized the applicability of the special needs doctrine to investigations of child abuse. The court addressed the essential issue of whether a caseworker, following agency policy, can constitutionally conduct a nude body search of a child “without meeting the strictures of probable cause or the warrant requirement.” *Id.* Applying the T.L.O. balancing test, and recognizing the various and competing interests involved, the court found that the state's need was “substantial and multifaceted.” *Id.* at 900 (citing *Terry v. Ohio*, 392 U.S. 1, 8 (1968)). As the court observed, there is no more worthy public calling than the protection of children. *Id.* at 902.

Due to the nature of child abuse investigations and the need to remove a child from a dangerous home as quickly as possible, the time allotted to the state in conducting these investigations is very short. *Croft*, 103 F.3d at 1126. The Seventh Circuit’s rationale in *Darryl H.* is directly applicable to the facts of this case, as a physical inspection of the families’ kitchens was the quickest way for the Department to assess the credibility of Prof. Dumbledore’s abuse allegations. *See Darryl H.*, 801 F.2d at 900 (relying on concerns for familial privacy, the court recognized that a nude body search might actually best protect familial privacy from an otherwise extensive home investigation).

The Fourth Circuit adopted the Seventh Circuit’s rationale and applied the special needs doctrine to child abuse investigations in *Wildauer v. Frederick County*, 993 F.2d at 370. The caseworker in *Wildauer*, responding to a neglect allegation, entered and searched the children’s house with nurses to “investigate [the children's] medical histories, medications, and schooling.” *Id.* at 371.

In *Doe v. Bagan*, 41 F.3d at 574, the Tenth Circuit also applied the special needs doctrine to a child abuse investigation that involved an interview and a medical test. In a later case, the Tenth Circuit suggested that the T.L.O. balancing test might also apply when a social worker removes a child from “parents' custody at a public school,” a situation not unlike the case at

hand. Jones v. Hunt, 410 F.3d 1221, 1228 (10th Cir. 2005).

These courts of appeal have held that the state interest in a child abuse investigation supersedes the parents' interests. Nonetheless, as with the home visits at issue here, the searches that were conducted in those cases were of an administrative nature. There was no individualized suspicion and they were conducted at random. These factors, put together, contributed to the courts' conclusion that those particular child abuse investigations qualified as a special need for purposes of the special needs doctrine, as they should here.

B. The Department Has Demonstrated a "Special Need" Discrete and Superior to the General Interest in Law Enforcement.

1. Law enforcement was never involved at any phase of the Policy.

In the first prong of the special needs doctrine, the Court is concerned about the involvement of police and law enforcement in the search and the purpose of the search. Ferguson v. City of Charleston, 532 U.S. 67, 68 (U.S. 2001). In T.L.O., for example, the Court scrutinized the school for turning over evidence found in the search to the police. T.L.O., 469 U.S. at 347 (ultimately holding that the search was reasonable under the Fourth Amendment).

If the need to enter the plaintiffs' home is sufficiently divorced from the state's general interest in law enforcement, there could be a special need that justifies the entry. Thomas v. Tex. Dep't of Family & Protective Servs., 427 F. App'x 309 (5th Cir. 2011); Gates v. Tex. Dep't of Protective & Regulatory Servs., 537 F.3d 404 (5th Cir. 2008). Courts focus on the state's *specific purpose*—and here, the specific purpose was to uncover potential child abuse by utilizing social services programs that are not intertwined with law enforcement. Ferguson, 532 U.S. at 98 (holding that the special needs doctrine was inapplicable because the search was undertaken “*for the specific purpose of incriminating those patients*” and that the purported medical rationale was merely a pretext; there was no special need); see also Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 621 n.5 (1989). Here, the special need was not mere pretext in order to involve law enforcement; the special need was to remove children from dangerous home environments. Law enforcement was not even apprised of the Department's Policy until the Department was under a legal duty to report evidence of abuse. Still, neither the Department's specific purpose nor its ultimate objective was to uncover evidence of abuse for purposes of prosecution. The secondary criminal repercussions that developed around a purely civil search do not by themselves make non-law-enforcement searches unreasonable under the Fourth Amendment. T.L.O., 469 U.S. at 347.

Even if child abuse is eventually reported to the authorities or turned into evidence, the Supreme Court in Ferguson drew a distinction between this general duty and the employees' specific purpose. Here, the social worker's specific purpose was not law enforcement or “ordinary crime detection activities.” See Ferguson, 532 U.S. at 81; MacWade v. Kelly, 460 F.3d 260, 268–96 (2d Cir. 2006).

Greene v. Camreta, 588 F.3d 1011, 1027 (9th Cir. 2009), did not permit application of the special needs doctrine because “the police were conducting ongoing investigation of allegations

of child sexual abuse against child's father,” and this is what led the court to decide that law enforcement personnel and purposes were “too deeply involved” in an in-school seizure and interrogation. In the case at hand, there was no ongoing investigation at the time of Policy No. 47’s enactment.

The Court in Ferguson was concerned that the patients “weren’t fully informed about their constitutional rights.” Ferguson, 532 U.S. at 81. Here, in contrast, the parents were told that they could deny access to the home. What the Department had in mind was a cooperative and synergistic relationship with the parents, as Department personnel never presupposed that there was intentional neglect or wrongdoing. The Department’s Policy was a proactive administrative search that applied on equal terms to all Hogwarts High School students. Even if Hogwarts had had a particular suspect in mind, the Department decided on its own initiative and after careful consideration that in these cases, defenseless children and potential victims were paying too high a price. The purpose of the search was not to uncover evidence, but to remove children from dangerous, unsafe, or unhealthy environments *temporarily* and then reintroduce them into their homes after rehabilitation.

The various circuit court rulings in child protection cases focus on the entanglement of law enforcement. When police are not included in the search, as they were not here, and when a child abuse investigation is “sufficiently disentangled from general law enforcement purposes,” then the “valid administrative purpose” of protecting children from abuse creates a special need justifying a lower standard than probable cause. 5 Search & Seizure § 10.3 (5th ed.).

2. Secondary criminal repercussions do not factor into the special needs analysis.

The fact that an arrest resulted from the search is not relevant. Secondary criminal repercussions that develop around a civil search do not automatically make non-law-enforcement searches unreasonable under the Fourth Amendment. T.L.O., 469 U.S. at 347 (finding the maintenance of order and discipline in the school setting to be the primary aim of the school official's search). When a defendant’s immediate objective is to ameliorate child abuse, the fact that evidence from the search could be used in a criminal investigation is a fact secondary to protecting the child. In such cases, the special needs doctrine is still appropriate for child abuse investigations. Darryl H., 801 F.2d at 899 (“[T]he right to familial privacy does not prevent the state from protecting the dependent child from harm at the hands of a parent or caretaker.”). As in Darryl H., the Department here was given a mandate to “protect the best interests of the child, offer protective services in order to prevent any further harm to the child and to other children in the family, stabilize the home environment and preserve family life whenever possible.” Id. at 895. The Department was attempting to fulfill this mandate and developed and implemented a comprehensive plan for preventing, detecting, and treating child abuse. The Department adopted a uniform policy for investigating these allegations of child abuse that it received from schoolteachers standing *in loco parentis* to the students at Hogwarts.

The various factors that are considered in a determination of whether a search is primarily for law enforcement purposes all point to a finding that the Department’s Policy here was *not* for a law enforcement purpose. Home visits by social workers are subject to less scrutiny than criminal investigations. See generally Wyman v. James, 400 U.S. 309, 317 (1971); Wildauer,

993 F.2d at 372; Darryl H., 801 F.2d at 900. The police were never involved at any stage of the search, and were only alerted as to the results weeks later. See Answer ¶ 5. In the case of the Hogwarts parents, “the focus was [on the] child” and not the “potential criminal culpability of her parents.” Franz, 997 F.2d at 791 (rejecting applicability of the special needs doctrine where the court was concerned about the involvement of the police and finding that this distinction is important given T.L.O.’s rationale that other officials require special needs because they are not fully versed in the niceties of probable cause like police officers). A focus on culpability is the hallmark of a criminal investigation. In contrast, a social worker’s principal focus is the welfare of the child. While a criminal prosecution may emanate from the social worker’s activity, that prospect is not a part of the social worker’s cachet. Id. Additionally, the Department distributed an agency-wide memorandum that contained written guidelines that limited the caseworker’s discretion. See Id. at 792 (citing the lack of a written policy to curb officer’s discretion as a concern).

3. The purpose of the home visit and entry was not coercive.

A warrantless search of the home may be reasonable if the search was for an administrative purpose. Gates, 537 F.3d at 420 (quoting United States v. Gomez–Moreno, 479 F.3d 350, 354 (5th Cir. 2007)). This is not a case of forced entry, as the Malfoys granted the caseworkers entry into their home. See Answer ¶ 5. There was no coercion or threat of sanctions on the part of the Department in order to attain consent to such entry. Law enforcement was never involved at any point of the investigation, and the sole purpose of the investigation was to remove children from any immediate danger.

In Ferguson v. City of Charleston, 532 U.S. at 68, the “special needs” exception did not apply because of the “extensive involvement of law enforcement at every stage of the policy.” The Supreme Court adopted a particularly fact-based approach to the assessment of whether there was some special need being served, separate and apart from general interest in crime control. Id. This is the approach that should be followed here.

The state here had no “dual purpose” in conducting the search, and the search was not inherently linked to the discovery of criminal activity or entangled with law enforcement. Id. Here, unlike the defendant hospital in Ferguson, the Department did not rely on the coercion of law enforcement. The State’s legitimate interest in this case is not vitiated by the police’s day-to-day role in administering the Policy because the police *did not have* a day-to-day role and were not involved in the creation or formulation of the Policy at all. The police became involved only after child abuse was discovered in a student’s home and only after the student’s parent specifically rejected non-coercive Department programs, at which point the police had no choice but to intervene.

In this case, the plaintiffs were not threatened with prosecution if they refused the authorities entry into their home. Rather, they were asked instead to visit their local station to answer a series of short interview questions (the same questions that would have been asked in the home setting). This was an alternative and non-coercive option that was provided to parents who did not feel comfortable welcoming the social welfare agents into their homes. The home visits were a matter of mere efficiency and convenience, as the Department did not find it

realistic to be escorting parents in and out of the Department's offices. After playing out the potential scenarios, Department officials decided that the parents themselves would find it preferable to be interviewed in the comfort of their own homes.

The mere fact that a different parent who is not a party to this lawsuit was ultimately charged with a count of negligent child abuse on the basis of the search should not factor into the analysis of whether potential child abuse qualifies under the special needs exception. The main and ultimate purpose of the Department's Policy is to *prevent* child abuse by means of detecting it. Before even being charged, Ms. Lovegood's father was not threatened with prosecution at all, but was, rather, given the option of participating in a voluntary (and temporary) removal program. Neither the Department nor its subordinate Bureau is a law enforcement agency; both are engaged in primarily civil activities and were chartered by the state to attend to civil—rather than criminal—purposes (to assist families and children in matters relating to housing, physical and mental health, nutrition, and other family programs). The Department was not pursuing an investigative agenda, and its full efforts were completely focused on the *child's* well-being rather than his or her *parents'* actions.

The government assistance program at issue is specifically designed to ameliorate child abuse. See Marchwinski v. Howard, 113 F. Supp. 2d 1134, 1141–44 (2002). This case fits into the category of cases in which there is a lack of individualized suspicion of wrongdoing, because the search was conducted on the child, who is not accused or suspected of any wrongdoing. The Department was never motivated by any individualized suspicion, as it was never briefed on any specific suspects and lacked sufficient knowledge or information to know or even suspect that this could be the case. The search was “aimed at helping the [child] herself,” Ferguson, 532 U.S. at 80–81, and when the Department came across the information, they were subject to a reporting requirement under rule of law. However, it was neither the Department's ultimate goal nor its immediate objective to generate evidence for law enforcement purposes.

The challenges of child abuse investigations include: a short time frame to remove a child from a dangerous home, a child's inability to admit to the abuse, and the fact that the only way to investigate an abuse allegation is by examining the victim and interviewing the alleged perpetrator(s). Darryl H., 801 F.2d at 902. When CPS agents conduct the investigations alone without the presence of law enforcement personnel, as the agents did here, the circuits have consistently applied the special needs doctrine. 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, 376 (2012). The difficulty of a child abuse investigation is a consideration separate from the “normal need for law enforcement” and qualifies as a special need. The Department never second-guessed the child-rearing decisions made by any of the parents. Its immediate goal was to remove children from a dangerous environment and its ultimate goal was to create voluntary programs that would educate parents interested in health and nutrition. The Department is not a law enforcement agency, and these are the kinds of services it engages in. Its Policy fulfilled objectives that could not be achieved through normal law enforcement.

II. THE SCOPE OF THE DEPARTMENT'S SEARCH WAS REASONABLE IN RELATION TO THE IMPORTANCE OF THE GOVERNMENT INTEREST AT STAKE AND THE THREAT POSED.

A. The Need for a Search Outweighs the Offensiveness of the Intrusion.

Once a special need is found in warrantless searches in the child welfare context, courts use a general reasonableness test that balances the need of the government against the invasion caused by the search. The nature and immediacy of the governmental concern at issue and the efficacy of the means for addressing it favor a finding of reasonableness. The Department's Policy was not meant to encroach upon Mr. and Mrs. Malfoy's ordinary parental authority, and the potential danger of doing so is effectively addressed by ensuring that the personnel conducting the searches be trained and that the searches be random and suspicionless. The Fourth Amendment does not require that the "least intrusive" search be conducted. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 647 (1995).

The Department's response was directly proportional to the threat posed (food deprivation is a form of physical abuse) and was narrowly tailored to address concerns regarding nutrition (weighing students, urine samples for mineral testing, searching food pantries, and strip searches to see whether a child is too thin). The option of a voluntary program before removal provided a non-coercive alternative to Mr. Lovegood. Entry into the home was not forced, and parents were free to refuse and go to the Department offices. These facts clearly support a finding that the intrusion was not offensive when weighed against the need to uncover the alleged abuse.

In weighing the competing interests, "the state's interests are . . . extraordinarily weighty. Its obligations are multifaceted. The state has an obligation to prevent loss of life and serious injury to those members of the community to whom it has a very special responsibility, the young." Darryl H. v. Coler, 801 F.2d 893, 902 (7th Cir. 1986). We must also remember that the government must fulfill these responsibilities under difficult circumstances. Once a complaint is received, time can be an important factor, especially if the child is still in a situation where repetition of the alleged abuse is a possibility. A visual inspection provides quick and objective information. Id. The Department was acting reasonably in attempting to balance these competing interests. In crafting its Policy and authorizing visual inspections, the Department was hoping to alleviate the need for any further inquiry or make plain the need for additional investigation. Therefore, the Department was actually trying to respect the family's interest in privacy and minimize the scope of the intrusion as much as possible, while still fulfilling its responsibility to the public.

B. The Department's Search and Policy Were Reasonable

A court's inquiry turns on the "objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." Pearson v. Callahan, 555 U.S. 223, 244 (2009) (quoting Wilson v. Layne, 526 U.S. 603, 614 (1999)); see also Anderson v. Creighton, 483 U.S. 635, 640 (1987).

The federal courts' tentative case-by-case approach to deciding the special needs question has left the states with little guidance in shaping their CPS policies, and the Department was not acting unreasonably in light of this uncertainty. Reasonable people could disagree whether to place a higher value on children's safety than on individual or familial privacy, and therefore the Department did not act unreasonably in deciding to place a higher value on child safety in this specific instance.

Over the years, CPS agencies across the nation have created a wide range of policies and procedures that vary in scope and intrusiveness. These procedural differences often influence how a court will determine whether the CPS has violated the Fourth Amendment. Because the circuits are responding reactively to the special needs question, their decisions often cover only a small subset of agency policies. In essence, CPS agencies are flying blindly, hoping that the courts will find their policies satisfactory under the Fourth Amendment. Greene v. Camreta, 588 F.3d 1011, 1032 (9th Cir. 2009) (where, despite its holding, the court acknowledged the difficult task placed on protective services caseworkers in balancing between infringement upon a parent's constitutional rights and potential child abuse, and noted that the CPS workers did not know which standard they were bound by).

Courts have authorized home searches on numerous occasions in special needs cases. The Supreme Court has previously found that a system of state supervision could require applying the special needs doctrine to home searches. See Samson v. California, 547 U.S. 843, 849–50 (2006); Griffin v. Wisconsin, 483 U.S. 868, 874, 878 (1987). Therefore, any argument that the special needs doctrine is inapplicable to searches that take place in the home is unfounded.

Although courts grant parents deference in most child-rearing decisions, they also recognize that the State has legitimate authority to interfere with parental rights if the child is in danger. A child has a right to not only family privacy, but also to bodily integrity, and the Department here was doing its part to ensure that children were not being deprived of the latter. Any familial right must still be weighed against the state's need to investigate and protect children from abuse.

Applying the standard first articulated in New Jersey v. T.L.O., 469 U.S. 325, 351 (1985), the Department could have reasonably believed that the decision to search the children was sufficiently justified at its inception. In addition, it could have reasonably regarded the search "as actually conducted" as reasonable in scope. See Greene, 588 F.3d 1011, 1032–33 (9th Cir. 2009). The parents gave permission to enter their homes, they were present during the search, the children themselves were not searched, and all the caseworkers did was glance around kitchen cabinets. The courts' analysis of factual reasonableness puts the Department in a difficult position: the nature of its field often leads to unfounded reports, but those reports still must be filed. Additionally, speed is of the essence, and third-party corroboration is often counterproductive, but agencies should nevertheless seek further corroboration when time permits. Lengthy delays between the allegation and the investigation or the discovery "of information which cast[s] serious doubt on the validity of the charge," Darryl H., 801 F.2d at 907, are not reasonable, and therefore the agency needed to act quickly.

Courts are also mindful of the difficult task facing social services caseworkers, who are

required to exercise significant discretion in determining whether a child's welfare is in jeopardy. As the Second Circuit has explained, "Protective services caseworkers [must] choose between difficult alternatives . . . . If they err in interrupting parental custody, they may be accused of infringing the parents' constitutional rights. If they err in not removing the child, they risk injury to the child and may be accused of infringing the child's rights." Tenenbaum v. Williams, 193 F.3d 581, 596 (2d Cir. 1999) (quoting Van Emrik v. Chemung Cnty. Dep't of Social Servs., 911 F.2d 863, 866 (2d Cir. 1990)).

The Department recognizes the constitutionally protected liberty interests that parents have in the custody, care, and management of their children. See Lehr v. Robertson, 463 U.S. 248, 258 (1983). But this interest is by no means absolute. Martinez v. Mafchir, 35 F.3d 1486, 1490 (10th Cir. 1994); Myers v. Morris, 810 F.2d 1437, 1462 (8th Cir. 1987). Indeed, this liberty interest in familial integrity is limited by the compelling governmental interest in the protection of children—particularly where the children need to be protected from their own parents. See Myers, 810 F.2d at 1462. The right to familial integrity, in other words, does not include a right to remain free from child abuse investigations. Watterson v. Page, 987 F.2d 1, 8 (1st Cir. 1993).

#### Conclusion

For the foregoing reasons, this Court should reverse the district court's grant of summary judgment to Appellees.

APPELLEES' ARGUMENT

I. APPELLANTS FAILED TO ESTABLISH THAT THE SPECIAL NEEDS DOCTRINE IMMUNIZED THEIR ACTIONS, AND SUMMARY JUDGMENT WAS THEREFORE APPROPRIATE.

Plaintiff maintains that the special needs doctrine does not apply to child abuse investigations. In the case at hand, the Department has not established the existence of a special need. Furthermore, the search exceeds the bounds of reasonableness required by the Fourth Amendment when weighed against the intrusion on the Malfoys' familial interest in privacy. Therefore, the Department's search constituted an illegal search within the meaning of the Fourth Amendment and Plaintiff is entitled to relief under § 1983 and judgment as a matter of law. This Court should affirm the decision of the Fourteenth Circuit.

II. APPELLEES WERE ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THE DEPARTMENT VIOLATED THE FOURTH AMENDMENT PROTECTION AGAINST UNREASONABLE SEARCH AND SEIZURE.

A search conducted without a warrant is “per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.” Sibron v. New York, 392 U.S. 40, 62 (1968). The “special needs doctrine” is an exception to the warrant requirement. Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 619 (1989); Griffin v. Wisconsin, 483 U.S. 868, 873 (1987); New Jersey v. T.L.O., 469 U.S. 325, 351 (1985). Courts that adopt the special needs doctrine use a two-step test considering whether the search was conducted (1) to meet a state's “special need” and (2) whether the search was reasonable in light of the individual privacy interests and the government's goals and immediate objectives. The Fourteenth Circuit is a special needs jurisdiction, but this case does not fall into that exception.

Child abuse investigations do not constitute a special need, particularly when a search is in the home or involves law enforcement. See generally Roe v. Tex. Dep't of Protective & Regulatory Servs., 299 F.3d 395 (5th Cir. 2002); Tenenbaum v. Williams, 193 F.3d 581 (2d Cir. 1999); Calabretta v. Floyd, 189 F.3d 808 (9th Cir. 1999); Good v. Dauphin Cnty. Soc. Servs. for Children & Youth, 891 F.2d 1087 (3d Cir. 1989). Moreover, the Department's searches were unreasonable because it did not take care to preserve familial privacy in enacting Policy No. 47. Familial privacy considerations include the privacy of the child from intrusive and potentially traumatic searches. See Troxel v. Granville, 530 U.S. 57, 65–66 (2000); see also Berman v. Young, 291 F.3d 976, 983 (7th Cir. 2002) (citing cases and tracing the development of familial rights); Brokaw v. Mercer Cnty., 235 F.3d 1000, 1018 (7th Cir. 2000) (citing Santosky v. Kramer, 455 U.S. 745, 760 (1982)). Therefore, the search was unconstitutional and violated the Malfoy family's constitutional rights.

III. THE DEPARTMENT'S SEARCH SERVES NO “SPECIAL NEED” BEYOND THE NORMAL NEED FOR LAW ENFORCEMENT.

Although Plaintiff recognizes that the high number of abuse cases creates a compelling interest for the state, it does not create a “special need, separate and apart from law

enforcement,” and therefore the special needs doctrine cannot be used to justify the warrantless entry. See Thomas v. Tex. Dep’t of Family & Protective Servs., 427 F. App’x 309, 314 (5th Cir. 2011) (concluding that, under similar circumstances, a home visit to investigate possible child abuse “was not separate from general law enforcement” because the visit was also to investigate the possibility of child abuse and the safety of the children); see also City of Indianapolis v. Edmond, 531 U.S. 32, 121 (2000); Gates v. Tex. Dep’t of Protective & Regulatory Servs., 537 F.3d 404 (5th Cir. 2008).

Courts that have applied the special needs doctrine to justify warrantless searches have focused on the interest in the prevention of some future harm. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822, 824 (2002); Marchwinski v. Howard, 309 F.3d 330, 334 (6th Cir. 2002) (rejecting the state’s contention that Michigan’s interest in the prevention of child abuse and neglect was a sufficient public safety concern). Even if there were some narrow “special need” that courts consistently and expressly recognized regarding the prevention of child abuse, the Policy adopted by the Department was not a government assistance program designed to ameliorate child abuse and would not fit within this hypothetical “special need.” Marchwinski, 309 F.3d at 334.

A government assistance program that might, in some future case, be considered a special need is a statute that allows a department to offer information, referrals, or services to families, focusing on the children at highest risk. See Nina Williams-Mbengue et. al., National Conference of State Legislatures, Differential Response Approach in Child Protective Services: An Analysis of State Legislative Provisions 2–9 (2009), available at <http://perma.cc/LV29-XKKJ>. For example, a Missouri statute provides voluntary and time-limited services. Id. at 6. Nevada legislation allows the child welfare agency to “provide counseling, training or other services,” or “conduct an assessment of the family to determine what services are necessary.” Id. Oklahoma requires that the department identify prevention and intervention services in the community and arrange for the provision of voluntary services. Wyoming’s statute requires the county to offer services on a voluntary basis to the child’s family. Id. As such, the Policy at issue was not that type of program. The search that gave rise to Plaintiff’s cause of action was conducted in order to detect child abuse, rather than prevent it, and in fact resulted in the arrest of Luna Lovegood’s father. Child abuse should only constitute a “special need” when the purpose is prevention, rather than detection, and therefore the Department cannot escape liability under the special needs doctrine. Id.; see also Marchwinski, 309 F.3d at 335–36 (finding a special need only where a program was found to *assist* families receiving welfare benefits, a heavily regulated field—a fact which additionally led the court to find there was a diminished expectation of privacy).

The state’s interest diminishes as the probability of any abuse decreases. See Tenenbaum v. Williams, 193 F.3d 581, 602 (2d Cir. 1999); see also Mark R. Brown, Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process, 65 Ohio St. L.J. 913, 920 (2004) (discussing how dispensing with the need for prior judicial review saves time and may facilitate detection but risks unnecessary invasions of privacy and familial harmony, and how invasive governmental practices risk alienating parents who need help and who would otherwise cooperate with social workers). The probability of uncovering abuse decreases exponentially when the principal way of uncovering it is by searching homes at random where there have been no allegations or indications of abuse. See Berman v. Young, 291 F.3d 976, 979 (7th Cir. 2002).

In any case, there is no special need when the goal is to *uncover* the abuse, rather than to *prevent* it. Defendant should not be allowed to rely on any correlation between its course of action and its ultimate goal of “preventing child abuse” given that the searches were not designed to ameliorate child abuse or adequately respond to the threat of child abuse. See Marchwinski, 309 F.3d at 334. In Tenenbaum, the Second Circuit refused to distinguish a CPS agency’s investigative purpose from the purpose of detecting and treating injuries that may have been caused by alleged child abuse. Tenenbaum, 193 F.3d at 599 (where a gynecological exam was undertaken for the purpose of determining whether abuse occurred, the possibility that if injuries had been found doctors would have been treated them “did not turn an investigative examination into one that is ‘medically indicated’ and designed for treatment”).

A. The Special Needs Doctrine Is Inapplicable to Child Abuse Investigations Conducted in the Home

The Department’s *general* interest in protecting children, coupled with the manner in which the search was conducted, does not fit into the narrow category of cases in which courts have accepted the existence of a special need. When confronted with the issue, the Second, Third, Fifth, and Ninth Circuits have held that the special needs doctrine does not apply to child abuse investigations, particularly when the search is in the home or involves law enforcement. See Roe v. Tex. Dep’t of Protective & Regulatory Servs., 299 F.3d 395 (5th Cir. 2002); Tenenbaum, 193 F.3d 581; Calabretta v. Floyd, 189 F.3d 808 (9th Cir. 1999); Good v. Dauphin Cnty. Soc. Servs. for Children & Youth, 891 F.2d 1087 (3d Cir. 1989).

The Seventh Circuit has adopted a different approach, creating a jurisdictional element that determines the appropriateness of applying the special needs doctrine to child abuse investigations based on where the search or seizure occurs. Under this approach, cases often turn on whether the search occurred in a public school, a private school, or the home. See Darryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986) (expressing concerns over familial privacy and how it can be harmed by an extensive home investigation).

The Third Circuit refused to consider the special needs doctrine in a case where a caseworker and female police officer paid a home visit and conducted a strip search on a frightened girl, despite no signs of abuse. Good, 891 F.2d at 1093. Good is particularly noteworthy because the Third Circuit quickly rejected the applicability of the special needs doctrine, finding no suggestion that “the governing principles [of the Fourth Amendment] should vary depending on the court’s assessment of the gravity of the societal risk involved.” Id. at 1092. In the present case, the Department’s Policy practically coerced the Malfoy family into granting the officials access to their home, absent any exigent circumstances or specific allegations of abuse. There was coercion because the Department’s Policy was purposefully vague on what alternatives families had besides granting the officials entry; the Policy was also elusive in stating what consequences a family might face if it rejected entry into the home.

The Ninth Circuit addressed the application of the special needs doctrine to child abuse investigations in Calabretta, 189 F.3d at 811, expressing particular concern over the fact that the location of the search was in the child’s home. Calabretta is especially apposite here because in that case, the social worker was denied entry into the family home during the first visit. Id.

Despite still being able to observe that the children did not appear abused, the social worker later returned and entered the home without consent. In similar fashion, Hogwarts High School faculty searched the Malfoys' son, Draco, and saw no signs of abuse. Nevertheless, the Department still decided to conduct a home search. The court in Calabretta also recognized that when there is a "criminal aspect to the investigation," the search moves beyond the realm of special needs and into the realm of traditional law enforcement purposes. Id. at 815. Most important, the Ninth Circuit held that the special needs test announced in New Jersey v. T.L.O., 469 U.S. 325, 351 (1985), applies only to the special environment of schools and not to children in general. Calabretta, 189 F.3d at 816. Thus, even if the initial search conducted on Draco by the Hogwarts nurse was the product of a special need under the T.L.O. standard, the second search of the Malfoy family home was not.

In Tenenbaum, 193 F.3d at 581, the Second Circuit addressed the competing interests of the state and the parents, recognizing the fundamental right of parents to raise their children free from the intrusion of the state. The court ultimately concluded that "[w]hen child abuse is asserted, the child's welfare predominates over other interests of her parents and the State." Id. at 595. The court adopted the Tenth Circuit's rationale in Franz v. Lytle, 997 F.2d 784, 791 (10th Cir. 1993), that the multifaceted interests of the child include the interest to be free from not only physical abuse, but also unwarranted assaults from the state against the child's "psychological well-being, autonomy, and relationship to the family." Tenenbaum, 193 F.3d at 581. This same concern is the very reason that Respondent is challenging the Department's Policy. The Second Circuit refused to hold that a special need existed, finding specific utility in requiring the state to seek judicial authorization, which "makes a fundamental contribution to the proper resolution of the tension among the interests of the child, the parents, and the State." Id. at 604. We urge this Court to adopt that same reasoning in order to achieve a proper balance between these competing tensions.

The Fifth Circuit addressed the special needs question in Roe v. Texas Department of Protective & Regulatory Services, 299 F.3d 395 (5th Cir. 2002). There, the caseworker was allowed entry into the family home and, after a discussion with Mrs. Roe, conducted a nude body search on Mrs. Roe's child. Id. at 402. The facts therefore are similar to the facts of the present case, especially with regard to the Malfoys' reluctance to allow officials into their home. Holding that the special needs doctrine did not apply to strip searches, the Ninth Circuit noted that the Supreme Court's special needs precedents exhibited a longstanding concern that "citizens have an especially strong expectation of privacy in their homes." Id. at 405 (citing Payton v. New York, 445 U.S. 573, 586 (1980)); see also United States v. U.S. Dist. Court for the E. Dist. of Mich., S. Div., 407 U.S. 297, 313 (1972); Silverman v. United States, 365 U.S. 505, 511 (1961).

B. The Department's Civil Purpose Is Not Sufficiently Divorced from the State's General Interest in Law Enforcement.

Special needs can only be applied where the need is "divorced from the state's general interest in law enforcement." Ferguson v. City of Charleston, 532 U.S. 67, 68 (2001). Because the search at issue served the goal of general law enforcement (defined as "ordinary crime-detection activities"), it would be inappropriate to engage in a balancing test to determine whether the search meets the constitutional requirement of reasonableness. See MacWade v.

Kelly, 460 F.3d 260, 268 (2d Cir. 2006). The state’s principal means of preventing child abuse is by use and imposition of its criminal law, and this purpose is not sufficiently divorced from the state’s general interest in crime control and law enforcement.

In this case, the Malfoys and other families were told that both the Hogwarts policy and the Department’s Policy were mandatory and, in the case of the latter, they were not told what would occur if they refused to grant the caseworkers home entry or if they decided not to go to the social services offices for questioning. A “central and indispensable feature” of the Department’s Policy from its inception in the Hogwarts conference room was the “use of law enforcement to coerce” the parents’ involvement. Ferguson, 532 U.S. at 68. Even if the Department’s ultimate goal is to prevent child abuse, “the immediate objective of the searches was to generate evidence for law enforcement purposes in order to reach that goal.” Id. at 83.

The very reason that Prof. Dumbledore reached out to the Department in the first place was to involve law enforcement personnel. Before contacting the police, the Hogwarts administration was under a legal duty to alert the appropriate authorities (in this case, the Department and the Bureau) as to allegations of likely child abuse and exhaust all administrative possibilities. For examples of statutes imposing legal duties on school officials, see Cal. Penal Code § 11166 (West 2013); Fla. Stat. Ann. § 39.201 (West 2013); Ind. Code Ann. § 31-33-5-1 (West 2013); N.Y. Soc. Serv. Law § 413 (McKinney 2013).

When law enforcement personnel and purposes are too deeply involved in an interrogation conducted by child protective services caseworker of a “child who was a suspected abuse victim,” this may prevent the application of “special needs” doctrine. See Greene v. Camreta, 588 F.3d 1011, 1027 (9th Cir. 2009).

#### IV. THE SEARCH EXCEEDED THE BOUNDS OF REASONABLENESS REQUIRED BY THE FOURTH AMENDMENT WHEN WEIGHED AGAINST THE INTRUSION ON THE MALFOYS’ FAMILIAL INTEREST IN PRIVACY.

##### A. Appellees Were Entitled to Rely on a Reasonable and Objective Expectation of Privacy in Their Own Home.

Unlike here, most cases in the special needs context rely on the concept of a party’s reduced expectation of privacy when engaging in the reasonableness determination. See Samson v. California, 547 U.S. 843, 849–50 (2006); Griffin v. Wisconsin, 483 U.S. 868, 874, 878 (1987). In a departure from the Supreme Court’s jurisprudence in the area of special needs, Defendant here does not rely on Plaintiff’s reduced expectation of privacy. Even in those cases where home searches have been found reasonable when weighed against the individual privacy interests at stake, it was only in relation to the special status held by probationers and/or parolees, who have a reduced expectation of privacy based on the well-established special need of the state supervision system. See, e.g., Samson, 547 U.S. at 843 (parolees have even fewer expectations of privacy than probationers); Griffin, 483 U.S. at 875 (supervision of probationer is a special need of the state permitting degree of infringement upon privacy that would not be constitutional if applied to public at large).

The Supreme Court's holdings in Samson and Griffin are inapplicable to the present case. In those cases, findings of special needs were appropriate primarily because probationers "waive many of their privacy rights and have a much lower subjective expectation of privacy in the home." Roe v. Tex. Dep't of Protective & Regulatory Servs., 299 F.3d 395, 405 (5th Cir. 2002). In stark contrast, the Court has never upheld a "special needs" search where the individual's expectation of and interest in bodily and familial privacy was as strong as Draco Malfoy's. Id. at 406 (noting how the home search cases underscore the strength of the child's privacy interest). Unlike the searched persons in Samson and Griffin, Draco Malfoy and his family never "voluntarily surrendered a great deal of the privacy interest in their homes." Id.; see also Wyman v. James, 400 U.S. 309, 318 (1971). Because of the "potency" of the Malfoy family's privacy interest in this case, the Department's search cannot be considered reasonable, and this Court must not apply the special needs doctrine. See Roe at 406.

In those special needs cases where the Court did not rely on the individual's reduced expectation of privacy, it relied instead on the voluntary nature of the plaintiffs' activities (indicating a form of consent), the discretionary nature of the activity in question, or whether a particular industry was highly regulated. See Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 627 (1989); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 671 (1989). These circumstances are not relevant here; indeed, Defendant does not even claim any of these factors led to its decision to carry out the improper search. Besides prisoners, parolees, probationers, and some arrestees, the Court has extended the reduced expectation of privacy rationale only to student athletes being tested for drugs, students participating in extracurricular activities, persons working in highly regulated industries, and federal customs officials. See Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 831-32 (2002); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995); see also Skinner, 489 U.S. at 627. While Plaintiff supports the state's need to protect innocent children from the threat of harm by ill-intentioned or negligent parents, the Defendant's Policy in and of itself poses a huge threat of harm. The Supreme Court's previous cases have all focused on searches that take on an almost administrative component.

Children must also be protected from intrusive and potentially traumatic searches. It is this concern that motivated the Third Circuit in Good v. Dauphin County Social Services for Children & Youth, 891 F.2d 1087, 1095 (3d Cir. 1989), where a home search and strip search were conducted despite the lack of any evidence suggesting abuse. The Third Circuit chastised the state officials because after "finding no evidence of marks, injury, or abuse," the officer left the child and her mother "shocked and shaken, deeply upset and worried." Id. As in Good, Draco Malfoy, a child who showed no signs of abuse, was forced to endure the frightening and humiliating experience of an invasive search on the basis of a vague and unfounded allegation. The profound irony of this approach is that, in the name of saving children from the harm that their parents and guardians are thought to pose, states ultimately cause more harm to many more children than they ever help. 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).

In addition to infiltrating the private family home without any kind of suspicion, permission, or justification, the search in this case is particularly offensive because Department officials went through cabinets and second-guessed parents on child-rearing decisions. When

government actors invade one's home, they become privy to "the sanctity of a man's home and the privacies of life." Boyd v. United States, 116 U.S. 616, 630 (1886). The rummaging through drawers affects "the very essence of constitutional liberty and personal security." Id. The "means" that the government used in fulfilling its supposed "special need" are also analyzed as part of the reasonableness inquiry. Cassidy v. Chertoff, 471 F.3d 67, 87 (2d Cir. 2006) (whether a search is a *reasonable method* of fulfilling the special need asserted is a factor that courts weigh heavily when balancing the competing interests). Here, the government failed to use any screening procedures commonly used by child protective agencies that could have significantly reduced the intrusion posed by the warrantless searches. See Nina Williams-Mbengue, et. al., National Conference of State Legislatures, Differential Response Approach in Child Protective Services: An Analysis of State Legislative Provisions 2–9 (2009), available at <http://perma.cc/LV29-XKKJ> (detailing how various state statutes "require the use of an approved screening instrument . . . to make an initial screening decision upon receipt of a report of a harm. Upon determination that the child is at risk, the department is to determine the appropriate level of intervention"). In failing to exercise this kind of diligence, the Department can hardly claim that its actions were "reasonable."

The state's important interest in protecting children "include[s] not only protection against child abuse, but also 'the child's psychological well-being, autonomy, and relationship to the family or caretaker setting'" and the "interest in the privacy and dignity of their homes." Calabretta v. Floyd, 189 F.3d 808, 820 (9th Cir. 1999) (quoting Franz v. Lytle, 997 F.2d 784, 792–93 (10th Cir. 1993)). This being the case, the interests of Draco and his parents are substantially greater than the state's interest in guarding against the highly unlikely possibility of child abuse.

Although the Department's intentions are commendable, it is innocent parents, such as the Malfoys, who often face significant and unwarranted emotional consequences. The significant stigma that surrounds an allegation of child abuse, coupled with the fact that the parents had to watch or allow the highly intrusive physical examinations of their children, can leave an indelible mark on the memories of the parents. However, the greatest costs of child abuse investigations are borne by the children themselves. In wretched irony, the child bears much of the emotional consequences of temporary seizures and physical examinations that are done for his protection. The Ninth Circuit cited this concern as especially troublesome when the child possesses the cognitive abilities (as a sixteen-year-old Draco does) to understand that his privacy and dignity are being violated. Calabretta, 189 F.3d at 818.

### Conclusion

The Department's policy was unconstitutional and violated the Malfoy family's Fourth Amendment rights. For the foregoing reasons, the Court should affirm the district court's grant of summary judgment in favor of Appellees.