No. 03-240

In The

Supreme Court of the United States

October Term, 2016

UNITED STATES OF AMERICA,
Petitioner,

v.

WILLIAM LARSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit

BRIEF FOR PETITIONER

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Counsel for Petitioner

Oral Argument Requested

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ISSUES PRESENTED FOR REVIEW

1. Whether L.O. 1923 was permitted under the special needs exception to the Fourth Amendment, when the ordinance was narrowly tailored to protecting children from an anticipated surge in sex trafficking during the All-Star game.

2. Whether an officer's search of an apartment and belongings was valid when the defendant's live-in girlfriend consented to the search and made affirmations that she possessed control over and had access to the residence and all of its contents, including a cell phone

STATEMENT OF THE FACTS

The Tragedy. This case looks into one of the most heartbreaking pandemics the world faces today: human sex trafficking. R. at 2. Large sporting events, such as the 2015 All-Star game hosted in the city of Victoria, cause human trafficking to increase exponentially. R. at 2. Studies show that oftentimes the victims of these crimes are children, and the viral spread of the sex trade ruins the lives of thousands each year. R. at 41.

The Ordinance. Knowing that their city would soon contract the disease of human trafficking, the Victoria City Board of Supervisors (the "Board") voted to take affirmative steps to quarantine the sex slave trade before it spread to Victoria's children. R. at 2. Accordingly, the Board enacted L.O. 1923, which equipped officers with the means to fight child sex traffickers and protect their victims in the days and areas surrounding the game. R. at 2.

The Instigation. Following the provisions of L.O. 1923, Officers Richols and Nelson stopped and searched an adult male and an underage female whom they feared to be a sex trafficker and his victim. As a result of the search, the officers recovered an abundance of evidence that corroborated their fears. Subsequently, they arrested the male, Respondent, for sex trafficking and Officer Nelson spoke further with the child, W.M., in an attempt to rescue her from her nightmarish situation.

The Home. Officer Nelson spoke with W.M. and learned that she shared and had complete access to an apartment with Respondent at which she kept all of her belongings and received mail. W.M. then allowed Officer Nelson to search the home. While in the apartment, Officer Nelson found a cell phone that W.M. told him she also shared with Respondent. She knew the passcode to it and kept all of her social media accounts on it, and allowed the officer to search its contents.

SUMMARY OF THE ARGUMENT

This Court should reverse the Thirteenth Circuit and uphold L.O. 1923 and the subsequent search of W.M. and Respondent's apartment and cell phone for two reasons: first, because L.O. 1923 survives a facial Fourth Amendment challenge under the special needs doctrine; second, because W.M. properly authorized Officer Nelson's search of the apartment and cell phone.

L.O. 1923's immediate goal is protecting children from sex offenders, not prosecuting criminals. Restrictions to time, place, and manner of search are indicative of a non-law enforcement purpose. L.O. 1923 only affects the immediate area in the days surrounding the game, and only allows searches for sex trafficking of children. Moreover, L.O. 1923 contains no procedures dictating arrest or modes of liability. These factors indicate that L.O. 1923 is a reaction to the specific threat the All-Star game poses to children, is aimed to protect those children, and is not a proxy for a broad "general warrant" proscribed by the Fourth Amendment.

L.O. 1923 is also reasonable in light of the competing government and privacy interests and those interests, on balance, make the warrant and probable cause requirements impracticable. First, the privacy interest implicated is reduced as notice was given of the exact parameters of the search including trigger, scope, purpose and area and time of effect. Second, the scope of the search is limited because the search is predicated on reasonable suspicion and has detailed procedures on whom to search, when to search, where to search, and what to search. Third and finally, it cannot be denied that the government's interest is salient as protecting children has long been considered compelling. The delay in obtaining a warrant will potentially cause harm not only to that abused child—who can be smuggled off or sold while the officer is waiting for the warrant—but also to other children not found because police resources were tied up. L.O. 1923 is therefore constitutional as a special need outside the normal need for law enforcement which makes warrant and probable cause requirements impracticable.

On the second issue, W.M. possessed both the actual and the apparent authority to consent to the search of the apartment and cell phone she shared with Respondent. It was objectively reasonable for Officer Nelson to believe W.M. possessed the apparent authority to consent to the search of the apartment because of her access to the apartment, her substantial interest in the apartment as well as affirmative statements W.M. made to Officer Nelson indicating residency. To Officer Nelson's eyes, W.M. was a live-in girlfriend who received personal mail and keep personal items in the apartment. W.M. also had the actual authority to consent to the search of the apartment as she was a live-in girlfriend. W.M. cleaned the bedroom and the apartment in its entirety, she received personal mail at the apartment, and she had unlimited access to the apartment.

W.M. also possessed authority over Respondent's cell phone because she knew the passcode, made affirmative representations that she and Respondent shared the phone, and had her own applications and accounts on the phone. Officer Nelson therefore received satisfactory consent to search the phone, and no warrant was needed.

In sum, L.O. 1923 survives a facial challenge under the Fourth Amendment, and W.M. possessed the authority to consent to the searches of the shared house and cell phone. The ruling of the Thirteenth Circuit was therefore erroneous and this court should reverse.

STANDARD OF REVIEW

This Court reviews conclusions of law *de novo* and findings of fact for clear error. *J.D.B. v. North Carolina*, 564 U.S. 261, 277 (2011). Since there are no issues of fact on appeal in this case, *de novo* review is appropriate. R. at 24.

ARGUMENT

The Thirteenth Circuit erred when it held that Respondent's motion to suppress should be granted. First, because L.O. 1923 falls under the special needs exception as its goal of protecting children from abuse is distinct from general law enforcement, and makes a warrant or probable cause impracticable. Second, because W.M. had the common authority to consent to the search of the apartment and the cell phone she shared with Respondent. In light of these facts, Respondent's Fourth Amendment rights were not violated and the lower court's decision should be reversed.

I. L.O. 1923 IS FACIALLY CONSTITUTIONAL UNDER THE SPECIAL NEEDS DOCTRINE.

L.O. 1923 ("1923") is facially constitutional under the Fourth Amendment as (1) the underage sex trafficking spawned by the All-Star game creates a special need to protect children which (2) the ordinance reasonably addresses. Since this a facial challenge to 1923, R. at 5, Respondent has the burden to establish that "no set of circumstances exists under which [1923] would be valid," *U.S. v. Salerno*, 481 U.S. 739, 745 (1987), or that 1923 lacks any "plainly legitimate sweep." *U.S. v. Stevens*, 559 U.S. 460, 472 (2010). This they cannot do.

The Fourth Amendment is designed to protect "persons . . . from unreasonable searches and seizures." U.S. Const. amend. IV. A search is presumptively unreasonable without a warrant or probable cause. *See Skinner v. Ry. Labor Executives Ass'n*, 489 U.S. 602, 619 (1989). However, that presumption can be rebutted by an established exception. *See Terry v. Ohio*, 392 U.S. 1, 30

(1968) (reasonable suspicion that a person is armed); *see also Riley v. California*, 134 S. Ct. 2473, 2483 (2014) (searches incident to arrest). One such exception is the special needs exception established in Justice Blackmun's concurrence in *New Jersey v. T.L.O*. *See New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring); *see also O'Connor v. Ortega*, 480 U.S. 709, 719 (1987) (plurality opinion codifying the exception). In determining constitutionality under the special needs exception, the Court looks at two things: first, whether there exists a special need beyond the normal need for law enforcement; second, whether the competing individual privacy and government interests render the warrant and probable cause requirements impracticable. *See Skinner*, 489 U.S. at 619. Under this framework, L.O. 1923 passes constitutional muster: first, because 1923's immediate goal in protecting children from abuse is distinct from general law enforcement functions; second, because 1923 is reasonable in light of the government's interest in protecting vulnerable children from the All-Star game sex trafficking boom.

A. Protecting Children from Abuse Constitutes a Special Need.

L.O. 1923 is insulated by a special need exception because the ordinance's primary purpose is protecting children from sexual exploitation. Protecting the health of children has been routinely upheld by the Supreme Court as a special need. *See Bd. of Educ. v. Earls*, 536 U.S. 822, 835–36, (2002). However, special needs exist only when the government interest being advanced goes "beyond the normal need for law enforcement." *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). Therefore if a legislation's primary purpose is "indistinguishable from a general interest in crime control" there is no special need. *Id.*; *see also City of Indianapolis v. Edmond*, 531 U.S. 32, 36 (2000) (striking down a police stop system because it was used to investigate multiple crimes). In its opinion below, the Thirteenth Circuit finds police involvement in the search dispositive and implies 1923's purpose of protecting children is "an ultimate" rather than "primary" purpose. R.

at 17-18. However, courts have held that a special need exists even where the police are directly conducting the search. *See Griffin,* 483 U.S.at 873 (upholding searches of probationers as a special need); *Henderson v. City of Simi Valley*, 305 F.3d 1052 (9th Cir. 2008) (upholding searches of homes to protect victims of domestic violence). Furthermore, so long as the ultimate goal of the legislation is not too attenuated from "the immediate objective of the search," courts have routinely accepted the public safety justification proffered by the City of Victoria. *See Ferguson v. City of Charleston*, 532 U.S. 67, 81–82, 121 (2001).

For example, in *Illinois v. Lidster*, the Supreme Court used the primary purpose test to determine that police use of a traffic checkpoint to investigate a hit and run was constitutional. *Illinois v. Lidster*, 540 U.S. 419, 421 (2004). The stop scheme's temporal and geographic restrictions indicated that the stop was not being used broadly to root out criminals, but to investigate a specific crime as claimed. *See id*. at 431. Catching lawbreakers who were stopped was incidental to the collection of information about the crime. *See id*.; *see also Wagner v. Swarts*, 827 F. Supp. 2d 85, 95 (N.D.N.Y. 2011), *aff'd sub nom., Wagner v. Sprague*, 489 F. App'x 500 (2d Cir. 2012) (primary purpose of motorcycle checkpoints executed by state police was safety, and therefore distinct from a general interest in crime control).

Likewise, in *Macwade v. Kelly*, the Second Circuit upheld a New York Police Department checkpoint program that "search[ed] the bags of . . . riders entering the station" for explosives. *Macwade v. Kelly*, 460 F.3d 260, 264 (2d Cir. 2006). Despite direct police involvement, the immediate purpose of the program was preventing a terrorist attack, not general crime control. *See id*. The court noted that the government's need to "prevent and discover . . . latent or hidden hazards" was a distinct need. *Id*. at 270. Moreover, "officers were trained to recognize explosives, they searched only containers capable of containing explosives, and they [could] not intentionally

search for other contraband." *Id.* at 271. These factors indicated that the immediate object of the search was to protect the public from a specific crime, not to gather evidence for criminal prosecution. *See id.* The primary purpose of the policy was therefore outside the scope of general crime control and qualified as a special need. *See id.*

In contrast, in *Ferguson v. City of Charleston*, the Supreme Court found that testing expectant mothers for cocaine did not qualify for a special need under the Fourth Amendment. *Ferguson v. City of Charleston*, 532 U.S 67, 70 (2001). While the Court noted that protecting the health of the child and mother was a "beneficial" aim, the immediate goal of searches under the program was not to protect the mothers or their children, but rather was "focused on [the mother's] arrest and prosecution." *Id*. at 81–82. As the arrest and prosecution of drug abusers was a normal function of law enforcement, the primary purpose of the drug policy was not distinguishable from the police's general criminal interest in crime control. *See id*. It therefore failed to qualify as a special need and was ruled unconstitutional by the Court. *See id*.

In the present case, the immediate objective of a search under 1923 is to protect the child, not to prosecute the criminal. R. at 2, 41. Like the bag search in *Macwade*, a search under 1923 seeks to prevent a specific and unique harm to the public. *See Macwade*, 460 F.3d at 264. The All-Star game will cause an explosion in the sex trafficking trade, and the threat to vulnerable children will be dire. R. at 41. The number of children at risk will likely be in the thousands R. at 40. 1923 was passed to counter this specific threat, not as a carte blanche to law enforcement. R. at 2. This limited purpose is reinforced by the plain language of the ordinance, which confines searches to the days and areas immediately surrounding the game. R at 2. Like in *Lidster*, where the court found that confining stops to the area and time of night the crime occurred indicated a purpose detached from general law enforcement, here the strict limitations on when and where these

searches can be conducted indicates 1923's laser focus on protecting children affected by the All-Star game. *See Lidster*, 540 U.S. at 421; R. at 2.

Similarly, the search itself is restricted. The Ordinance requires reasonable suspicion of sex trafficking to search. R. at 2. Once initiated, this search is then confined to that "reasonably necessary to ascertain whether the individual searched is "an adult or minor who is facilitating, or attempting to facilitate the use of a minor [in a sex act]." *Id*. Like the limited searches for explosives upheld in *Macwade*, here limiting searches to sex trafficking dispels the worry that 1923 will grant broad prosecutorial license to ferret out crimes. *See Macwade*, 460 F.3d at 264.

In contrast to *Ferguson*, where the policy set regulations for the "chain of custody, the range of possible criminal charges, and the logistics of police arrests," here, 1923 does not specifically contemplate arrest at all. *Ferguson*, 532 U.S. at 81; R. at 2. While it is true that in this case an arrest did occur, the challenge before this Court is a facial one. R. at 4. The question of whether the Ordinance *was* applied unconstitutionally—which we do not concede—is wholly irrelevant to the question of whether it *may* be applied constitutionally.

In sum, the immediate objective of a search under 1923 is to protect the child and the primary purpose of 1923 is to protect children from the epidemic of sexual abuse precipitated by the All-Star game. This purpose, like the public safety purpose in *Macwade*, is detached from "a general interest in crime control" and therefore qualifies as an "interest beyond the normal need for law enforcement." *Macwade*, 460 F.3d at 264. The question then turns to whether this interest makes the warrant and probable cause requirements impracticable. Again, the answer is yes.

B. The Unique Circumstances of the All-Star Game Make a Warrant Impracticable.

Assuming the government interest goes beyond the normal need for law enforcement, the circumstances surrounding the All-Star game make a warrant impracticable. "After a special need

has been identified, the court then employs a reasonableness balancing test to determine whether it is impractical to require a warrant . . . in the particular context." *Nat'l Treasury Employees v. Von Raab*, 489 U.S. 656, 665 (1989). These balancing factors include (1) the weight and immediacy of the government interest; (2) the nature of the privacy interest allegedly compromised by the search; (3) and the character of the intrusion imposed by the search. *See Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

1. Notice of the search diminishes the privacy interest.

The privacy interest is diminished in this case, but even assuming it is not, such an interest is not dispositive. Respondent's expectation of privacy must be objectively legitimate. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). "The Fourth Amendment does not recognize all subjective expectations of privacy, but only those that society recognizes as 'legitimate.'" *Id*. at 654. For example, courts have found that individuals in highly regulated industries have a lowered expectation of privacy. *See Von Raab*, 489 U.S. at 665. As the Court in *Von Raab* stated, every employee in that case "knows they have to take a drug test." *Id*. at 667.

In the present case, the Ordinance was a response to citizens' request. R. at 3. It had precise temporal and geographic limits which were widely reported in the community. *Id*. As in *Von Raab*, notice was given. *See id*.; *see Von Raab*, 489 U.S. at 665. The community understood that entering the affected area during the time the Ordinance was active was subjecting themselves to the potential for a search. R. at 40-41. While Respondent *may* have had a subjective expectation of complete privacy, in light of these facts it is not one that society would deem to be objectively reasonable. However even if Respondent has a full expectation of privacy that fact alone is not dispositive. The other factors must be taken into consideration. *See Earls*, 536 U.S. at 83. Given

the limited nature of the intrusion, and the compelling government interest in protecting children, this search is still reasonable.

2. L.O. 1923's inherent protections limit the intrusion's scope.

L.O. 1923 mimics the protections typically provided by warrants, including individualized suspicion. The imposition on privacy is therefore limited. "A warrant serves primarily to advise that an intrusion is authorized by law and limited in its permissible scope . . ." *Von Raab*, 489 U.S. at 667. In cases where these requirements have been fulfilled, a warrant is superfluous. *See id.*

For example, the Supreme Court in *Von Raab* found that urinalysis tests of employees was permitted because "the circumstances justifying toxicological testing and the permissible limits of such intrusions [were] defined narrowly and specifically." *Id.* While it is true that there is no third party magistrate to determine the facts of each particular search, in the words of *Van Raab*, the intrusion is "defined narrowly and specifically." *Id.*; R. at 2. As mentioned above, the community was aware of the time and place that the Ordinance was active, and the effects of 1923 were limited to where the issue of child prostitution would be most prevalent. R. at 2.

Moreover, courts are more likely to find warrants and probable cause superfluous when individualized suspicion is present. *See Edmond*, 531 U.S. at 37. Under L.O. 1923 only those reasonably suspected of engaging in sex trafficking can be searched. R. at 2. Furthermore, these searches are limited "in scope and duration" to that which is "reasonably necessary" to ascertain the presence of under-age sex trafficking. *Id.* This operates similarly to a constitutionally permissible "Terry Stop," where officers can only stop with reasonable suspicion and searches are limited to items related to officer safety, such as weapons. *See Terry*, 392 U.S. at 20–21. As with a Terry Stop, it is presumed that most things found outside the scope of the search will here be

labeled fruit of the poisonous tree and excluded, providing no incentive for the officers to exceed the bounds of L.O. 1923's strict search limitations. *See id*. at 24.

Because L.O. 1923 gave notice of its precise parameters, required individual suspicion and limited its searches in scope and duration, the warrant and probable cause requirements would have added very little certainty and regularity. However, even assuming the warrant and probable cause requirements are not superfluous, they are still impracticable as a matter of law, as both the warrant requirement and the probable cause requirement would frustrate the government's compelling interest in protecting children from the amorphous hydra that is the sex trade.

3. The government interest is compelling and immediate.

Courts have found a persuasive government interest in a variety of circumstances, including preventing drug use in children. *See Earls*, 536 U.S. at 822; *see also Henderson*, 305 F.3d at 1052 (preventing domestic abuse); *see also Macwade*, 460 F.3d at 260 (thwarting public harm from terrorist attacks). While the interest must be "immediate," courts have upheld interests lacking "a particularized or pervasive problem" if there is a need to prevent a substantial future harm. *Earls*, 536 U.S. at 835–36. All that is typically required is that the "risk to public safety [be] substantial and real" as opposed to "symbolic." *Chandler v. Miller*, 520 U.S. 305, 322–23 (1997).

For example, the Court in *Earls* found that the need to prevent and deter the substantial harm of childhood drug use provided the immediate necessity for its search. *See Earls*, 536 U.S. at 830. As the *Earls* Court noted, it would make little sense "to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use." *Id.* Likewise, the Second Circuit in *Macwade* found a compelling government interest in preventing a terrorist attack, even if they did not know specifically when or where the attack was going to occur. *Macwade*, 460 F.3d at 270. The Second

Circuit noted that no express threat or special imminence is required before "we may accord great weight to the government's interest in staving off considerable harm. It is sufficient that the government have a compelling interest in preventing an otherwise pervasive societal problem from spreading." *Id*. Accordingly the court found that the "subway system['s]…desirability as a target, and the recent bombings of public transportation systems in Madrid, Moscow, and London, [meant] the risk to public safety [was] substantial and real." *Id*. at 272.

However, this does not mean that particularized harm is not weighted. As the Supreme Court in *Chandler* noted, the existence of a particularized and specific harm "shore[s] up an assertion of special need for a suspicionless general search program" and its presence should therefore be considered in favor of the government. *Chandler*, 520 U.S. at 319.

In the present case, the city of Victoria's interest in protecting children from sexual abuse is substantial. Like the drug policy in *Earls*, which was geared towards protecting children from the dangers of drug abuse, the city's interest here is in protecting a particularly vulnerable segment of society from predatory acts of prostitution. *See Earls*, 536 U.S. at 830. Moreover, while no statistical proof of imminent or pervasive harm is required, its presence here bolsters the government's argument. Statistics show that events such as the All-Star game bloat demand for sex solicitation by a third. R. at 41. Similar to the way the New York subway system created an obvious target for terrorist attacks in *Macwade*, the All-Star game here creates a target for sexual predators and the child sex trafficking market. *Macwade*, 460 F.3d at 270; R. at 40-41.

Warrant and probable cause requirements would also frustrate the government's ability to prevent the sexual abuse of children. "[T]he government's interest in dispensing with the warrant requirement is at its strongest when the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Skinner*, 489 U.S. at 623.

For example, In *Griffin*, the Court found that the government "must be able to act based upon a lesser degree of certainty than the Fourth Amendment would otherwise require in order to intervene before a probationer does damage to himself or society." *Griffin*, 483 U.S. at 869. A probable cause requirement would reduce the deterrent effect of the supervisory arrangement. *See id*. The probationer would be assured that so long as his illegal activities were sufficiently concealed as to give rise to no more than reasonable suspicion, they would go undetected and uncorrected. *See id*. The Ninth Circuit reached a similar conclusion in *Henderson*. *See Henderson*, 305 F.3d at 1052. There the court found that tacking a warrant requirement to a domestic abuse policy could cause an impermissible delay in which individuals could be harmed. *See id*.

In the present case, the purpose of L.O. 1923 is to protect children from sexual exploitation. R. at 2-3. A warrant requirement would unduly frustrate this purpose. Like the probationers in *Griffin* who were savvy enough to avoid evoking probable cause, here sex traffickers are not going to flaunt their illegality. *See Griffin*, 483 U.S. at 869. Given both the expected scope of abuses and the savviness of the criminal perpetrators, normal law enforcement techniques are unlikely to suffice. L.O. 1923 is attempting to curtail this unique threat by allowing law enforcement to intervene before children are abused, and a higher evidentiary standard facially frustrates that purpose. Moreover, like in *Henderson*, where the delay in obtaining a warrant, or determining probable cause made it difficult for officers to respond quickly to violent violations, here any delay would potentially cause harm not only to that abused child—who can be smuggled off or sold while the officer is waiting for the warrant—but also to other children not found because police resources were tied up. *See Henderson*, 305 F.3d at 1052. Just as the officer in *Terry*, *supra*, could conduct a limited search based on reasonable suspicion for his own safety, the officers here are conducting a limited search based on reasonable suspicion for the safety of others. *See Terry*, 392

U.S. at 20. Rigidly applying the warrant and probable cause clauses of the Fourth Amendment would therefore not only frustrate the purpose of L.O. 1923, but nullify the purpose entirely.

In conclusion, the balance of interests firmly points towards the warrant and probable cause requirements being impracticable. Since 1923's primary purpose is to protect children, not to prosecute criminals, and since the balance of the government and privacy interests here makes warrant and probable cause requirements impracticable, 1923 serves a special need under the Fourth Amendment and is therefore facially constitutional.

II. W.M. PROPERLY AUTHORIZED THE SEARCH OF THE SHARED CELL PHONE AND APARTMENT.

W.M. possessed both the actual and the apparent authority to consent to the search of the apartment and cell phone she shared with Respondent. W.M. "possess[ed] common authority over the shared premises," and her consent to its search was therefore valid. *U.S. v. Matlock*, 415 U.S. 164, 171 (1974). First, because W.M. told Officer Nelson she was a resident of the apartment, and provided him with several examples of her control over the apartment, he reasonably believed that she had apparent common authority over the apartment and could consent to him searching it. R. at 4. Second, because Respondent gave up his expectation of privacy and allowed W.M. permanent residency in the apartment, W.M. had the actual authority to consent to a search of the residence and the contents therein, including the cell phone the two shared. R. at 4.

This Court should therefore reverse the erroneous decision of the Thirteenth Circuit and find that W.M. had authority to allow Officer Nelson to search the apartment, the cell phone, and the other items located there.

A. W.M. Had the Authority to Consent to the Search of the Apartment.

W.M. had both (1) the apparent authority and (2) the actual authority to consent to the search of the apartment. A co-habitant may possess either actual or apparent authority to give

consent to search a property. *See Matlock*, 415 U.S. at 176. Certain co-habitants, such as live-in girlfriends, have common authority over a shared residence and therefore have the authority to give consent to a warrantless search. *See id*. A co-habitant enjoys actual authority to give consent to search if he or she asserts possession over the property in a way that would be rationally ascertainable to law enforcement officers. *See id*. In contrast, apparent authority to search exists when a law enforcement officer has conducted a sensible inquiry into the circumstances and holds an objectively reasonable belief that the third party has the authority to give consent. *See Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990). Pertinently, every circuit has adopted this Court's jurisprudence on third party consent and has found that girlfriends and other co-habitants have the requisite apparent authority to consent to a search of the premises.[1]

1. W.M. had the apparent authority to consent to the search of the apartment.

W.M. had the authority to consent to the search of the apartment because she had unrestricted access to and control of it. Co-habitants and other similarly situated third parties may give consent for law enforcement officers to search a residence if they have the actual or apparent authority to do so. *See Rodriguez*, 497 U.S. at 188. Girlfriends, and other types of partners, roommates and significant others, fall within this category of "co-habitants" that are able to give consent to a search. *See id*. at 186. Consequently, "the consent of one who possesses common authority over a premise or effects is valid against the absent, nonconsenting person with whom that authority is shared." *Matlock*, 415 U.S. at 170. Moreover, this Court has held that "there is no

[1] *See U.S. v. Marshall*, 348 F.3d 281, 286 (1st Cir. 2003); *U.S. v McGee*, 564 F.3d 136, 138 (2d Cir. 2009); *U.S. v. Perez*, 246 F. App'x 140, 146 (3d Cir. 2007); *Webb v Brawn*, 568 F. App'x 252, 256 (4th Cir. 2014); *U.S. v. Gonzales*, 508 F. App'x 288, 290 (5th Cir. 2013); *U.S. v. Gillis*, 358 F.3d 386, 391 (6th Cir. 2004); *U.S. v. Goins*, 437 F.3d 644, 649 (7th Cir. 2006); *U.S. v. Nichols*, 574 F.3d 633, 636 (8th Cir. 2009); *U.S. v. Lacey*, 224 F. App'x 478, 480 (9th Cir. 2007); *U.S. v. Bass*, 661 F.3d 1299, 1305 (10th Cir. 2011); *U.S. v. Camp*, 157 F. App'x 121, 123 (11th Cir. 2005); *Donovan v. A.A. Beiro Const. Co.*, 746 F.2d 894, 901 (D.C. Cir. 1984).

Fourth Amendment violation if the police conduct the search in good faith reliance on the third-party's apparent authority." *U.S. v. Gardner*, 2016 WL 5110190 at *7 (E.D. Mich. 2016) (citing *Rodriguez*, 497 U.S. at 188-89). The Thirteenth Circuit erred by failing to recognize that W.M. was exactly the type of co-habitant that this Court has held has the authority to consent.

A third party may give consent to a search of the property in many different circumstances. For instance, this Court elucidated in *Matlock* that a third party may give permission to search if he or she "possesse[s] common authority over or other sufficient relationship to the premises sought to be inspected." *Matlock*, 415 U.S. at 170. In a footnote, this Court clarified that the "mere property interest" the third party may or may not possess in the residence is irrelevant. *Id*. at 172 n.7. Instead, the analysis rests on the "mutual use of the property by persons generally having joint access or control." *Id.* By examining this factor, law enforcement officers could reasonably identify whether a co-habitant would have the authority to permit the search. *See id*. Moreover, apparent authority is judged by an objective standard based on what the law enforcement officers reasonably believed at the time; even if the consenter ends up not having the actual authority to consent, the officers' decision to do so will be upheld if their belief was reasonable. *See U.S. v. Clay*, 630 F. App'x 377, 383 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 1394 (2016).

Other circuits have also found co-habituating girlfriends may consent to the search of a shared residence under apparent authority. In fact, this is the most common form of third party consent in Fourth Amendment jurisprudence. For example, in *McGee* the Second Circuit held that the defendant's girlfriend was able to consent to the search of the apartment that she and the defendant shared because she had broad access to the apartment. *See McGee*, 564 F.3d at 138. The court held that the facts surrounding the situation validated a search by the authorities for two reasons: "first, the third party had access to the area searched, and, second, W.M. had either: (a)

common authority over the area; or (b) a substantial interest in the area; or (c) permission to gain access." *Id*. at 140. Accordingly, the court held that the officers acted reasonably and the defendant's Fourth Amendment rights were not violated by the search. *See id*.

Furthermore, when a joint occupant of a property affirmatively expresses to law enforcement officers that he or she permanently lives at the residence, it is reasonable to believe that person has the authority to consent to a search of the premises. For instance, the Tenth Circuit found that the defendant's girlfriend had the ability to consent to a search of his trailer when she told police officers that she lived in the trailer with the defendant and that she "kept personal items, personal hygiene items, and clothing [there]." *Bass*, 661 F.3d at 1035. The court held that, based on these facts, it was reasonable to believe the girlfriend could authorize the officers' search of the trailer. *See id.* When the defendant argued that the law enforcement officers should have conducted a more extensive investigation into the girlfriend's residency status, the court disagreed. *See id*. A ten to fifteen minute long conversation with the girlfriend and their observation of the circumstances were enough to warrant a reasonable belief in the girlfriend's authority. *See id*.

Likewise, the court in *Clay* found that a live-in girlfriend had the apparent authority to consent to a search of the apartment she shared with the defendant even though she did not have a key to the apartment and her name was not on the lease. *See Clay*, 630 F. App'x at 383. The court held that these ambiguities were insufficient to undermine the apparent authority of the girlfriend. *See id*. The officers were given specific details about the apartment that only a resident would know, and therefore were reasonable in their belief that the girlfriend could authorize their search. *See id*.

In the case at bar, Officer Nelson was objectively reasonable in his belief that W.M. had the authority to consent to his search of the apartment she shared with Respondent. W.M. possessed

a common authority over the apartment because of her access to the apartment, her substantial interest in the apartment, and her control over the apartment, thus meeting the standard set out in *Matlock* as well as the multi-pronged test relied on by other circuits. *See Matlock*, 415 U.S. at 170*; see also McGee*, 564 F.3d at 138. Officer Nelson reasonably assessed the circumstances surrounding W.M.'s authority over the shared apartment and, during a ten minute long conversation, W.M. made affirmative statements that she lived there full-time. R. at 4. Respondent's Fourth Amendment rights were therefore not violated by the search.

Additionally, W.M. fits squarely into the category of live-in girlfriends that courts have found to have the authority to consent to searches. Similar to the co-habituating girlfriend in *Bass*, W.M. affirmatively told Officer Nelson that she lived with Respondent and that the apartment was her only home. *See Bass*, 661 F.3d at 1035; R. at 4. Also akin to *Bass*, W.M. kept all of her belongings in the shared apartment, including clothes and personal hygiene items. *See id*; R. at 4. In fact, in this case Officer Nelson had even stronger evidence of W.M.'s common authority over the apartment than the officers did in *Bass*: W.M. received all of her personal mail at the apartment and was in charge of its cleaning and upkeep. *See id*; R. at 4. These facts add up to the conclusion that W.M. had common authority over the apartment and therefore could consent to Officer Nelson's search.

Moreover, any potential ambiguities surrounding W.M.'s common authority over the apartment are immaterial. For instance, the fact that W.M. did not carry a key with her (she retrieved the key from under the door mat at the entrance to the apartment) is inconsequential (R. at. 4); much like the girlfriend in *Clay*, the other factors pointing towards W.M.'s authority were so strong that the lack of a key on her physical person did not matter. *See Clay*, 630 F. App'x at 383. Also like the girlfriend in *Clay*, it did not matter that W.M.'s name was not specifically on

the lease to the apartment because the other factors of her unrestricted access to the apartment and the permanency of her residence relating to her control over the apartment are so compelling. *See id*. Finally, contrary to the Thirteenth Circuit's belief, W.M's age does not weigh against the acceptability of her consent, as several circuits have found that minors younger than W.M. can validly consent to a search. *See U.S. v. Clutter*, 914 F.2d 775, 778 (6th Cir. 1990) (finding that children aged 12 and 14 were not too young to consent to the search of their mother's bedroom). The circumstances surrounding Officer Nelson's interaction with W.M. therefore reasonably lead him to believe she had the authority to consent to his search of the apartment.

Because W.M. kept all of her belongings at the apartment, received all of her important mail at the apartment, cleaned the apartment and had unlimited access to the apartment, as well as made affirmative statements that she lived at the apartment, Officer Nelson had the objectively reasonable belief that she had the authority to give consent to his search. Accordingly, the Thirteenth Circuit erred in its decision to grant Respondent's motion to suppress the evidence obtained during the search of his and W.M.'s apartment.

2. W.M. had the actual authority to consent to the search of the apartment.

In addition to having apparent authority, W.M. also had the actual authority to consent to the search of the apartment she shared with Respondent. Actual authority of a dwelling "rests…on mutual use of the property by persons generally having joint access or control for most purposes." *Matlock*, 415 U.S. at 172 n.7. Courts have found that co-habitants have the actual authority to consent to the search of a dwelling and even a specific room within the dwelling when the co-habitant used the room frequently, cleaned the room on a regular basis and stored clothes or other personal belongings in the room. *See U.S. v. Aghedo*, 159 F.3d 308, 310 (7th Cir. 1998).

For instance, in *Aghedo*, the court held that the defendant's girlfriend had the actual authority to consent to the search of the bedroom in an apartment because of the amount of control and access she exerted over that specific room. *See id*. The court stated that because the girlfriend "had more access and control to [the] room than the typical friend sharing an apartment with another friend" she had the actual authority to allow the officers to search the room. *Id*. The court also held that the girlfriend had the actual authority to allow the officers to look under the mattress within that room as part of their search. *See id*. Because the girlfriend "cleaned the room and stored items there, including intimate apparel" there was "no limitation on her control and therefore on her authority to consent to a search." *Id*. at 311.

Following the court's reasoning in *Aghedo*, W.M. also had the actual authority to consent to the search of the apartment and most, if not all, of the contents located therein. W.M. kept her clothes and personal belongings in the bedroom she shared with Respondent, she cleaned the bedroom and the apartment in its entirety, she received personal mail at the apartment, and she had unlimited access to and control over the apartment and the bedroom. R. at 12. Thus, W.M. had the actual authority to consent to Officer Nelson's search of the apartment in its entirety.

B. W.M. Had the Authority to Consent to the Search of the Cell Phone She Shared with Respondent.

Third-party consent to search extends beyond searching a residence or dwelling and encompasses items located within the area being searched. This Court has held that a defendant seeking to suppress evidence obtained during such a search must show that he or she had a legitimate expectation of privacy in the place being searched. *See U.S. v. Katz*, 389 U.S. 347, 361 (1967) (Harlan, J. concurring). Additionally, the defendant must show that he or she had an "actual subjective expectation of privacy, and…that expectation [must] be one that society is prepared to recognize as 'reasonable.'" *Id*. at 361. Once the defendant has established this reasonable

expectation of privacy, it is the government's burden to show the warrantless search fell within one of the exceptions to the warrant requirement, including valid third-party consent. *See id*.

Moreover, this Court has held that objects within a residence that is subjected to a warrantless search are also subjected to that same search. *See Frazier v. Cupp*, 394 U.S. 731, 740 (1969). In *Cupp*, this Court held that engaging in judging the "metaphysical subtleties" of particular items located within a searchable dwelling should not be allowed. *Id*. The Court reasoned that the consent-to-search authority of a dwelling or residence logically and presumably extends to objects located within the residence. *See id*. This consent to search the objects within a home therefore reasonably extends to cell phones and other personal belongings, so long as one of the exceptions to warrantless searches also applies to the object in question.

Other circuits have also recognized that while certain objects within a home may not necessarily be explicitly authorized by the initial grant of consent, a reasonable officer may be able to deduce from the available facts that authority to search nevertheless exists. For example, in *Bass*, the court held that the defendant's girlfriend had common authority over a closed, zipped bag located in the apartment even though it did not have her name on it or any other markings that indicated she had common authority over it. *See Bass*, 661 F.3d at 1035. The court reasoned that because she lived there, it was reasonable for the defendant to expect that she would have access to and might open the bag (which ended up housing illegal weapons and drug paraphernalia). *See id*. Like the girlfriend in *Bass*, the fact that W.M. possessed common authority over the apartment she shared with Respondent made it reasonable for him to expect that she would have access to the cell phone and other objects located there. *See id*; R. at 2.

Specifically in regards to cellular devices, courts have found that common authority over such a device extends the consent-to-search doctrine and allows officers to search one upon

receiving consent. In a case similar to the case at bar, the Eastern District of Michigan denied a defendant's motion to suppress evidence obtained from his cell phone in a sex trafficking case. *See Gardner* at *7. There, the officers searched the defendant's cell phone after the minor victim told them that she and the defendant shared the phone. *See id*. The court found that even though the defendant was the primary owner of the phone, the officers could reasonably believe, based on the victim's statements, that she shared authority over the phone and therefore had the ability to consent to its search. *See id*. The court based its findings on the evidence that showed she had "complete access to it, including the passcode to open it." *Id*. The fact that the victim had clear access to the password-protected device, in addition to the fact that she made affirmative representations that she had shared possession of the phone and exerted control over it, gave her the authority to consent to the search of the phone and remedied any constitutional error that would have resulted from an otherwise warrantless search. *See id*.

The facts in the case at hand closely parallel the facts from *Gardner*. *See id*. Just like the minor victim there, W.M. had control over Respondent's cell phone because she knew the passcode to it and had full access to it. R. at 4. She also made affirmative representations to Officer Nelson that she and Respondent shared the phone, adding further credence to Officer Nelson's belief that she had the requisite authority to consent to its search. R. at 4, 12. Moreover, the fact that W.M. had her own applications and accounts on the phone (including Facebook and Instagram accounts), that she used the phone to send and receive text messages, that she did not have another cell phone and that her picture was on the lock screen strengthens the argument that W.M. had unfettered authority over the cell phone, and her consent to its search did not violate Respondent's Fourth Amendment rights. R. at 4, 12.

In contrast, the court in *Trulock v. Freeh* held that the defendant's Fourth Amendment rights were violated when officers obtained consent to search his password-protected computer from his girlfriend. *See Trulock v. Freeh*, 275 F.3d 391, 403 (4th Cir. 2001). However, the defendant's girlfriend there did not have the password to the computer nor any other access to the device. *See id*. The present case is therefore distinguishable from *Trulock* because W.M. not only had the password to defendant's cell phone, she also accessed her own personal information and social media accounts from it. R. at 4.

Likewise, the case at bar is distinguishable from this Court's recent decision in *Riley v. California*. In *Riley*, the decision was premised on the search-incident-to-arrest exception to the Fourth Amendment warrant requirements. *See Riley v. California*, 134 S. Ct. 2437, 2479 (2014). There, the Court held that the defendant's Fourth Amendment rights had been violated by the officers' seizure and search of his cell phone, which was located in his vehicle, subsequent to his arrest. *See id.* The Court reasoned that the officers' search of the contents of the cell phone, beyond just the physical aspects of the device, was unwarranted because it represented an unreasonable invasion of the defendant's privacy. *See id.* Although the reasoning in *Riley* is important with regards to the importance of cellular device privacy expectations, the holding in itself is immaterial to the case at bar. The fact that W.M. had the authority to consent, and did consent, to the search of the cell phone makes the concerns outlined in *Riley* inconsequential to the present case. R. at 4.

In light of the above facts, W.M. had the authority to consent to the search of both the apartment and the cell phone she shared with Respondent and the Thirteenth Circuit's decision should be reversed.

CONCLUSION

L.O. 1923 passes constitutional muster under the Fourth Amendment special needs exception. Furthermore, W.M. possessed the authority to consent to the searches of the apartment and cell phone she shared with Respondent.

First, L.O. 1923's immediate goal in protecting children from abuse is distinct from general law enforcement functions. The limits the statute imposes on officers demonstrate the Ordinance's focus on protecting children. Any criminal prosecution is secondary to this goal. Moreover, L.O. 1923 is reasonable in light of the Government's interest in protecting vulnerable children from the All-Star game sex trafficking boom. Balancing this interest against the lowered privacy interest and the limited scope of the search, the warrant and probable cause requirements become impracticable. L.O. 1923 is therefore facially constitutional under the special need exception.

Second, W.M. possessed the requisite authority to consent to Officer Nelson's search of both the apartment and the cell phone she shared with Respondent. Officer Nelson was objectively reasonable in his belief that she had this common authority over the residence because W.M. lived at the apartment full time, kept all of her belongings there and had unrestricted access to the residence. Additionally, Officer Nelson was objectively reasonable in his belief that W.M. possessed common authority over the cell phone she shared with Respondent because she knew the passcode to it, had her own applications and social media accounts on it, used it to send and receive text messages and did not have another cell phone of her own. Because W.M. possessed the requisite common authority to consent to the searches, Respondent's Fourth Amendment rights were not violated by the warrantless search of either the apartment or the cell phone.

This Court should therefore reverse the erroneous ruling of the Thirteenth Circuit and uphold Respondent's conviction.

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully requests that this Court reverse the decision of the Thirteenth Circuit.

Respectfully submitted,

Team P. 10
COUNSEL FOR PETITIONER

/s/ _____
Partner 1

/s/ _____
Partner 2