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CONSTITUTIONAL LAW—FOURTH AMENDMENT SEARCH AND SEIZURE—ONLINE SCHOOLS DURING A PANDEMIC: FOURTH AMENDMENT IMPLICATIONS WHEN THE STATE REQUIRES YOUR CHILD TO TURN ON THE CAMERA AND MICROPHONE INSIDE YOUR HOME

I. INTRODUCTION

Consider the following real-life scenario. A male child attending an online fifth grade class has a BB gun hanging on the wall behind him in full view of his computer's camera.[1] A teacher sees the gun in the background and takes a screenshot of the video image.[2] The image is then forwarded to the school principal, and the school safety officer later contacts local law enforcement regarding an unsecured weapon.[3] As justification, the principal draws an analogy between the child's having a weapon in a virtual class and bringing a weapon to school.[4] The school knows about the BB gun only due to the audio and video requirements of virtual instruction the school conducts during the COVID-19 pandemic.[5]

To make matters worse, local police later arrive at the child's home and conduct a consensual search of the residence in concern over the weapon observed during the online class.[6] When the child's mother asks to see the online screenshot taken by the teacher, she is advised the picture is not part of the official school record and she will not be allowed to view it.[7] In expressing both frustration and alarm that her rights were violated, the mother pleads to reporters, "[w]ho do we have viewing your children and subsequently taking these screenshots that can be sent anywhere or used for any purpose?"[8] The Baltimore County, Maryland mother poses a valid question after suffering the unintended consequences of society's reaction to the pandemic.[9]

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1. Chris Papst, *"I FELT VIOLATED" Police Search Baltimore County House Over BB Gun in Virtual Class*, FOX BALTIMORE (June 10, 2020), https://foxbaltimore.com/news/project-baltimore/police-search-baltimore-county-house-over-bb-gun-in-virtual-class.

2. *Id.*

3. Jordan Davidson, *School Calls Police On Student With BB Gun In Background of Virtual Class*, THE FEDERALIST (June 12, 2020), https://thefederalist.com/2020/06/12/school-calls-police-on-student-with-bb-gun-in-background-of-virtual-class/.

4. *Id.*

5. *See* Papst, *supra* note 1.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

Since March of 2020, the United States has responded to the global pandemic of COVID-19 in a variety of ways. The term "social distancing" has entered our daily vocabulary, wearing masks has become commonplace, and some States have issued stay-at-home orders forcing daily life to shift almost entirely online.[10] By the end of March 2020, authorities had urged at least 316 million people in at least forty-two states, the District of Columbia, and Puerto Rico to stay home.[11] Although some citizens defied the stay-at-home orders throughout 2020, "the number of Americans under instructions to stay at home . . . persisted at an astonishing level [during the] spring, accounting for a stunning 95 percent of the population."[12]

In an immediate response to health concerns in schools of all levels, in-person classes transformed overnight to online formats.[13] Schools first concentrated on providing basics such as food to students, and then shifted to the more daunting task of teaching children remotely.[14] As the Fall 2020 school semester began, many States gave school districts the discretion whether to operate in a fully online format, an in-person format, or a hybrid model.[15] "Many of the requirements and suggestions are dependent on whether [S]tates have been able to contain the spread of the coronavirus. Most [S]tates' guidelines were released at the beginning or in the middle of June, before a resurgence of COVID-19 infections was reported in many [S]tates across the country."[16]

Today, whether holding classes via Zoom, Google Meet, Blackboard, or any other platform, children attending public school in districts with an online format use laptops or similar devices to participate in virtual face-to-face meetings.[17] For instance, California state law requires students to inter-

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10. *See generally* Sarah Mervosh et al., *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Mar. 25, 2020), https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html.

11. *Id.*

12. *Id.*

13. Benjamin Herold, *The Scramble to Move America's Schools Online*, EDUC. WK. (Mar. 27, 2020), https://www.edweek.org/technology/the-scramble-to-move-americas-schools-online/2020/03.

14. *Id.*

15. Shawn Hubler & Dana Goldstein, *Los Angeles and San Diego Schools to Go Online-Only in the Fall*, N.Y. TIMES (updated July 24, 2020), https://www.nytimes.com/2020/07/13/us/lausd-san-diego-school- reopening.html.

16. Hristina Byrnes, *Reopening Schools Amid COVID-19: A Mix of In-Person Attendance, Remote Learning and Hybrid Plans*, USA TODAY (Aug. 3, 2020), https://www.usatoday.com/story/money/2020/08/03/every-states-plan-to-reopen-schools-in-the-fall/112599652/.

17. Bob Musinski, *Coronavirus and Schools: What Parents Should Know for the Fall*, U.S. NEWS & WORLD REPORT (Aug. 6, 2020), https://www.usnews.com/education/coronavirus-and-schools-guide.

act with their teachers and other students each day of distance learning.[18] School districts, such as in San Diego County, argue "maintaining face-to-face contact is critical" to keep students connected to their teachers and peers during remote instruction.[19] Schools are subject to constitutional restraints[20] and turning on the camera and audio to participate in class allows the schools (i.e., the State) to see into students' homes and hear what is going on inside them. This is undoubtedly a search under the Fourth Amendment.[21] Thus, it is important to explore the legal ramifications that arise when the State perceives something in the video, or something overheard via the audio.

This Note argues that the requirement that public-school students, who are attending school online due to the COVID-19 pandemic, keep their video and in some instances their audio on during virtual class is a search within the meaning of the Fourth Amendment and that legislators, school districts, and courts should address the constitutional implications of such searches. Part II of this Note provides a historical perspective for defining a search, describes exceptions to the warrant requirement, and highlights the foundational basis that online compulsory schooling is a search within the meaning of the Fourth Amendment.[22] Part III provides insight regarding the current pandemic while examining compulsory school formats throughout the United States.[23] Part IV then explores how States' requiring children to turn on audio and video within the home is a search within the meaning of the Fourth Amendment and identifies factors pertaining to special needs searches that courts, legislatures, and school districts should consider in addressing online classes.[24] Finally, Part V highlights these Fourth Amendment implications while outlining factors courts should use to address the information obtained in these special needs searches.[25]

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18. Sydney Johnson, *On or Off? California Schools Weigh Webcam Concerns During Distance Learning*, EDSOURCE (Aug. 26, 2020), https://edsource.org/2020/on-or-off-california-schools-weigh-webcam-concerns-during-distance-learning/.

19. *Id.*

20. *See* New Jersey v. T.L.O., 469 U.S. 325, 336 (1985) (The Supreme Court identified that public school officials are state actors subject to constitutional restraints such as due process, free speech, and the Fourth Amendment.).

21. *See infra* Part IV.

22. *See infra* Part II.

23. *See infra* Part III.

24. *See infra* Part IV.

25. *See infra* Part V.

II. FOURTH AMENDMENT BACKGROUND

The Fourth Amendment is the central constitutional provision that establishes the rules under which the State must act when performing a search or seizure.[26] It states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[27]

The Supreme Court has frequently interpreted the Fourth Amendment as having a warrant requirement; meaning warrantless searches and seizures are presumptively unreasonable, unless one or more of the established exceptions to the warrant requirement can rebut the presumption.[28] Probable cause is required for the issuance of a warrant.[29] The Supreme Court has stated that in defining probable cause, the test is "[i]f the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offence has been committed, it is sufficient."[30] Additionally, the Court has stated that probable cause is presumptively required to render a search or seizure reasonable even when a warrant is unnecessary.[31] Therefore, absent a judicially permitted exception, searches within the meaning of the Fourth Amendment must be based on probable cause.[32] When the State acquires evidence through unreasonable searches, which are counter to the Fourth Amendment, courts may exclude the admission of the evidence.[33] In order to fully analyze the issue involving online compulsory schools in the context of a search, it is first necessary to understand what a search is within the meaning of the Fourth Amendment.

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26. U.S. CONST. amend. IV.

27. *Id.*

28. *See* ERWIN CHEMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE: INVESTIGATION, 160 (3d ed. 2018).

29. U.S. CONST. amend. IV.

30. Stacey v. Emery, 97 U.S. 642, 645 (1878).

31. Chambers v. Maroney, 399 U.S. 42, 51 (1970).

32. *See* CHEMERINSKY & LEVENSON, *supra* note 28, at 160.

33. Herring v. United States, 555 U.S. 135, 139–40 (2009) (noting the Fourth Amendment does not contain a provision that precludes evidence obtained through a violation; however, the Supreme Court established an exclusionary rule that forbids the use of improperly obtained evidence at trial. The rule was "'designed to safeguard Fourth Amendment rights generally through its deterrent effect.'" (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)). The application of the exclusionary rule is beyond the scope of this Note.

A. Searches

There is a presumption that a search conducted without a warrant is unreasonable.[34] A warrantless search is reasonable only if it falls within a specific exception to the warrant requirement.[35] The Supreme Court repeatedly states, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'"[36] The Court has further stated "[o]ur cases have determined that '[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant.'"[37] Nonetheless, this presumptive warrant requirement arises only if the government's conduct constitutes a Fourth Amendment search in the first place.[38] If the government's investigative activity qualifies as neither a search nor a seizure, the Fourth Amendment places no restrictions on such activity.[39] The Supreme Court defines three ways to conduct a search within the meaning of the Fourth Amendment: (1) trespass, (2) violating an expectation of privacy, or (3) using sense-enhancing technology.[40]

The first recognized definition of a "search" centered on the concept of a trespass as identified in *Olmstead v. United States*.[41] A trespass occurs when the government physically enters (i.e., occupies) private property to obtain information.[42] This basic conceptualization governed for thirty-nine years until the Supreme Court decided *Katz v. United States* in 1967.[43] There, the Supreme Court established that a search occurs when the government takes action that violates a person's reasonable expectation of privacy.[44] Justice Harlan defined reasonable expectation of privacy using a two-part test.[45] First, a person must have demonstrated a subjective expectation of privacy, and; second, that expectation must be one that society is

34. *See* Kentucky v. King, 563 U.S. 452, 459 (2011).

35. Riley v. California, 573 U.S. 373, 382 (2014).

36. *Id.* (quoting Brigham City v. Stuart, 547 U.S. 398, 403; *see generally* Kansas v. Glover, 140 S. Ct. 1183 (2020); Michigan v. Fisher, 558 U.S. 45 (2009); Florida v. Jimeno, 500 U.S. 248 (1991); United States v. Knights, 534 U.S. 112 (2001).

37. *Riley*, 573 U.S. at 382 (quoting Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 653 (1995)).

38. *See* Katz v. United States, 389 U.S. 347, 357 (1967) (The Fourth Amendment imposes a presumptive warrant requirement for searches and seizures.).

39. *See* U.S. CONST. amend. IV.

40. *See generally* Olmstead v. United States, 277 U.S. 438 (1928) (trespass doctrine); United States v. Jones, 565 U.S. 400 (2012) (reasonable expectation of privacy); Kyllo v. United States, 533 U.S. 27 (2001) (sense-enhancing technology); *Katz*, 389 U.S. 347.

41. 277 U.S. 438 (1928).

42. *Id.* at 466.

43. *Katz*, 389 U.S. 347.

44. *Id.* at 361 (Harlan, J., concurring).

45. *Id.*

willing to deem reasonable.[46] Though *Katz* indicated that a trespass "is neither necessary nor sufficient for the existence of a search,"[47] in 2012 the Supreme Court in *United States v. Jones*[48] resuscitated the physical intrusion (trespass) approach to defining Fourth Amendment searches as an alternative to *Katz*'s privacy rubric.

In *Jones*, law enforcement personnel attached a global positioning system (GPS) electronic tracking device to the undercarriage of a Jeep Grand Cherokee in a public parking lot.[49] Government agents then used the GPS device to track the vehicle's movements over a twenty-eight-day period.[50] Justice Scalia, writing for the majority, stated that the agents' physical occupation of private property for the purpose of gaining information was a search within the meaning of the Fourth Amendment when it was adopted.[51] Under *Jones*, not all trespasses to gather information constitute a search; rather, only a "physical intrusion of a constitutionally protected area" qualifies as such.[52] Justice Sotomayor noted in her concurring opinion that the majority had made it clear the *Katz* reasonable expectation of privacy test augmented what is considered a search, "but did not displace or diminish" the trespass test.[53] Therefore, both the trespass test and the reasonable expectation of privacy test apply in identifying whether government action resulted in a search.[54]

In 2001, the Supreme Court extended the definition of a search.[55] In *Kyllo v. United States*, law enforcement personnel suspected Danny Kyllo of growing marijuana inside his home.[56] Agents employed a thermal scanning device to peer into the home searching for heat signatures, resulting in positive excessive indicators of heat within the roof over the garage.[57] Combined with utility bills and informant tips, the thermal imaging was used to obtain a search warrant, resulting in the seizure of over 100 marijuana plants and Kyllo's arrest.[58] The Court concluded that a search occurs when the gov-

46. *Id.* (Justice Harlan's concurring opinion is widely recognized as the development of the reasonable expectation of privacy test).

47. *See* CHEMERINSKY & LEVENSON, *supra* note 28, at 38.

48. 565 U.S. 400, 409 (2012).

49. *Id.* at 403.

50. *Id.*

51. *Id.* at 411.

52. *Id.* at 407.

53. *Id.* at 414 (Sotomayor, J. concurring). Justice Sotomayor recommended closer attention be paid to cases involving "short-term monitoring" because the technology creates precise records that reflect details about a person's "familial, political, professional, religious, and sexual associations" that can be stored and analyzed for years into the future. *Id.* at 415.

54. *See Jones,* 565 U.S. at 414.

55. Kyllo v. United States, 533 U.S. 27, 34–35 (2001).

56. *Id.* at 29.

57. *Id.* at 30.

58. *Id.*

ernment uses "sense-enhancing technology" that is "not in general public use" to explore details of the home that would previously have been unknowable without physical intrusion.[59] Such technology-aided surveillance is a search and is presumptively unreasonable without a warrant.[60] The Supreme Court recognized that a search of the interior of the home, whether in person or through the use of technology, invades a person's reasonable expectation of privacy protected by the Fourth Amendment.[61]

With these search doctrines in mind, the Supreme Court has conversely recognized that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[62] In *Smith v. Maryland,* the Supreme Court held that the Government's use of a pen register to record the numbers people dial on their phones does not intrude upon a reasonable expectation of privacy because that information is voluntarily provided to the phone company.[63] Additionally, in *United States v. Miller,* the Supreme Court held that a bank account holder does not have a reasonable expectation of privacy in the bank's records regarding the holder's account activity.[64] This is true even when the individual revealed information based on the assumption that it would be used only for a limited purpose and that the third party would not betray the holder's confidence.[65] *Smith* and *Miller* helped to establish what has become known as the third party doctrine.[66] Under that doctrine, a person voluntarily providing information to a third party allows the government to obtain that information from the third party without a warrant.[67] This is because when the third party doctrine applies, the conduct in question is not a search within the meaning of the Fourth Amendment as the information is provided by the owner.[68] Therefore, there is no reasonable expectation of privacy when one voluntarily conveys information to a third party.[69]

This third party doctrine has exceptions depending on the type and quantity of information in question.[70] In 2018, the Supreme Court refused to extend *Smith* and *Miller* in deciding *Carpenter v. United States*.[71] In *Carpenter*, law enforcement identified cellular telephone numbers for several

59. *Id.* at 34–35.
60. *See id.* at 37.
61. *See Kyllo*, 533 U.S. at 35.
62. Katz v. United States, 389 U.S. 347, 351 (1967).
63. *See* Smith v. Maryland, 442 U.S. 735, 743–44 (1979).
64. *See* United States v. Miller, 425 U.S. 435, 443 (1976).
65. *Id.*
66. *See* Carpenter v. United States, 138 S. Ct. 2206, 2216–17 (2018).
67. *See Smith*, 442 U.S. at 743–44.
68. *Id.*
69. *Id.*
70. *See generally Carpenter*, 138 S. Ct. 2206 (2018).
71. *Id.* at 2216–17.

robbery suspects and issued court orders to telephone service providers to obtain records for those phones under the Stored Communications Act.[72] From these records over 12,800 location points cataloged Carpenter's exact location over a 127-day period and pinpointed his telephone to the time and location of several robberies.[73] The trial court convicted Carpenter of several counts of robbery and carrying a firearm, sentencing him to over 100 years of incarceration.[74] Carpenter argued the warrantless seizure of records violated his Fourth Amendment rights and the Government claimed the third party doctrine applied.[75] Chief Justice Roberts, in reversing the trial and appellate courts, concluded that due to the unique nature of cellular telephone location records, having those records maintained by a third party does not by itself overcome the cellular telephone user's reasonable expectation of privacy.[76] Therefore, a person does not surrender his or her Fourth Amendment protections simply by "venturing into the public sphere."[77] With these concepts of a search defined, it is important to direct attention to the role of warrants and the exceptions to the warrant requirement.

B. Warrants

The Warrant Clause of the Fourth Amendment states, "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[78] For a search to be valid, a warrant must be approved and signed by a neutral judge limiting the scope of the search and seizure.[79] Although the Court has repeatedly stated that warrantless searches are presumptively unreasonable,[80] a debate continues over whether this presumption is desirable.[81] This debate hinges on answering two questions for any Fourth Amendment case: (1) whether the search was executed pursuant to the War-

72. *See id.* at 2212 (The statute permits the Government to compel the disclosure of telecommunication records to law enforcement when articulable facts are provided showing reasonable grounds to believe the records are sought for an ongoing criminal investigation. 18 U.S.C.S. § 2703(d).).

73. *Carpenter*, 138 S. Ct. at 2212–13.

74. *Id.* at 2213.

75. *Id.* at 2212–13.

76. *Id.* at 2217–18 (noting seventy-five percent of smartphone users reported being within five feet of their phones most of the time and the retrospective quality of information that cell-site location information provides law enforcement. *Id.* at 2218. With CSLI, the Government can retrace a person's location for as long as the service provider maintains records (up to five years). *Id.*).

77. *See id.* at 2217.

78. U.S. CONST. amend. IV.

79. CHEMERINSKY & LEVENSON, *supra* note 28, at 130.

80. *Id.* at 131.

81. *Id.* at 130–31.

rant Clause of the Fourth Amendment, or (2) in the absence of a warrant, whether the search was conducted in a reasonable manner.[82] The reasonableness analysis includes identifying one or more of the judicially permitted exceptions to the warrant requirement.[83]

C. Exceptions to the Warrant Requirement

Searches within the meaning of the Fourth Amendment are only valid if they are based on probable cause, absent a judicially permitted exception.[84] This Section explores the applicable permitted exceptions such as consent, special needs, and exigent circumstances.

1. Consent

The presumption that a warrantless search is unreasonable can be rebutted by the Government demonstrating the applicability of one or more exceptions to the Warrant Clause.[85] One of the exceptions to both the warrant requirement and probable cause requirement is voluntary consent to the government action.[86] However, under the Fourth and Fourteenth Amendments, consent cannot "be coerced, by explicit or implicit means, by implied threat or covert force."[87] This is because "no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the

82. *See* United States v. Leon, 468 U.S. 897, 961 (1984) (Stevens, J., concurring); *see also* California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring). Justice Scalia stated that "[a]lthough the Fourth Amendment does not explicitly impose the requirement of a warrant, it is . . . textually possible to consider that implicit within the requirement of reasonableness." *Acevedo*, 500 U.S. at 582. Scalia further pointed out that the Court's rhetorical commitment to the warrant-preference theory is contradicted by the numerous exceptions to the warrant requirement that arguably swallow the ostensible rule. *Id.* (citing Craig Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473–74 (1985)).

83. The author notes that online schooling includes recording of conversations between teachers and students, and potentially additional background conversations occurring within the home. Such recordings may fall under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, codified *inter alia*, at 18 U.S.C. § 2510, which prohibits the unauthorized, nonconsensual interception of "wire, oral or electronic communications" by government agencies as well as private parties. Without consent, the government would need a court-ordered Title III authorization (i.e., a super warrant). *See* 18 U.S.C. §§ 2510–22 (2011). However, most states have adopted the one-party consent rule where a person can record a conversation if he or she is a party to the conversation. *See* Erin M. Pauley, *Conflicts Among Federal and State Wiretap Statutes Present Practical Challenges for Business*, THE NAT'L L. REV., Vol. VIII, No. 269 (Sept. 26, 2018), https://www.natlawreview.com/article/conflicts-among-federal-and-state-wiretap-statutes-present-practical-challenges.

84. *See* CHEMERINSKY & LEVENSON, *supra* note 28, at 160.

85. *Id.* at 160–61.

86. *Id*. at 247.

87. Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973).

unjustified police intrusion against which the Fourth Amendment is directed."[88] Voluntariness is a question of fact to be determined from the circumstances, and although "the subject's knowledge of a right to refuse [should] be taken into account," the prosecution need not prove that knowledge as a requirement to establishing voluntary consent.[89] Aside from the subject's voluntary consent, other parties have the authority to grant consent depending on the circumstances.[90]

For example, a person who is not the subject of a search may grant consent to the search.[91] This so-called third party consent can be valid even when the subject lacks the actual authority to consent to the search.[92] In the seminal case of *Illinois v. Rodriguez*, a woman contacted police and alleged assault charges against Rodriguez whom she stated was at an apartment in Chicago, Illinois.[93] The woman stated she resided with Rodriguez for several months, she referred to the residence as "our apartment," and gave access to the apartment with her key.[94] Upon entry, and without a warrant, police located drugs and arrested Rodriguez.[95] Rodriguez moved to suppress the evidence claiming the woman had vacated the apartment several weeks before his arrest and did not have authority to consent to the entry of the apartment.[96] The Supreme Court held a warrantless entry and subsequent search are valid under the Fourth Amendment when law enforcement reasonably believes that the person giving consent has the authority to do so, even though it is later determined the authority did not exist.[97] Police may rely upon the apparent common authority of the subject providing consent when the totality of the circumstances makes the reliance reasonable.[98] This reasoning applies to both adults and minors regarding consent.[99]

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88. *Id.*
89. *Id.* at 248–49.
90. State v. Orta, 2018 WI App 39 ¶ 10, 382 Wis. 2d 830, 917 N.W. 2d 233 (per curiam).
91. *Id.*
92. *Id.*
93. 497 U.S. 177, 179–80 (1990).
94. *Id.*
95. *Id.* at 180.
96. *Id.*
97. *Id.* at 188–89.
98. *Id.* at 188 (The Supreme Court identified apparent authority as consent by one appearing to have authority to grant consent, such that a reasonable person would not doubt its truth and would act upon the consent without making a further inquiry.); *see* United States v. Matlock, 415 U.S. 164, 171 n.7 (1974) (The Court defined actual common authority to consent in footnote 7 as dependent upon "mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.").
99. *See generally Rodriguez*, 497 U.S. 177.

Usually, a minor will not have the same authority as a parent or guardian to consent to a search of his or her home, but in some circumstances a child may in fact have such an authority.[100] Identifying whether the child has authority depends on several factors that courts must review in the totality of the circumstances.[101] The main factors considered are the age of the child, his or her intelligence, his or her maturity, and the scope of the search to which the child consents.[102] Identifying the scope of the consent is "important because there are parts of a family's home where the parents have an increased privacy interest, and where the child could not reasonably give consent to a search."[103] Although not an exhaustive list, intuitively these areas can include the parents' bedroom, their closet, a private office, or information obtained on computers and other electronic devices.[104]

2. Special Needs

Similar to obtaining consent, the government also does not need a warrant in special needs cases.[105] These special needs searches often involve searches for reasons other than criminal law enforcement purposes.[106] In fact, the Supreme Court abandons any pretense that warrants or probable cause are presumptively required for special needs searches.[107] Rather, when the primary purpose of the search is something other than the general interest in crime control, the Court uses a completely unfettered balancing process to determine the reasonableness of the search.[108] For in-person instruction, the Supreme Court has said that school officials can search a student based on reasonable suspicion.[109] Reasonable suspicion is less rigorous than the probable cause standard often required for searches outside of a school

100. *See* State v. Orta, 2018 WI App. 39 ¶ 10, 382 Wis. 2d 830, 917 N.W. 2d 233.
101. *Id.*
102. *Id.*
103. *Id.*
104. *See* Georgia v. Randolph, 547 U.S. 103, 112 (2006). The Court identified there are locations to the search of which a child cannot provide consent:

> [A] child of eight might well be considered to have the power to consent to the police [sic] crossing the threshold into that part of the house where any caller . . . might well be admitted, but no one would reasonably expect such a child to be in a position to authorize anyone to rummage through his parents' bedroom.

Id. (internal quotations omitted).
105. CHEMERINSKY & LEVENSON, *supra* note 28, at 265–66.
106. *Id.*
107. *See* Skinner v. Ry. Lab. Execs'. Ass'n, 489 U.S. 602, 619 (1989); *see* Ashcroft v. al-Kidd, 563 U.S. 731, 736 (2011); *see generally* Griffin v. Wis., 483 U.S. 868 (1987); United States v. Knights, 534 U.S. 112 (2001).
108. *Skinner*, 489 U.S. at 619; *Aschcroft,* 563 U.S. at 736.
109. *See* New Jersey v. T.L.O., 469 U.S. 325, 341 (1985).

setting.[110] In *New Jersey v. T.L.O.*, the Supreme Court said this special needs search was valid under the Fourth Amendment because there were "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."[111] Justice White formed this conclusion by balancing the diminished expectation of privacy of students in schools against the need for schools to maintain order and discipline.[112]

The Supreme Court has held that Fourth Amendment protections apply to government action and not just to that of law enforcement.[113] This decision is based on the premise that an "individual's interest in privacy and personal security 'suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards.'"[114] It would be out of the ordinary "to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."[115]

Three cases provide additional foundational concepts regarding special needs searches.[116] First, in *National Treasury Employees v. Von Raab*, the Supreme Court held that requiring U.S. Customs Service employees to submit urinalysis tests when seeking a transfer or a promotion to certain positions was reasonable.[117] The Customs policy precluded the Government from providing evidence of drug use to law enforcement authorities, which added to the Court's calculus of reasonableness.[118] A Customs employee who tests positive for drugs and fails to provide an acceptable explanation is subject to removal from the agency; however, the results of the test could not be turned over to any other agency, including criminal prosecutors, without consent from the employee.[119] The Supreme Court opined that the Government's need to conduct a suspicionless search required by the drug testing program outweighed the privacy interests of employees engaged in drug interdiction and those required to carry firearms.[120]

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110. *Id.* at 340–41.
111. *See id.* at 342.
112. *Id.*
113. *Id.* at 335.
114. *Id.* (quoting Marshall v. Barlow's, Inc., 436 U.S. 307, 312–13 (1978)).
115. *T.L.O.*, 469 U.S. at 335 (quoting Camara v. Mun. Ct., 387 U.S. 523, 530 (1967)).
116. The author notes that aside from the following special needs cases, the Court has considered numerous others.
117. Nat'l Treasury Emps. v. Von Raab, 489 U.S. 656, 679 (1989) (establishing that positions involving drug interdiction, carrying firearms, or handling classified material required drug testing).
118. *Id.*
119. *Id.* at 663.
120. *Id.* at 668.

Second, in *Board of Education v. Earls*, the Supreme Court held that the school district's Student Activities Drug Testing Policy requiring drug testing of students who participate in competitive extracurricular activities was constitutional.[121] Under the policy, students are required to submit to random drug testing before participating in an extracurricular activity and must agree to additional testing upon reasonable suspicion.[122] Justice Thomas noted that although students do not forfeit their constitutional rights when attending school, Fourth Amendment rights are different in public schools because the question of reasonableness "cannot disregard the schools' custodial and tutelary responsibility for children."[123] The Supreme Court found this special needs search reasonable because of the minimally intrusive nature of the sample collected and the fact that the test results were not turned over to any law enforcement, nor did they result in academic consequences.[124] Therefore, under *Von Raab* and *Earls*, the Court views a policy's refusal of turning over information to law enforcement in two ways: (1) to establish government action as a special needs search, and (2) as a significant factor when determining the reasonableness of the search.[125]

Finally, in *Naperville Smart Meter Awareness v. City of Naperville*,[126] a Seventh Circuit decision made just months after *Carpenter*,[127] the Seventh Circuit Court of Appeals held the use of smart meters constituted a Fourth Amendment search. In *Naperville*, the city-owned public utility company collected residents' energy usage data in fifteen-minute intervals and stored the information for up to three years.[128] The residents of Naperville possessed one utility company option if they desired the use of electricity.[129] The Court held the smart meter conduct was a search, a determination based on the holding in *Kyllo*, where sense-enhancing technology not in general public use was used to collect information regarding the interior of the home as each appliance has a distinct energy-consumption pattern.[130] In its analysis, the Court ruled the third party doctrine did not apply, and even if the utility company were a third party, the holding in *Carpenter* would preclude

121. *See* 536 U.S. 822, 837 (2002).
122. *Id.* at 826.
123. *Id.* at 829–30 (quoting Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 656 (1995)).
124. *Id.* at 833–34.
125. *See Von Raab*, 489 U.S. 656; *Earls*, 536 U.S. 822.
126. 900 F.3d 521 (7th Cir. 2018).
127. *See* Carpenter v. United States, 138 S. Ct. 2206, 2222–24 (2018) (considering CSLI provided detailed information regarding a person's location, and therefore holding that the third party doctrine did not apply).
128. *Naperville*, 900 F.3d at 523.
129. *Id.* at 524.
130. *Id.* at 525; *see* Kyllo v. United States, 533 U.S. 27, 31–32 (2001).

it based on the detail of information collected and stored.[131] Additionally, the Court held the search was reasonable because the special needs search was conducted by employees of the city's utility company without any prosecutorial intent.[132] The Court did note that this conclusion might change if the data were accessible to other city officials or law enforcement, highlighting this as a determinable factor in its analysis.[133] Therefore, the use of smart meters justified the government's interest in reducing costs, providing cheaper power to customers, and increased grid stability while not giving the information to law enforcement without a warrant.[134]

3. Exigent Circumstances

One final exception worth mentioning is the exigent circumstance exception, which is rooted in the premise that there is an emergency, the government must act now or never, and it is unrealistic to obtain a warrant under the circumstances.[135] In an emergency the police can conduct a warrantless search if there is probable cause.[136] These circumstances are rare, but the Supreme Court has found they arise in hot pursuit of a felon, when protecting safety, and when preventing destruction of evidence.[137] Most applicable to online schooling is the exigent circumstances of protecting safety, where the State may enter a home without a warrant when they have an objectively reasonable basis for believing a person is seriously injured or imminently threatened with such serious injury.[138] Thus, the exigency relates to the imminence of the action or threat.[139]

In sum, identifying the State's conduct as a search within the meaning of the Fourth Amendment requires an analysis of the three judicially identified definitions with the present facts.[140] Moreover, application of one or more judicially permissible exceptions to the warrant requirement shifts the presumption of unreasonableness of warrantless searches to that of reasonable.[141] Apart from valid consent or an exigent circumstance, school searches fall within the category of special needs searches where a determinable fac-

131. *See Naperville*, 900 F.3d at 527; *Carpenter*, 138 S. Ct. at 2220.
132. *See Naperville*, 900 F.3d at 528.
133. *Id.* at 529.
134. *Id.*
135. CHEMERINSKY & LEVENSON, *supra* note 28, at 166.
136. *Id.* at 161.
137. *Id.*
138. *See* Brigham City v. Stuart, 547 U.S. 398, 403 (2006).
139. *See id.*
140. *See generally* United States v. Jones, 565 U.S. 400 (2012); Katz v. United States, 389 U.S. 347 (1967); Kyllo v. United States, 533 U.S. 27 (2001).
141. *See* CHEMERINSKY & LEVENSON, *supra* note 28, at 160–61.

tor of reasonableness hinges on law enforcement's access to information obtained during the search.

III. ONLINE COMPULSORY SCHOOLS AND COVID-19

To fully understand why online compulsory schools' requiring live video and audio features is a search within the Fourth Amendment, it is first necessary to explain additional concepts. This section examines compulsory education in the United States, how educators as mandatory reporters possess a duty to notify authorities in various situations, and how States and school districts have responded to the COVID-19 pandemic in terms of continuing public education.

A. Compulsory Education

States have the authority to enact compulsory education laws making it mandatory for children to attend school.[142] In *Brown v. Board of Education*, the Supreme Court eloquently identified education as one of the most important functions of government.[143] The Supreme Court concluded that both compulsory school laws and expenditures for education demonstrate the significance of education to society.[144] Education is necessary for the performance of basic public responsibilities and is the foundational platform of citizenship.[145] It opens a child's mind to cultural values, prepares him or her for later professional training, and allows him or her to adjust normally to the environment.[146] Education is essential to the success of the nation as our youth are responsible for the future.[147]

Currently, every State has compulsory school attendance laws; however, the minimum and maximum ages of required attendance vary from State to State.[148] With a few exceptions, most States require children between the ages of six and sixteen to attend school.[149] Parents or guardians bear the risk

142. *See* U.S. CONST. amend. X.
143. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).
144. *Id.*
145. *Id.*
146. *Id.*
147. Chelsea Lauren Chicosky, Article, *Restructuring the Modern Education System in the United States: A Look at the Value of Compulsory Education Laws*, 15 BYU EDUC. & L.J. 1, 11 (2015).
148. NAT'L CTR. FOR EDUC. STAT., STATE EDUC. PRACS. (SEP), *Table 5.1. Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, by State: 2017*, https://nces.ed.gov/programs/statereform/tab5_1.asp (quoting EDUC. COMM'N OF THE STATES, *Age Requirements for Free and Compulsory Education*, retrieved Jan. 8, 2018 from https://www.ecs.org/age-requirements-for-free-and-compulsory-education/).
149. *Id.*

of judicial penalties when their school-age children fail to attend compulsory school.[150] Although dependent upon the individual state law, parents or guardians may face a misdemeanor charge for their child not attending school on a regular basis.[151] Most States use a monetary fine system for initial offenses; however, some States may impose a jail sentence for parents who fail to ensure their children regularly attend school pursuant to the compulsory school laws.[152]

B. Mandated Reporters

The Federal Child Abuse Prevention and Treatment Act (CAPTA) requires each State to enact requirements for certain persons to report known or suspected occurrences of child abuse and neglect.[153] All States have these statutes; however, forty-seven States, as well as the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands also designate specific professions that are required by law to report child abuse.[154] Indiana, New Jersey, and Wyoming do not specifically identify professions that must report but instead require all persons to report suspected abuse.[155] A common standard specified in the statutes is the requirement to report "situations in which the reporter has knowledge of, or observes a child being subjected to, conditions that would reasonably result in harm to the child."[156]

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150. *See* Sampson Quain, *What Happens When a Kid Doesn't Go to School Under the Age of 18?*, CLASSROOM, https://classroom.synonym.com/happens-kid-doesnt-school-under-age-18-10066717.html (last visited Sept. 12, 2021).

151. *Id.*

152. *Id.*

153. 42 U.S.C. § 5106a(b)(2)(B)(i).

154. CHILD WELFARE INFO. GATEWAY, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 2 (2019), https://www.childwelfare.gov/pubPDFs/manda.pdf.

155. *Id.*

156. *Id.* at 3. For example, under Arkansas state statute "[a]n individual listed as a mandated reporter shall immediately notify the Child Abuse Hotline if he or she has reasonable cause to suspect that a child has [b]een subjected to maltreatment; [d]ied because of the maltreatment; . . . or [o]bserves a child being subjected to conditions or circumstances that would reasonably result in child maltreatment." ARK. CODE ANN. § 12-18-402(a) (2009). Such mandatory reporters are "immune from civil and criminal liability" if they report the information in good faith. *Id.* § 12-18-402(d). The statute states a school "shall not require an employee or volunteer to obtain permission from or notify any person, [to include] a supervisor, before reporting child maltreatment." *Id.* § 12-18-402(c)(3).

C. Current Pandemic School Situation Due to COVID-19

1. Attendance Models

As the 2020-2021 school year began, the United States used three attendance models.[157] There were full-time, in-person classes; full-time online or remote learning classes; and a hybrid model, where part of the week was attended in-person and the remainder online.[158] According to nationwide statistics, every state instituted plans for reopening schools and made recommendations to districts based on both health and academic concerns.[159] Four States, Iowa, Arkansas, Texas, and Florida, ordered in-person instruction available part-time or full-time.[160] For example, Arkansas issued guidance on August 5, 2020, that required districts to offer in-person instruction five days a week.[161] In Arkansas, the decision to close a school and transition to an online format occurred in collaboration with the Arkansas Department of Health and Arkansas Department of Education.[162] Five States (Oregon, California, Hawaii, New Mexico, and West Virginia) began with state-ordered regional closures resulting in online schooling.[163] The remaining thirty-nine States have varied in-person attendance or online formats dictated by the school or district depending on local health authorities.[164]

Many school districts decided to start the 2020-2021 school year all online or used a hybrid model format.[165] In California, two of the State's

157. *See Where Schools are Reopening in the US*, CNN (updated Mar. 1, 2021), https://www.cnn.com/interactive/2020/health/coronavirus-schools-reopening/#topic-menu.

158. *See id.*

159. *See* Megan Ferren, *Remote Learning and School Reopenings: What Worked and What Didn't*, CENTER FOR AMERICAN PROGRESS, https://www.americanprogress.org/issues/education-k-12/reports/2021/07/06/501221/remote-learning-school-reopenings-worked-didnt/ (last visited Sept. 23, 2021).

160. *See id.*

161. *See* Todd Gill, *State Says All Schools in Arkansas Must Offer In-Person Interaction Five Days a Week*, FAYETTEVILLE FLYER, https://www.fayettevilleflyer.com/2020/08/05/state-says-all-schools-in-arkansas-must-offer-in-person-interaction-five-days-a-week/ (Aug. 5, 2020).

162. *See id.*

163. *See* Ferran, *supra* note 159.

164. *See id.*

165. The author points out that the current pandemic is evolving. Where schools moved to full-time remote or hybrid formats, the goal was to return children to the classroom. In his first full day of office, President Joseph Biden announced, "The United States is committed to ensuring that students and educators are able to resume safe, in-person learning as quickly as possible, with the goal of getting a majority of K-8 schools safely open in 100 days." Lauren Camera, *Biden Details Plan for Reopening Schools*, U.S. NEWS & WORLD REPORT (Jan. 21, 2021), https://www.usnews.com/news/education-news/articles/2021-01-21/biden-details-plan-for-reopening-schools. Through executive order, President Biden will direct the De-

largest public schools decided in July to begin in a purely online format.[166] The Los Angeles and San Diego school districts, which enroll over 820,000 students combined, were the largest districts in the country to move to a strict remote learning format when they reopened in August 2020.[167] The largest school district in the nation in New York, New York, announced in July 2020 that it would provide several days per week of in-person learning with the remainder of the week conducted online.[168] However, in November 2020, New York schools went to an all-remote format due to the increase in positive COVID-19 cases.[169] Other large school districts, like Seattle, Washington, joined the hybrid model approach.[170] And by the end of August, 2020, 180 districts across the State of New Jersey had demonstrated their desire to open the 2020-21 school year with all remote learning.[171]

2. Federal Laws

As stated, each State and school district can have its own online classroom format.[172] Though there are currently no laws specifically addressing how schools must administer remote instruction, there are nonetheless a variety of federal laws that generally govern online learning.[173] The Children's Online Privacy Protection Act (COPPA) applies to commercial companies and limits their ability to collect personal information from children under the age of thirteen.[174] Therefore, students signing on to a remote learning platform are protected from having their personal information collected and disseminated by commercial entities.[175] There is also the Child Internet Protection Act (CIPA) that essentially requires technology measures and policies be put in place to protect students from harmful materials, including obscene and pornographic content.[176] These requirements must be met if a

partment of Education and Department of Health and Humans Services to provide guidance regarding in-person learning and to operate in a way that allows schools to stay open. *Id.*

166. Hubler & Goldstein, *supra* note 15.

167. *Id.*

168. *Id.*

169. *COVID In NYC: Schools Switching To All-Remote Learning Starting Thursday*, CBS NEW YORK (Nov. 18, 2020), https://newyork.cbslocal.com/2020/11/18/nyc-schools-going-all-remote.

170. Hubler & Goldstein, *supra* note 15.

171. Brianna Kudisch & Nestor F. Sebastian, *N.J. Schools Reopening: These Districts are Planning Virtual Classes in September*, NJ ADVANCE MEDIA FOR NJ (updated Aug. 29, 2020), https://www.nj.com/education/2020/08/nj-schools-reopening-these-districts-are-planning-virtual-classes-in-september-aug-29-2020-updates.html.

172. *See* CNN, *supra* note 157.

173. 15 U.S.C. §§ 6501–05.

174. *Id.*

175. *Id.*

176. 47 U.S.C. § 254.

school requests discounts for internet access or internal connections through the E-rate program.[177] Under CIPA, schools and libraries must be certified to ensure internet safety policies are implemented and they must provide education for children about appropriate online behavior.[178] Additionally, the Family Educational Rights and Privacy Act (FERPA) protects the privacy of students' educational records.[179] The law applies to all schools receiving funding under the U.S. Department of Education programs and prevents the distribution of students' private education records without appropriate authorization or consent.[180]

3. Consent Forms

Currently, school consent forms address these federal laws as they apply to the schools, informing parents, guardians, and students of the requirements and requesting adherence to these policies and laws.[181] The consent forms vary from standard versions broadly explaining consent for students to participate in online or distance learning, to forms outlining the above-mentioned federal laws, and even to clickwrap consent forms, or browse-wrap forms.[182] With only a few exceptions, a majority of schools have not specifically addressed what is viewed or heard during online classes.[183] A majority of consent forms provide parents or guardians the opportunity to acknowledge acceptable uses of student technology, consent to students' use of social media, permit the district to use the student's photo or video, and consent to the release of student directory information.[184] An ex-

177. *Id.* § 254(h)(5)(A)(i).
178. *Id.* § 254(h)(6)(A)–(B).
179. 20 U.S.C. § 1232g.
180. *Id.*
181. *See, e.g.,* 15 U.S.C. §§ 6501–05.
182. According to Thomson Reuters Practical Law Glossary (2020), a clickwrap agreement is a legal agreement used for software programs or online services, for which a user indicates acceptance by selecting a particular icon or link before receiving access. *Clickwrap Agreement*, THOMSON REUTERS PRAC. L. GLOSSARY. In contrast, a browse wrap agreement "aims to bind the user by virtue of the user browsing the website." *Browsewrap Agreement*, THOMSON REUTERS PRAC. L. GLOSSARY. "Unlike a clickwrap agreement, browse-wrap agreements do not require a user [to] take action to affirm consent to be bound." *Id.*
183. The author has not conducted an exhaustive search of all consent forms used within the United States and its territories.
184. *See generally Public Schools of Edison Township Consent Form Packet*, PUB. SCHS. OF EDISON TWP., https://www.edison.k12.nj.us/; *Distance Learning Parent Permission Form*, PLAIN LOCAL SCHS., https://www.plainlocal.org/docs/8-Dist_Learn_Parent_Permission_Form.pdf; *Online Parental Consent Form*, SIXTWELVE, http://www.sixtwelve.org/online-learning-parental-consent-form; *Newhall School District Distance Learning Policy*, NEWHALL SCH. DIST., https://www.newhallschooldistrict.com/; *Distance Learning Student Course Contract*, LAS CRUCES PUB. SCHS., http://www.lcps.net/returnplan/.

ample of a California school district that *does* address the issue uses the following language:

> During synchronous (students and teachers are online at the same time and interacting in real time) distance learning through live streaming, videoconferencing, or other interactive methodologies during which students and teachers are engaged in live electronic communication, parents/guardians and students do not have a reasonable expectation of privacy in information and images that can be perceived through audio and/or video during the use of such programs. Parents/guardians are advised to take any necessary precautions to ensure their privacy and the privacy of their children during these live distance learning events.[185]

So, where most districts do not address privacy concerns,[186] the ones that do explicitly state there is no reasonable expectation of privacy, and caution parents to take necessary steps to avoid having private matters seen or heard.

IV. ARGUMENT

The COVID-19 pandemic took a toll on the United States during 2020 and into 2021.[187] From January 21, 2020, to September 12, 2021, the United States identified 40,870,648 cases of COVID-19, with 656,318 deaths.[188] There is no clear end in sight for this pandemic, and yet life must go on. Education is an essential part of our democracy,[189] and alternative formats to traditional in-person schooling result in educating our youth while maintaining the health and safety of our citizens. School is compulsory and many classes are in online or hybrid formats to limit in-person contact.[190] When these compulsory public schools require students to turn on video cameras and microphones to attend classes from home, the State obtains information about the intimate details and conversations occurring within the home.[191] The question is whether this action constitutes a search. If so, and the State

185. *HESD Distance Learning Parent Consent*, HEBER ELEMENTARY SCH. DIST., HEBER, CALIFORNIA (2021), https://core-docs.s3.amazonaws.com/documents/asset/uploaded_file/672333/HESD_Distance_Learning_Parent_Consent.pdf.

186. *See generally* PUB. SCHS. OF EDISON TWP., *supra* note 184; PLAIN LOC. SCH., *supra* note 184; SIXTWELVE, *supra* note 184; NEWHALL SCH. DIST., *supra* note 184; LAS CRUCES PUB. SCHS., *supra* note 184.

187. At the time this Note was published (Fall 2021), the COVID-19 pandemic was ongoing with a new Delta variant surging throughout the United States.

188. CENTERS FOR DISEASE CONTROL AND PREVENTION, *United States COVID-19 Cases, Deaths, and Laboratory Testing (NAATS) by State, Territory, and Jurisdiction*, (last visited Sept. 12, 2021) https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days.

189. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

190. CNN, *supra* note 157.

191. *See supra* Part III.

has not acquired a warrant, are there exceptions to the warrant requirement that can rebut this presumptively unreasonable search?[192] Additionally, in assessing if the Government's interest outweighs the privacy intrusion, what procedural limitations, if any, are necessary for States and school districts to show such searches are reasonable? The following sections answer these questions and identify factors States and courts should consider in examining information derived from compulsory online education.

A. Online Compulsory Schooling Is a Search

When the State requires students to turn on their video cameras and microphones during online classes, information becomes instantly available to school faculty and other students.[193] Because each State and school district can employ different rules and formats, defining a search will happen on a case-by-case basis.[194] At a minimum, the State's action is not a physical trespass under *Olmstead* and *Jones,*[195] as the State is not occupying private property to obtain information. Even under the *Kyllo* definition, online schools would not pass as a search.[196] This is because live audio and video footage is not sense-enhancing technology such as the thermal imaging used in *Kyllo*.[197] Additionally, the technology (laptops, iPads, tablets, etc.) used is not only available for general use, it is actually in general use by every student attending the classes.[198] However, the *Katz* reasonable expectation of privacy test does prove helpful in classifying the state action as a search.[199] There is an expectation of privacy in the interior of the home, one that society holds as reasonable.[200] The décor of one's house, their personal effects, any religious symbols (or lack thereof), books, movies, medicines, level of cleanliness, and actions of persons inside the home are all details a reasonable person would not share with the world.[201] That information is typically shared with relatives or close friends; however, it is often only shared upon

192. CHEMERINSKY & LEVENSON, *supra* note 28, at 160–61.

193. *See Getting Started with Zoom*, ZOOM HELP CENTER, https://support.zoom.us/hc/en-us/articles/206175806-Frequently-asked-questions.

194. *See* CNN, *supra* note 157.

195. *See* Olmstead v. United States, 277 U.S. 438, 466 (1928); United States v. Jones, 565 U.S. 400 (2012); *supra* Part II.A.

196. *See* Kyllo v. United States, 533 U.S. 27 (2001); *see supra* Part II.A.

197. *See* Kyllo, 533 U.S. at 29.

198. *Id.* at 34. Justice Scalia wrote, "at least where (as here) the technology in question is not in general public use." *Id.* Later, in footnote 6 of the majority opinion, Justice Scalia stated merely that whether technology is in general public use "may be a factor." *Id.* at 39 n.6.

199. *See* Katz v. United States, 389 U.S. 347 (1967); *supra* Part II.A.

200. *See Katz*, 389 U.S. 347; *supra* Part II.A.

201. *See, e.g.,* Segura v. United States, 468 U.S. 796, 810 (1984).

invitation and consent of the homeowner. Presently the State has invited itself and students' fellow classmates to see and hear what goes on inside the home during each school day.

The Baltimore fifth grader and his family can attest to having their expectation of privacy violated by the State.[202] Viewing a BB gun hanging on the wall behind the student and then reporting it to law enforcement is an example of how the State can peer into the home and make conclusions regarding safety or legal issues based on those observations.[203] The school observed these things only because of the required video features of online school, [204] and the result is a search within the meaning of the Fourth Amendment.

Critics could argue that the expectations for online classes are clear and therefore the privacy violation should not apply. While attending online classes, students are aware that they are on camera and their background conversations are audible.[205] Most online video formats used for classes allow all users to employ virtual backgrounds, which arguably offer a failsafe method for preventing visual intrusions.[206] In addition, students can use earphones and microphones to limit background noise, as well as mute their microphones when not required to talk.[207]

These precautions appear facially valid; however, they are not foolproof. Schools might not require students to use such precautions, not all young students would consider such precautions necessary, not all students have the technical expertise to apply them appropriately, and there are no guarantees students will employ these measures.[208] Moreover, in at least some of the online platforms, the host of the meetings (e.g., the teacher) has the ability to unmute students at will.[209] This allows teachers to ensure the student is attending and participating, but also gives the State the ability to reach into the home with a microphone.[210] So, although a counterargument

202. Papst, *supra* note 1.

203. *Id.*

204. *Id.*

205. *See Getting Started with Zoom*, *supra* note 193.

206. *See Getting Started with Virtual Background,* ZOOM HELP CENTER, https://support.zoom.us/hc/en-us/articles/210707503-Virtual-Background (noting the Virtual Background feature allows a user to display an image or video as the background during an online meeting or class and prevents other attendees from observing the true background of the user).

207. *See Preventing on Zoom Event Disruptions as a Host,* ZOOM HELP CENTER, https://support.zoom.us/hc/en-us/articles/360051286171-Preventing-OnZoom-event-disruptions-as-a-Host (last visited Aug. 9, 2021).

208. *See supra* Part III.C.

209. *See Host and co-Host controls in a meeting*, ZOOM HELP CENTER, https://support.zoom.us/hc/en-us/articles/201362603-Host-and-co-host-controls-in-a-meeting (last visited Aug. 9, 2021).

210. *See id.*

exists regarding a reasonable expectation of privacy, it ultimately fails to provide complete protections against privacy intrusions.[211] Without informed consent, requiring students to turn on a video camera and microphone while attending online classes is a search within the meaning of the Fourth Amendment.

B. Warrants Are Not Employed by Schools During Online Schooling

In recognizing that online compulsory education results in a search within the meaning of the Fourth Amendment, the focus shifts to whether such searches are reasonable in the absence of a warrant.[212] The Supreme Court holds warrantless searches are presumptively unreasonable and the Fourth Amendment protects citizens from unreasonable searches and seizures.[213] It is obvious that schools are not obtaining warrants to conduct online classes; nor would it be practicable to do so.[214] However, when law enforcement seeks to use information obtained from online classes (either live or recorded), a warrant would undoubtedly provide the safest route to admission of such information in court.[215] Therefore, because the State is conducting warrantless searches, exceptions to the warrant requirement are necessary to rebut the presumption of unreasonableness.[216]

C. Exceptions to the Warrant Requirement Apply to Compulsory Online Schooling

As different States and school districts employ diverse methods of online compulsory school,[217] exploring the applicable exceptions to the warrant requirement is essential for evaluating online classes. In particular, the concepts of consent and special needs searches are critical to the analysis.[218]

1. Informed Consent Is Necessary for Online Compulsory Schooling

Whether valid consent exists for violations of privacy is dependent upon the school district and applicable state law.[219] As stated in *Schneckloth,* there is no requirement for the State to inform a party that he or she has the

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211. *See id.*
212. *See* Katz v. United States, 389 U.S. 347, 360–62 (1967) (Harlan, J., concurring).
213. CHEMERINSKY & LEVENSON, *supra* note 28, at 160.
214. *See supra* Part III.C.
215. *See* U.S. CONST. amend. IV.
216. CHEMERINSKY & LEVENSON, *supra* note 28, at 160–61.
217. CNN, *supra* note 157.
218. *See supra* Part II.C.
219. *Id.*

right to refuse consent.[220] Compulsory online school attendance by nature does not provide a meaningful voluntary consent format, as there is no request made.[221] Most school districts request and receive consent to videotape (i.e., recording) school age children during online classes.[222] As the students in question are mostly juveniles, parents must grant consent to allow the recording of their children while attending classes.[223] This consent, however, does not include an invitation for the State to observe the ongoings of a home and record those actions and viewable objects within the home.[224] In fact, districts have considered privacy concerns of online education and explicitly state there is no expectation of privacy for observations made or conversations heard during "synchronous distance learning" classes.[225]

Assuming parents grant consent—as there are limited repercussions for refusing[226]—in a context where no other school options are truly available during a pandemic, the concern shifts to how far the authorization extends.[227] At the very least, a parent or guardian would not expect that he or she is granting consent to allow such observations like those of their child going to the bathroom.[228] Critics can argue that along with parental consent

220. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).

221. *See generally* PUB. SCHS. OF EDISON TWP., *supra* note 184; PLAIN LOC. SCHS., *supra* note 184; SIXTWELVE, *supra* note 184; NEWHALL SCH. DIST., *supra* note 184; LAS CRUCES PUB. SCHS., *supra* note 184.

222. *See* PUB. SCHS. OF EDISON TWP., *supra* note 184; PLAIN LOCAL SCHS., *supra* note 184; SIXTWELVE, *supra* note 184; NEWHALL SCH. DIST., *supra* note 184; LAS CRUCES PUB. SCHS., *supra* note 184.

223. *See* Hodgson v. Minn., 497 U.S. 417, 482 (1990) (citing Parham v. J.R., 442 U.S. 584, 621 (1979) (Stewart, J., concurring in judgment)) (Kennedy, J., concurring in the judgment in part and dissenting in part). "The welfare of the child has always been the central concern of laws with regard to minors." *Id.* The law does not provide the same rights to minors as afforded adults, and children can exercise the rights they do possess only with parental consent. *Id.*

224. State v. Orta, 2018 WI App. 39 ¶ 10, 382 Wis. 2d 830, 917 N.W. 2d 233 (per curiam).

225. *See, e.g.,* HEBER ELEMENTARY SCH. DIST., *supra* note 185.

226. *See* PUB. SCHS. OF EDISON TWP., *supra* note 184; PLAIN LOC. SCHS., *supra* note 184; SIXTWELVE, *supra* note 184; NEWHALL SCH. DIST., *supra* note 184; LAS CRUCES PUB. SCHS., *supra* note 184; HEBER ELEMENTARY SCH. DIST., *supra* note 185. A review of consent forms identified the following common repercussions for parents' refusal of consent for the recording of a child: (1) the student would not receive recognition for any online postings of school material; (2) the student could not appear on the school's broadcast channel during athletic events, school programs, and award ceremonies; and (3) the child would not receive remote group services. None of the consent forms reviewed contained statements equating refusal of consent with a violation of state compulsory school laws.

227. *See* PUB. SCHS. OF EDISON TWP., *supra* note 184; PLAIN LOC. SCHS., *supra* note 184; SIXTWELVE, *supra* note 184; NEWHALL SCH. DIST., *supra* note 184; LAS CRUCES PUB. SCHS., *supra* note 184.

228. *See generally* 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.11(f) (6th ed. 2020).

allowing recording of their children during class, there is an implied consent to view other things appearing within the frame of the video.[229] However, consent is free and voluntary only if one understands what he or she is granting consent to in the first place.[230] Without notice of what the school is recording, which would open the door to understanding the potential use of the audio and video, valid consent does not exist.[231] A separate example helps to explain this concept. If a child needs technical assistance and requests help from the teacher through screen sharing of the child's computer, a teacher may view the contents of a computer while screen sharing.[232] Surely a parent's consent for recording a student does not provide implied consent to view the contents of a computer.[233] It appears online compulsory schools operate without properly informed and voluntary consent.[234] This is a gap that state legislatures and school districts can address moving forward.[235]

2. Online Compulsory Schooling as Special Needs Searches

Aside from consent, another exception to the warrant requirement is a "special needs" search.[236] The primary purpose of compulsory online schooling is to continue educating our youth while the country suffers through a pandemic.[237] Teachers require the ability to view children on screen to maintain a sense of normalcy, ensure attendance, avoid distractions, prevent academic dishonesty, and to assist students in understanding

229. *See id.*

230. *See id.* LaFave discusses implied consent in the context of airline passenger screening. If it were true that implied consent applied to those who are aware of the screening process, then the government could decide to create similar screening processes for other modes of travel (e.g., cars), and all travelers would implicitly consent to searches of their persons and effects. *Id.* § 10.6(g). LaFave concludes this logic "offends common sense . . . [and] flies in the face of the most fundamental Fourth Amendment principle that the government cannot avoid the restrictions of the Fourth Amendment by notifying the public that all telephone lines would be tapped or that all homes would be searched." *Id.* (internal quotations omitted).

231. *See id.*

232. *See Sharing Your Screen, Content or Second Camera*, ZOOM HELP CENTER, https://support.zoom.us/hc/en-us/articles/201362153-Sharing-your-screen-content-or-second-camera (last visited July 17, 2021). Screen sharing is a function used in most online meeting platforms where a user may share his or her screen with one or more attendees.

233. *See* LAFAVE, *supra* note 228, § 10.6(g).

234. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973).

235. *See supra* Part III.

236. CHEMERINSKY & LEVENSON, *supra* note 28, at 265–66.

237. *See* Madeline Will, *Most Educators Require Kids to Turn Cameras on in Virtual Class, Despite Equity Concerns*, EDUC. WK. (Oct. 20, 2020), https://www.edweek.org/teaching-learning/most-educators-require-kids-to-turn-cameras-on-in-virtual-class-despite-equity-concerns/2020/10.

the material.[238] There currently are few viable alternatives to requiring cameras and microphones turned on during classes to achieve these goals.[239] In fact, "[s]ixty percent of teachers, principals, and district leaders say students face consequences if they turn off cameras during class. Parental notification is the most common consequence, followed by losing participation points or facing a lower grade, and being marked partially or fully absent."[240] In this context, special needs searches are unique in that they may have been consented to, but the voluntariness of consent is distorted by potential adverse consequences of refusal.[241] Consent, and the totality of the circumstances in which it is granted, will affect the reasonableness of applying the special needs exception to the warrant requirement.[242] Moreover, although the primary purpose of the special needs search (i.e., compulsory online schooling) is not for criminal investigative purposes, law enforcement historically looks to exploit avenues by which it can obtain evidence.[243] Sharing information with law enforcement[244] from an online class is simply a byproduct of the COVID-19 pandemic situation affecting the United States.

As an analogy, the federal government created the Transportation and Safety Administration (TSA) following the terrorist attacks on September 11, 2001.[245] Since that date, persons electing to travel via commercial airlines are subject to x-ray and physical search of their persons and effects prior to boarding an airplane.[246] The principal purpose of the search is not law enforcement related, but rather, maintaining the safety of the airlines and preventing terrorists from using planes as weapons.[247] But no one contests that, should TSA locate incriminating evidence of other crimes, it may turn that evidence over to law enforcement while performing its "special needs" searches. In a similar way, teachers, as mandatory reporters, possess a duty to notify the appropriate authorities if they suspect child endanger-

238. *Id.* (stating a recent Education Week Research Center survey found that more than three quarters of teachers, principals, and district leaders whose schools or districts provide live remote instruction require students with working cameras on their devices to keep them on during class).

239. *See id.*

240. *Id.*

241. Ferguson v. City of Charleston, 532 U.S. 67, 91 (2001) (Kennedy, J., concurring).

242. *Id.*

243. *See generally* Kyllo v. United States, 533 U.S. 27 (2001); Carpenter v. United States, 138 S. Ct. 2206 (2018).

244. *See generally* New Jersey v. T.L.O., 469 U.S. 325 (1985).

245. *See Protecting the Nation's Transportation Systems: Oversight of the Transportation Security Administration Before the S. Comm. on Com., Sci., and Transp.*, 116th Cong. 2 (2019) (statement of Patricia F.S. Cogswell, Acting Deputy Administrator of Transportation Security Administration).

246. *See id.*

247. *Id.*

ment.[248] On the other hand, whether officials conducting a special needs search can turn evidence over to law enforcement agencies can be part of the calculus in determining the reasonableness of the search.[249] Where teachers previously had limitations in what they saw of a student in the classroom and learned from their conversations at school, now teachers may peer into the home and listen to conversations conducted inside the house.[250]

To be fair, there are online classroom incidents that require immediate action.[251] In October 2020, authorities arrested an eighteen-year-old man after he livestreamed himself sexually assaulting a seven-year-old family member while on a class break.[252] The victim was attending a Chicago Public School remote learning class and her teacher observed the assault during a Google classroom session.[253] The teacher immediately notified law enforcement after witnessing the sexual assault.[254] Information obtained from the subsequent investigation identified the student had suffered repeated molestation for approximately one year.[255] Undoubtedly, this horrific abuse would have continued had it not been for the online camera and the teacher's diligent response.[256] The ensuing issue is if the court will admit the evidence from the online school video to convict the assailant.[257]

The student in Baltimore with the BB gun and the student-victim in Chicago are on opposite sides of the spectrum.[258] One appears to involve a teacher overreacting to a toy hanging on the wall behind a student.[259] The other clearly shows how online school video can stop and prevent further sexual assault.[260] But both are a search within the meaning of the Fourth Amendment, and one cannot later justify the search as reasonable based on what the evidence happens to disclose.[261] A balancing analysis is therefore

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248. *See* CHILD WELFARE INFO. GATEWAY, *supra* note 154.

249. *See, e.g.,* Bd. of Educ. v. Earls, 536 U.S. 822, 833 (2002); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 666 (1989).

250. Will, *supra* note 237.

251. *See supra* Part II.C.3.

252. Deanese Williams-Harris & Rosemary Sobol, *Man Accused of Assaulting 7-year-old Girl During Online Learning Class had Been Sexually Abusing Her for a Year, Prosecutors Say*, CHICAGO TRIB. (Oct. 17, 2020), www.chicagotribune.com.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *See id.*

258. *See generally* Papst, *supra* note 1; Williams-Harris & Sobol, *supra* note 252.

259. Papst, *supra* note 1.

260. Williams-Harris & Sobol, *supra* note 252.

261. *See* Rios v. United States, 364 U.S. 253, 261 (1960) (Stewart, J., majority decision stated a seizure "can survive constitutional inhibition only upon a showing that the surrounding facts brought it within one of the exceptions to the [search warrant requirement]." *Id.*).

necessary to weigh the government's interests against the privacy interests of students.[262]

D. Balancing Compulsory Online Education Against Privacy Interests

It is clear that compulsory online schooling results in a search within the meaning of the Fourth Amendment.[263] Absent valid consent, it is necessary to assess the reasonableness of these warrantless searches by balancing the promotion of legitimate government interests against the intrusion on individuals' Fourth Amendment rights.[264] On one side of the scale lies the State's interest in continuing compulsory education during an ongoing pandemic.[265] Education is a foundational component of our society, [266] yet the contagious nature of COVID-19 precludes in-person school attendance. In addition, schools have a custodial and guardian responsibility for children while attending compulsory school.[267] Therefore, the State must not only ensure America's youth continue their necessary education, but that they do so in a healthy environment to protect both students and faculty.[268] The other side of the scale contains the privacy interests of each student attending compulsory online classes, to include non-student occupants of the dwellings during individual online class sessions.[269] These interests include not having the State listen and record ongoing conversations while peering into the home, which are the privacy rights upheld as sacrosanct by the Supreme Court.[270] As with any warrantless search, the analysis begins with the presumption that the search is unreasonable.[271]

In reviewing precedent, the Supreme Court found the Government's interest can overcome the presumption of unreasonableness when dealing with special needs searches.[272] In *National Treasury Employees v. Von Raab*, the Supreme Court held the Government's compelling interests in preventing drug users from being promoted to U.S. Customs positions where they could

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262. *See* Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 619 (1989).

263. *See supra* Part IV.A.

264. *See* Naperville Smart Meter Awareness v. City of Naperville, 900 F.3d 521, 528 (7th Cir. 2018).

265. *See supra* Part III.A.

266. *See generally* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

267. *See* Bd. of Educ. v. Earls, 536 U.S. 822, 830 (2002).

268. *See id.*

269. *See supra* Part IV.A.

270. Segura v. United States, 468 U.S. 796, 810 (1984) ("The sanctity of the home is not to be disputed."); *see* Katz v. United States, 389 U.S. 347, 351 (1967).

271. *See* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 679 (1989); Brigham City v. Stuart, 547 U.S. 398, 403 (2006).

272. *See supra* Part II.C.2; Naperville Smart Meter Awareness v. City of Naperville, 900 F.3d 521, 528 (7th Cir. 2018); *see generally Von Raab*, 489 U.S. 656; *Earls*, 536 U.S. 822.

endanger "the integrity of our Nation's borders" or the lives of citizens outweighed the privacy interests of those employees seeking promotions.[273] In *Board of Education v. Earls*, the Supreme Court stated that "testing students who participate in extracurricular activities is a reasonably effective means of addressing the School District's legitimate concerns in preventing, deterring, and detecting drug use."[274] While these two special needs cases are similar to compulsory online schooling, they are distinguished in that both the employees and students, respectively, voluntarily participated in the programs regulated by the special searches.[275] In contrast, states and school districts have regulated students to compulsory online formats with homeschooling or private schools as their only alternatives.[276]

A more analogous case (decided by the Seventh Circuit) is that of *Naperville Smart Meter Awareness v. City of Naperville*.[277] The Court found the Government's interest in utilizing smart meters was significant "[in allowing] utilities to reduce costs, provide cheaper power to consumers, encourage energy efficiency, and increase grid stability."[278] The government's interest overcame the presumption of unreasonableness even though customers had no alternative source or company for electricity and their privacy rights were implicated by detailed monitoring of the electronic signatures within the residence.[279] The Court held the Government's interests resulted in a reasonable search, because the search was "unrelated to law enforcement, [was] minimally invasive, and present[ed] little risk of corollary criminal consequences."[280]

Conceptualizing these three cases, and highlighting the similarities in *Naperville*, illustrates that the State's interests in conducting searches through compulsory online schooling during a pandemic render the searches reasonable.[281] As in *Naperville*, the third party doctrine does not apply to compulsory online schooling, and if a court ruled third parties do hold the school recordings, the nature and extent of the recordings would invoke the *Carpenter* decision.[282] The State's interests then focus on several important factors. First, the purpose of online compulsory schooling is educational in nature and not prosecutorial.[283] Therefore, the online schooling format does

273. *See Von Raab*, 489 U.S. at 679.
274. *See Earls*, 536 U.S. at 837.
275. *See Von Raab*, 489 U.S. at 679; *Earls*, 536 U.S. at 837.
276. *See supra* Part III.C.
277. *See Naperville*, 900 F.3d 521.
278. *See id.* at 529.
279. *See id.* at 524.
280. *Id*. at 529.
281. *See* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 679 (1989); Bd. of Educ. v. Earls, 536 U.S. 822, 837 (2002); *Naperville*, 900 F.3d at 529.
282. *See Naperville*, 900 F.3d at 527; Carpenter v. U.S., 138 S. Ct. 2206, 2220 (2018).
283. *See supra* Part III.A.

not serve a primary purpose of criminal investigation.[284] Second, health concerns related to preventing the spread of COVID-19 forced States and school districts to replace in-person school attendance with an alternative online model.[285] This underscores a central fact that not only do students lack alternative educational methods during the pandemic, but the States and school districts themselves are also without meaningful alternatives to provide compulsory education.[286] Third, although compulsory online classes result in searches of the home, there are technological capabilities available, although not foolproof, that can assist in minimizing the extent and duration of intrusions.[287] These factors potentially outweigh the privacy interests students normally possess when they attend public school and knowingly turn on cameras and microphones to attend online classes.[288]

However, this reasonableness determination only aligns with the precedent of *National Treasury Employees*, *Board of Education*, and *Naperville* with the caveat that online compulsory school policies reflect a refusal to provide information to law enforcement.[289] This factor repeatedly characterized the focal point by which courts determined special needs searches were reasonable.[290] Therefore, absent clear and unequivocal informed consent or exigent circumstances, online compulsory school policies hoping to tip the scale towards reasonableness should clearly state that information derived during online classes will not be shared with investigative law enforcement agencies, to include prosecutors.[291] If law enforcement has a need for recorded information obtained during online compulsory classes, the warrant requirement should apply requiring a detached and neutral magistrate to determine the requisite probable cause exists.[292]

E. A Call for Clear Online Education Policies and Consent Forms

In the face of a pandemic threatening the very safety of its citizens and students, States and school districts alike made sweeping policy changes.[293] There is no evidence of malice or impropriety in these decisions, as changes

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284. *See supra* Part II.C.2.
285. *See supra* Part III.B.
286. *See supra* Part III.C.
287. *See supra* Part IV.A.
288. *See supra* Part IV.A–C.
289. *See generally* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989); Bd. of Educ. v. Earls, 536 U.S. 822 (2002); Naperville Smart Meter Awareness v. City of Naperville, 900 F.3d 521 (7th Cir. 2018).
290. *See Von Raab*, 489 U.S. at 679; *Earls*, 536 U.S. at 837; *Naperville*, 900 F.3d at 524.
291. *See Naperville*, 900 F.3d at 529.
292. *See supra* Part II.B.
293. Hubler & Goldstein, *supra* note 15.

were necessary and were made almost overnight.[294] The simple truth is that shifting to online classes for compulsory education served the function of continuing education,[295] without regard to Fourth Amendment implications. State legislatures should now consider the Fourth Amendment implications of compulsory online schooling and the complications of utilizing evidence obtained in such searches.[296] In addition, school districts should revamp online attendance and operational policies to address the issue of teachers' peering into the homes of students.[297] States and school districts looking to avoid Fourth Amendment issues should create consent forms that fully inform parents and students of the intrusion on their legitimate expectation of privacy.[298] If parents refuse consent, districts should clearly articulate the repercussions for the parents and students.[299] Additionally, districts should ensure both policies and consent forms provide clear notice that schools can observe and listen to the ongoings of the home, should delineate how schools maintain recordings, and should clarify that such recordings will not be turned over to law enforcement outside of exigent circumstances or absent a valid warrant.[300] It is crucial that society take notice of the issues created by online compulsory education, and then take affirmative steps of clarifying policies and consent forms to ensure protections the Fourth Amendment provides.

V. CONCLUSION

Society should recognize there are Fourth Amendment implications to requiring online compulsory education. Although there are legitimate government interests involved in such searches, courts should balance these interests against individual privacy rights on a case-by-case basis.[301] As different school district policies and state laws apply independently, each jurisdiction should consider several factors in determining the reasonableness of these warrantless searches. Necessary factors include: (1) whether voluntary and informed consent was provided; (2) if the state or school district policy included a statement of refusal to share information with law enforcement outside of consent or exigent circumstances; and (3) if law enforcement used

294. Herold, *supra* note 13.
295. *See id.*
296. *See supra* Part IV.A.
297. *See supra* Part IV.A.
298. Ashish Deshpande, *How Online Consent Forms Better Serve Students and Parents in Your K-12 School*, EDUC. AUTOMATION (last updated Apr. 30, 2020), https://www.frevvo.com/blog/how-online-consent-forms-better-serve-students-and-parents-in-your-k-12-school/.
299. *Id.*
300. *See supra* Part IV.D.
301. *See supra* Part IV.D.

a search warrant to obtain evidence created during online compulsory school.[302] School districts and States concerned with alleviating such Fourth Amendment concerns should establish clearly defined consent forms to address issues regarding online education.[303] Implementing such provisions to address these concerns will uphold the protections of the Fourth Amendment while maintaining society's educational goals.

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302. *See supra* Part IV.D.

303. *See supra* Part IV.E.

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