No. 03-240

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

v.

WILLIAM LARSON

Respondent.

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

OCTOBER TERM 2016

BRIEF FOR PETITIONER

Team: P12
Counsel for Petitioner
October 21, 2016

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QUESTIONS PRESENTED FOR REVIEW

1. Whether searches conducted pursuant to Local Ordinance 1923 ("L.O. 1923") are permitted under the special needs exception of the Fourth Amendment.
2. Whether W.M. possessed sufficient authority to consent to Officer Nelson's search of the apartment at 621 Sasha Lane and the cell phone found therein.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. IV.

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

STATEMENT OF THE CASE

On July 12, 2015, William Larson ("Mr. Larson") was arrested for sex trafficking of a minor in violation of 18 U.S.C. §1591 (a)(1). R. at 4.[1] On August 1, 2015, Mr. Larson was charged with one count of being a felon in possession of a firearm in violation of 18 U.S.C. §922(g)(1) and with one count of sex trafficking of children in violation of 18 U.S.C. §1591 (a)(1). R. at 1. Mr. Larson filed motions to suppress the evidence obtained. R. at 1. The United States District Court for the Western District of Victoria denied the motions. R. at 13. The court held the search, conducted pursuant to Local Ordinance 1923 ("L.O. 1923"), did not violate the Fourth Amendment because special needs were present, rendering the requirement of a warrant impracticable. R. at 10. The district court also found consent was valid because W.M. had apparent authority to authorize both the search of the apartment and the cell phone. R. at 12–13.

On appeal, Mr. Larson argued the district court erred in denying his motion to suppress. R. at 15. The court held that L.O. 1923 served the ordinary purposes of law enforcement and did not qualify under the special needs exception. R. at 19. The court also held W.M. lacked authority to consent to the search of the house and the cell phone. R. at 21. Thus, the United States Court of Appeals for the Thirteenth Circuit reversed the district court's ruling. R. at 23. This Court granted a petition for certiorari. R. at 24.

STATEMENT OF THE FACTS

Modern-day slavery is more prominent than in the entire history of global slavery between 1600 and the end of the American Civil War. R. at 40. Sex trafficking, the most common form of human slavery, significantly increases during large sporting events,

[1] Citations to the factual record will be represented by the letter R. at [Page #].

finding a perfect stage, where large groups of men come together, many traveling without their partners, and indulge in entertainment that they may not otherwise consider. R. at 2, 41. In 2015, Victoria City was selected to host a large sporting event, the Professional Baseball Association All-Star Game (the "Game"), to be played at Cadbury Park. R. at 2. The Game's tentative date was set on July 14, 2015, and was expected to draw tens of thousands of visitors from across the country to the Starwood Park neighborhood. R. at 2.

Soon after the announcement, several groups of citizens voiced their concern the occurrence would increase human trafficking activities in their neighborhood. R. at 2. The collective fear, based on the collected statistics and the personal stories of rescued victims, came coupled with the knowledge that the Starwood Park neighborhood has long been afflicted by gang activity. R. at 2, 3. The "Starwood Homeboyz" and the "707 Hermanos", the controlling gangs in the area, engage in several crimes with their most profitable venture being human trafficking. R. at 2. These gangs control more than 1,500 conscripted sex workers, many of whom are children. R. at 2. Because these groups use the "deep web" and post advertisements on pages that are hard to monitor, law enforcement has difficulty locating the perpetrators of human trafficking. R. at 2.

In response to the eminent threat of sex trafficking, on May 5, 2015 the Victoria City Board of Supervisors ("Board") passed L.O. 1923[2]. R. at 2. Limited to the All-Star

[2] L.O. 1923 reads:

"1. Any individual obtaining a room in a hotel, motel, or other public lodging facility shall be subject to search by an authorized law enforcement officer if that officer has reasonable suspicion to believe that the individual is:
   a. A minor engaging in a commercial sex act as defined by federal law
   b. An adult or a minor who is facilitating or attempting to facilitate the use of a minor for a commercial sex act as defined by federal law.
2. This ordinance shall be valid only from Monday July 11, 2015, through Sunday July 17, 2015.

Game week, and encompassing only the area within a three-mile radius of Cadbury Park, L.O. 1923 gave law enforcement officers the authority to search individuals obtaining certain public lodging facilities based on the reasonable suspicion that the individual was involved in commercial sex acts involving a minor. R. at 2.

A press announcement regarding L.O. 1923 was released the following day that focused on the tremendously damaging effects of child sex trafficking on its victims, and emphasized the intent and determination of authorities to protect local and visiting children. R. at 3, 41. The Board concluded by telling the public that it envisioned a safe and fun week of the All-Star game. R. at 3.

On July 12, 2015, Officer Joseph Richols ("Officer Richols") and Officer Zachary Nelson ("Officer Nelson") were inspecting patrons at Stripes Motel, when they saw Mr. Larson enter with a female, W.M., who seemed young. R. at 3. In addition, Mr. Larson had two identifiable tattoos on the back of his neck. R. at 3. Officer Nelson, a trained officer, recognized the tattoos as indicating he was a member of the Starwood Homeboyz street gang. R. at 3. Based on this, the officers believed they could search Mr. Larson and W.M. per L.O. 1923. Upon searching Mr. Larson, the officers found incriminating items. R. at 4. The officers also searched W.M. When searched, W.M. produced a license listing she was sixteen (16) years old. R. at 4.

Officer Nelson asked W.M. if she was willing to speak with him. R. at 4. She

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3. A search conducted under the authority of this provision shall be limited in scope and duration to that which is reasonably necessary to ascertain whether the individual searched is engaging in the conduct described in subsection (1).
4. This ordinance shall be valid only in the Starwood Park neighborhood.
    a. Starwood Park is defined to encompass the area within a three-mile radius of Cadbury Park Stadium."

agreed. R. at 4. First, Officer Nelson inquired about how W.M. knew Mr. Larson. R. at 29. W.M. identified herself as Mr. Larson's girlfriend, and explained that she and Mr. Larson shared everything. R. at 29. Additionally, W.M. mentioned Mr. Larson was "nice to her," "gave her lots of compliments," and "treated her well." R. at 30. W.M. also told Officer Nelson she lived in an apartment with Mr. Larson, and that she could stay there even though Mr. Larson had been arrested. R. at 4, 29, 36. She also stated she lived in the apartment permanently for approximately one (1) year. R. at 30.

After hearing what W.M. said, Officer Nelson determined W.M. might have mutual use of the apartment. R. 30. Still, Officer Nelson, asked W.M. follow-up questions to ensure she had mutual use. R. at 30. Officer Nelson asked whether W.M. kept her belongings in the apartment. R. 30. W.M. stated she kept the few items she owned at the apartment. R. at 30. Also, W.M. had a separate section in the closet, where she stored her personal clothing. R. at 33. W.M. received her medical bills, and personal mail, to the apartment. R. at 31. W.M. also complained she regularly did all of the house chores. R. at 33. It was only after W.M. disclosed all of this information, that Officer Nelson reasonably believed she had mutual use. Officer Nelson then asked W.M. if she would consent to a search of the apartment. R. at 31. W.M. agreed to do so. R. at 4, 31.

Officer Nelson was led by W.M. directly to the apartment. R. at 31. There, W.M. knew to locate the spare key under a fake rock, and opened the door for Officer Nelson. R. at 31. W.M. told Officer Nelson she and Mr. Larson shared a bedroom. R. at 38. Upon receiving W.M.'s consent, Officer Nelson entered the bedroom and found a loaded handgun with a scratched off serial number. R. at 4, 31.

In addition, Officer Nelson found a cell phone on a nightstand in the room. R. 4.

The phone's lock screen had a photograph, which prominently displayed W.M. with Mr. Larson. R. at 34, 43. The phone also had an "S" and "W" wrapped around a wizard hat. R. 4. Mr. Larson had a tattoo identical to the image on the computer. R. at 4. W.M. also had a tattoo with the letters "S" and "W." R. at 37.

W.M. stated she only had access to one cell phone Mr. Larson had given her so that he could check on it. R. 30. Officer Nelson, again, inquired to determine whether W.M. had authority over the phone. R. at 31. W.M. stated this particular cell phone was the one Mr. Larson shared with her. R. at 4, 31. While Mr. Larson paid for the service of the phone, W.M. used it and kept her applications on it. R. at 32. Specifically, W.M. kept her Instagram, Facebook, and Snapchat on the phone. R. at 32. Aside from downloading all her apps onto the cell phone, W.M. sent personal text messages, and made personal phone calls on the cell phone.[3]

After obtaining information from W.M., Officer Nelson asked W.M. for consent to search the phone. R. at 4. W.M. consented, freely and voluntarily. R. at 19. W.M. gave Officer Nelson the password to access the phone.[4] R. at 4. Officer Nelson found inappropriate photographs of W.M. and a of video of Mr. Larson rapping about "pimping." R. at 4, 32.

SUMMARY OF THE ARGUMENT

Although searches pursuant to the Fourth Amendment are typically justified by a warrant based on probable cause, this Court has emphasized that, under certain well-

[3] Mr. Larson also used the cell phone for the purpose of making phone calls and sending messages for the "business they had together." R. at 32.

[4] The password to unlock the phone 4-11-5-11, a number combination related to the gang Mr. Larson was affiliated with. R. at 4.

delineated exceptions, the absence of a warrant will not render the search unreasonable. The exception articulated by this Court in *New Jersey v. T.L.O* of special needs that serve a purpose beyond the ordinary purposes of law enforcement will render the warrant and probable cause requirements of the Fourth Amendment impracticable.

L.O. 1923 falls within the special needs exception to the Fourth Amendment because these searches serve a purpose that is separate from the ordinary purposes of law enforcement. Although the Thirteenth Circuit Court of Appeals found guidance in *Ferguson* and *Edmond*, those cases are not instructive because the regulations there allowed for suspicionless searches, while L.O. 1923 only permits searches based upon reasonable suspicion. While cases struck down under the special needs exception have primary punitive purposes, the immediate purpose of L.O. 1923 to protect the vulnerable youth from the threat of human trafficking and sex slavery is divorced from the ordinary purposes of law enforcement.

Further, the special need targeted by L.O. 1923 renders the ordinary warrant requirement impracticable. The intrusions allowed by the ordinance were limited to a physical search of the individual, and they were also limited with respect to the time and scope of their application. Moreover, searches pursuant to L.O. 1923 eliminated the practicability of a warrant because it was the immediate and imminent nature of the threat of human trafficking that motivated the implementation of the ordinance.

Turning to the issue regarding the consent of the apartment, W.M.'s consent is valid because Officer Nelson reasonably believed she had mutual use of the apartment. For a valid consent two elements must be met (1) the consenting person must have actual or apparent authority; and (2) the consent must be voluntarily, and knowingly provided.

Mutual use, not ownership, establishes actual or apparent authority. Officer Nelson acquired facts a reasonable officer would need to ensure mutual use was present. Here, W.M. knew the location of the spare key to enter the home. Further, W.M. lived in the apartment for about one (1) year, kept her belongings at the apartment, regularly did all the chores at the apartment, and received her mail and medical bills to the apartment. Officer Nelson reasonably believed W.M. had the common authority to consent because all of the above-mentioned facts indicate mutual use and access of the apartment.

Similarly, under the totality of the circumstances, Officer Nelson reasonably believed W.M. had authority to consent to the search of the cell phone. The cell phone was found in a room W.M. shared with Mr. Larson. W.M. shared the phone with Mr. Larson. W.M. knew the password of the phone, and unlocked it for Officer Nelson to access. W.M. also kept all of her applications on the cell phone, made phone calls, and sent text messages. A person of reasonable caution would reasonably believe W.M. had authority to consent to the search of the phone. W.M.'s consent was freely and voluntarily given. Thus, W.M. had apparent authority to consent to the search of the apartment and the cell phone found therein.

STANDARD OF REVIEW

Courts have sole discretion as to whether a motion to suppress should be granted or denied. Courts may look to factual findings to make such a determination. Thus, where the determination of a motion to suppress is at question, a mixed standard of review exists. *United States v. Washington*, 573 F.3d 279, 282–83 (6th Cir. 2009). When the question of law regards a motion to suppress, facts are viewed in the light most favorable to the prevailing party. *See United States v. Kimoana*, 383 F.3d 1215, 1220

(10th Cir. 2004). Questions of law are reviewed *de novo* and findings of fact are reviewed for clear error. *United States v. Denberg*, 212 F.3d 987, 991 (7th Cir. 2000).

ARGUMENT

I. THE THIRTEENTH CIRCUIT COURT OF APPEALS' HOLDING SHOULD BE REVERSED BECAUSE SEARCHES CONDUCTED PURSUANT TO L.O. 1923 ARE PERMITTED UNDER THE SPECIAL NEEDS EXCEPTION TO THE FOURTH AMENDMENT.

The Fourth Amendment of the United States Constitution guarantees individuals the right to be secure against "unreasonable searches and seizures." U.S. CONST. amend. IV. In warrantless searches, the burden is placed on the government to show that the search in question was reasonable. *Katz v. United States*, 389 U.S. 347, 357 (1967); Although permissible warrantless searches generally require a finding of probable cause, this Court has recognized that probable cause is not an "irreducible requirement of a valid search." *New Jersey v. T.L.O.,* 469 U.S. 325, 340 (1985); *see also Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls,* 536 U.S. 822, 828 (2002). Specifically, this Court held that warrantless searches not based on probable cause will not be discarded as unreasonable, so long as they fit into a few well-delineated exceptions. *Mincey v. Arizona,* 437 U.S. 385, 390 (1978).

Within these well-delineated exceptions falls the special needs exception originally articulated by Justice Blackmun of this Court in his 1985 concurring opinion in *New Jersey v. T.L.O*. In this landmark decision, this Court clarified that circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable, a court is entitled to substitute its balancing of interests for that of the Framers. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring); *see also United States v. Sczubelek*, 402 F.3d 175 (3d Cir. 2005). Because minimal

intrusions were allowed under L.O. 1923 to achieve purposes that go beyond the ordinary purposes of law enforcement, searches pursuant to L.O. 1923 are permitted under the special needs exception of the Fourth Amendment.

A. Searches pursuant to L.O. 1923 serve a primary purpose that is separate from the ordinary purposes of law enforcement.

The first step in the special needs exception inquiry is to determine whether the special need claimed by the government goes beyond the ordinary purposes of law enforcement. *Ferguson v. City of Charleston*, 523 U.S. 67 (2001). However, it is not sufficient for the court to inquire into what the general purpose of a regulation is, or even what the ultimate purpose is. This Court has emphasized that the inquiry must focus on the *immediate* purpose of the search. *Id* at 82–83; *see also United States v. Amerson*, 483 F.3d 73, 81 (2d Cir. 2007). Thus, as long as the immediate purpose of a search is one other than crime detection, the government will have asserted a special need. *Chandler v. Miller*, 520 U.S. 305, 314 (1997). As evidenced by the press release, the purpose of L.O. 1923 was to "protect the safety of [the] local children as well as those visit[ing] for the Midsummer Classic." R. at 41. Palpably, the protection of the vulnerable youth is a purpose greater and separate from the ordinary evidence gathering objectives of law enforcement.

1. *Ferguson* and *Edmond* are not instructive in this case because L.O. 1923 did not authorize suspicionless searches.

Before further analysis can be conducted towards the primary purposes of L.O. 1923, it is important to highlight the main flaw in the analysis of the Thirteenth Circuit Court of Appeals that dismissed the special needs inquiry by finding guidance in *Ferguson* and *Edmond*. While L.O. 1923 restricts the discretion of law enforcement

officers to proceed pursuant to the ordinance only in the presence of reasonable suspicion, the regulations in *Ferguson* and *Edmond* provided no such restriction, and instead allowed for suspicionless searches.

Ferguson challenged the policy of a state hospital that allowed staff members to forward to the police the results of urine tests conducted on expectant mothers to detect the presence of drugs. *Ferguson*, 532 U.S. at 72. *Edmond* dealt with a drug interdiction checkpoint that its creators described as "an effort to interdict unlawful drugs." *City of Indianapolis v. Edmond*, 531 U.S. 32, 34 (2000). Notably lacking from either of these regulations was any requirement that the searches be conducted pursuant to reasonable suspicion. L.O. 1923 expressly requires authorized law enforcement to conduct searches only after a finding of reasonable suspicion. R. at 2.

Better guidance, instead, is found in this Court's decision in *Griffin*. In that case, warrantless searches of probationers' homes were upheld based only on "reasonable grounds." *Griffin v. Wisconsin*, 483 U.S. 868, 870-71 (1987). While subsequent decisions have highlighted that a *probation* officer conducted that search, the same year that this Court decided *Ferguson*, it declined to use the special needs exception to decide *United States v. Knights* where a probation officer conducted a search of an apartment based on reasonable suspicion; and decided instead to employ a general balancing test under the Fourth Amendment. 534 U.S. 112 (2001). The way to reconcile these decisions is that, under the totality of the circumstances, a search by a probation officer based on reasonable suspicion gives way for the application of a regular balancing test of the privacy and government interests involved. Where no personal relationship exists between the law enforcement officer and the person subjected to the search, unlike is the

case for probation officers, the court need not step away from the special needs exception, but rather find guidance *Griffin* where, even though a relationship existed, only "reasonable grounds"[5] and not as much as reasonable suspicion was required, as it is the under L.O. 1923.

2. The primary purpose of L.O. 1923 to protect the vulnerable youth from the threat of human trafficking and sex slavery is divorced from the ordinary purposes of law enforcement.

With the guidance of *Griffin*, *Ferguson*, *Edmond*, and any other case decided under the special needs exception, it is not difficult to distinguish the purpose of searches pursuant to L.O. 1923 from those struck down under the exception. With the central focus in removing children from dangerous situations before they can escalate, R. at 41, it is difficult to imagine that L.O. 1923 would not serve an immediate purpose that is detached from the ordinary crime detection oriented purposes of law enforcement.

In looking to the programmatic purpose, this Court has found it appropriate to consider all the available evidence in order to determine the relevant primary purpose.[6] *Ferguson*, 532 U.S. at 81. In cases where courts have struck down regulations pursuant to the special needs exception, it has been noted that no empirical or historical evidence of an ongoing problem exists. *See Chandler v. Miller*, 520 U.S. 305 (1997); *see also Knox Cty. Educ. Ass'n v. Knox Cty. Bd. of Educ.*, 158 F.3d 361 (6th Cir. 1998). Remarkably in contrast have been cases where this Court has found evidence of an

[5] This Court was bound by the state court's interpretation that only "a tip from a police detective that Griffin 'had' or 'may have had' an illegal weapon at his home constituted the requisite 'reasonable grounds.'" *Griffin*, 483 U.S. at 875.

[6] This Court has held that whether it was law enforcement personnel or another government officer that conducted the search in question is irrelevant to the primary purpose inquiry. *Griffin*, 483 U.S. at 873–75.

ongoing concern leading up to the implementation of the regulations that it has held to be constitutional under the special needs exception. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *see also Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989). Empirical studies cited to in the press release that followed the implementation of L.O. 1923 show the significant increase in sex services advertisements and human trafficking during major sporting events.[7] R. at 41. This means that not only was there a major nationwide emergency at the time of the implementation of L.O. 1923, but also that it became imminent with the approach of a major sporting event, giving credit to the legitimacy of the primary purpose of the legislation indicated by the press release.

Additionally, as evidenced by the press release, the government's interest in the protection of the vulnerable youth from the imminent threat of sex trafficking genuinely predominated over the desire to collect evidence in an effort to punish wrongdoers. Half of the press release was focused on a victim's story that symbolizes the many others that go silent under the oppression of human trafficking and sex slavery. In contrast, no part of the press release referenced or alluded to the desire to punish the perpetrators of this horrendous crime. This strongly indicates a focus on the protection of certain groups

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[7] Dominique Roe-Sepowitz, *Exploring the Impact of the Super Bowl on Sex Trafficking*, THE MCCAIN INSTITUTE (Feb. 2015), https://www.scribd.com/doc/256655029/Exploring-the-Impact-of-the-Super-Bowl-on-Sex-Trafficking-2015 (examining online postings advertising sex services in the days leading up to the 2015 Super Bowl); Meghan Casserly, *Sex and the Super Bowl*, FORBES (Feb. 2, 2012), http://www.forbes.com/sites/meghancasserly/2012/02/02/sex-and-the-super-bowl indianapolis-spotlightteen-sex-trafficking/#551a759f48a7 (discussing online postings advertising sex services that referenced the Super Bowl); Lane Anderson, *The Super Bowl is the largest human trafficking event in the country*, DISCRETE NEWS NATIONAL (Jan. 30, 2015), http://national.deseretnews.com/article/3412/the-super-bowl-is-the-largest-human-trafficking-event-in-the-country.html (evaluating human traffick into the 2010 Super Bowl host city).

under threat over the general crime prevention tendencies that are ordinary to law enforcement. *See Nicholas v. Goord*, 430 F.3d 652 (2d Cir. 2005).

Although the Thirteenth Circuit recognized the noble goal of L.O. 1923, it understood it to be goal that many task forces set up to combat every day. R. at 18. While this may truly be a frequent problem law enforcement encounters, it is difficult to envision them going out to the field on an ordinary basis with the specific purpose in mind to dedicate their main focus to combating human trafficking and sex slavery. As the Second Circuit noted in *Nicholas v. Goord*, in *Edmond* this Court prohibited searches conducted pursuant to a general interest in crime control and did not intend to prohibit *every* law enforcement objective, but rather only usual law enforcement objectives. 430 F.3d 652, 663 (2d Cir. 2005).

B. The special need targeted by L.O. 1923 renders the ordinary requirement of a warrant under the Fourth Amendment impracticable.

Having established that the primary purpose of L.O. 1923 is a valid special need beyond the ordinary purposes of law enforcement, the next step is to evaluate the impracticability of requiring a search warrant based on probable cause under the circumstances. As noted by this Court, "[w]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant." *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989). To achieve this goal, the court will evaluate three factors: (1) the nature of the privacy interest involved; (2) the character and degree of the governmental intrusion; and (3) the nature and immediacy of the

government's needs, and the efficacy of its policy in addressing those needs. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

1. The privacy interest intruded upon was limited to the physical search of the individual.

The interest involved in special needs regulations that permit warrantless searches is that of remaining free from unreasonable searches. However, this expectation must be objectively reasonable. *Katz*, 389 U.S. at 362. Although an individual's interest in not being searched may be significant, the intrusions permitted by L.O. 1963 were limited to a physical search of the individual against whom the officer had developed reasonable suspicion. While this is not minute intrusion, cases where much greater intrusions were allowed, such as urine, blood tests, and home searches with the potential to reveal a larger amount of information than a general physical search, were sustained under the special needs exception. *See generally Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989); *see also Griffin v. Wisconsin*, 483 U.S. 868 (1987).

2. The character of the intrusion was limited in time and scope.

As this Court emphasized in *United States v. Martinez-Fuerte*, the principal protection of Fourth Amendment rights lies in appropriate limitations on the scope of the intrusion. 428 U.S. 543, 566-67 (1976). L.O. 1923 is characterized by its multiple limitations. The applicability of it provisions was limited to encompass the area within a three-mile radius of the area most likely to be hit by the epidemic. R. at 3, 45. Further, distinctive from the prolonged or permanent regulations previously under the scrutiny of this Court, the ordinance was to be effective only for week of the Game. R. at 2.

Also notably absent from prior cases reviewed by this Court is a showing of individualized suspicion. To establish the degree of individualized suspicion required of

a search, this Court has required "a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable." *Knights*, 534 U.S. at 121. L.O. 1923 almost required individualized suspicion by guiding officers to obtain their reasonable suspicion based on specific characteristics of the individuals that led to the inference of very specific conduct. R. at 2. This is further illustrated when in this case the officers used all their training and knowledge to identify Mr. Larson as one of the perpetrators the ordinance was designed to protect victims from, before proceeding to search the individual.[8] In *Edmond*, this Court held that "[w]hen law enforcement authorities pursue primarily general crime control purposes . . . [intrusions] can only be justified by some quantum of individualized suspicion." *Edmond*, 531 U.S. at 47; *see generally Roe v. Marcotte*, 193 F.3d 72 (2d Cir. 1999). Thus, under this analysis, searches based on individualized suspicion, such as in this case, would be justified.

3. The government concern at issue originated in the immediate nature of the threat of human trafficking.

As the court in *Knox Cty. Educ. Ass'n* articulated, "[w]e can imagine few governmental interests more important to a community than that of insuring the safety and security of its children." *Knox Cty. Educ. Ass'n,* 158 F.3d at. 374. Not only is there an important interest here, but also a threat of human trafficking and sex slavery that is "substantial and real." *Chandler*, 520 U.S. at 323. Even though the statistics relied on by the Board to determine the imminence of the threat focused mainly on previous Super

[8] The officers were able to connect Mr. Larson's visible tattoos to one of the bands suspected of human trafficking which, which coupled with characteristics of the W.M. that matched those of underage victims, led to the development of the necessary reasonable suspicion to proceed pursuant to the ordinance.

Bowl games, R. at 41, the All-Star Game was one that would attract a significant amount of people as well as a crowd similar to that of the Super Bowl, R. at 9, requiring precautions in preparation for a threat of the same magnitude. Here, "the [g]overnment's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy." *Von Raab*, 489 U.S. at 668.

Inevitably, the inherent delay in obtaining a warrant would have devastating consequences in circumstances such as those present here that require an immediate response from law enforcement officers. *T.L.O.,* 469 U.S., at 340. Thus, after balancing the limited intrusion on the individual permitted by L.O. 1923 against the promotion of an important governmental interest and determining that requiring a warrant would cause an unnecessarily fatal delay, it can be concluded that the promotion of this special need rendered the warrant requirement impracticable.

Accordingly, because the government promoted a special need to protect the vulnerable youth from the imminent threats of human trafficking and sex slavery that made the ordinary warrant requirement impracticable, searches pursuant to L.O. 1923 are justified under the special needs exception of the Fourth Amendment.

II. THE THIRTEENTH CIRCUIT COURT OF APPEALS' HOLDING SHOULD BE REVERSED BECAUSE, UNDER THE TOTALITY OF THE CIRCUMSTANCES, W.M. HAD SUFFICIENT AUTHORITY TO CONSENT TO A SEARCH OF THE APARTMENT AND THE CELL PHONE FOUND THEREIN.

The Fourth Amendment provides protections to prevent individuals from being subjected to unreasonable searches and seizures. U.S. CONST. amend. IV. A search within the meaning of the Fourth Amendment occurs where a person has a reasonable expectation of privacy. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). When

information is obtained through the intrusion of an individual's home, a search has occurred. *Florida v. Jardines*, 133 S. Ct. 1409, 1412 (2013). Particularly, the Fourth Amendment closely protects the "sanctity" of the home. *Payton v. New York,* 445 U.S. 573, 585 (1980). Similarly, an individual manifests the requisite expectation of privacy in their cell phones. *Riley v. California*, 134 S. Ct. 2473, 2489 (2014).

A search without a warrant is "per se unreasonable," subject to only a few well-delineated exceptions. *Katz,* 389 U.S. at 357. Consent is a well-delineated exception to the warrant and probable cause requirement. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Thus, a search warrant is unnecessary where an individual, with authority, voluntarily consents. *Illinois v. Rodriguez,* 497 U.S. 177, 181 (1990). Here, W.M. had apparent authority to consent to the search of the apartment and the cell phone. Accordingly, Officer Nelson's search of the apartment and the cell phone was not in violation of the Fourth Amendment. Thus, the evidence found need not be suppressed.

A. W.M. had apparent authority to consent to the search of the apartment because Officer Nelson reasonably believed W.M. had mutual use and access of the apartment.

W.M.'s consent is valid because the facts known to Officer Nelson, at time of the search, would warrant a reasonable officer to believe W.M. had authority to consent. A search that is conducted pursuant to consent obtained from the individual whose right is being infringed upon, is generally reasonable. *Fernandez v. California*, 134 S. Ct. 1126, 1132 (2014). Similarly, a co-occupant may have sufficient authority to consent to the search of a house. *Georgia v. Randolph*, 547 U.S. 103, 106 (2009); *United States v. Matlock*, 415 U.S. 164, 170 (1974) (holding a third-party may consent to the search of a place they have common authority of). Common authority is deduced, not through

ownership, but by mutual use of a property by a person who has joint access and control. *Id*. at 171 n. 7; *Rodriguez*, 497 U.S. at 182; *see also United States v. Penney*, 576 F.3d 297, 307 (6th Cir. 2009). The issue of whether W.M. possessed actual authority was not preserved.[9] The Court's inquiry does not, however, end with actual authority. Instead, the court must next inquire whether W.M. possessed apparent authority.

W.M. possessed apparent authority, and thus, had sufficient authority to consent to the search of the apartment. A person need not have actual authority to have sufficient authority for the purpose of providing consent. *United States v. McCurdy*, 480 F.Supp.2d 380, 385 (D. Me 2007). A third party with apparent authority, can consent. *Rodriguez*, 497 U.S. at 177. (holding a "warrantless entry is valid when based upon consent of a third party whom police, at the time of entry, reasonably believe possess common authority over premises, but who in fact does not do so."). The basic premise of the Fourth Amendment is reasonableness. *Kentucky v. King*, 563 U.S. 452, 459 (2011). "[W]hat is at issue when a claim of apparent consent is raised is . . . whether the right to be free of *unreasonable* searches has been *violated*." *Rodriguez*, 497 U.S. at 187.

To establish apparent authority, the relevant objective inquiry questions whether, based on the facts known at the time of the search, a "man of reasonable caution" would believe the consenting party had authority over the premises. *Id*. at 188. The inquiry looks at the reasonableness of the officer's conduct. *United States v. James*, 353 F.3d 606, 615 (8th Cir. 2003). Here, the facts known to Officer Nelson at the time of the

[9] In this case, the district court and the Thirteenth Circuit Court of Appeals do not inquire as to whether W.M. possessed actual authority, or common authority. R. at 10, 20. The argument for apparent authority had not been proffered. R. at 10.

search reasonably indicate common authority. Thus, Officer Nelson reasonably believed W.M. had authority to consent.

1. Officer Nelson diligently acquired sufficient information to make a determination of mutual use prior to using W.M.'s consent to conduct the search of the apartment.

Prior to accepting the consent of W.M., Officer Nelson diligently acquired sufficient information, which would support a reasonable finding of authority to consent. Officers must consider surrounding circumstances when determining if further inquiry is necessary. *Id*. A warrantless entry is unlawful where ambiguity regarding mutual use exists, and an officer proceeds without further inquiry. *United States v. Salinas-Cano*, 959 F.2d 861, 864 (10th Cir. 1992); *see also Kimoana*, 383 F.3d 1215 at 1222. (finding where ambiguous facts regarding authority are present, the officer "has a duty to investigate further before relying on the consent."); *United States v. Cos*, 498 F.3d 1115, 1129 (10th Cir. 2007).

Officer Nelson conducted the necessary inquiry to determine the relationship between W.M. and Mr. Larson. Officer Nelson asked W.M. how she knew Mr. Larson. R at 29. W.M. stated she was Mr. Larson's girlfriend, that Mr. Larson was "nice to her" and "treated her well." R. at 29–30. An officer in the position of Officer Nelson would reasonably conclude W.M. was in an affectionate relationship with Mr. Larson. In the absence of express facts indicating the contrary, the court in *McCurdy* held apparent authority was present despite the fact it was not "inconceivable" that a domestic violence victim would not have authority to consent to a search of a perpetrator's home. *McCurdy*, 480 F.Supp.2d at 387. Similarly, without express facts to the contrary, Officer Nelson's inquiry strengthened W.M.'s appearance of authority.

Officer Nelson sought additional information indicating W.M. had authority to consent. In *United States v. Goins*, officers were deemed to have obtained a valid consent where (1) they did not "blindly accept claim of authority over the premises;" and (2) questioned defendant's girlfriend to determine whether she had authority to consent. 437 F.3d 644, 649 (7th Cir. 2006). Here, Officer Nelson did not blindly accept W.M.'s consent. After W.M. told Officer Nelson she lived in the apartment with Mr. Larson, Officer Nelson asked W.M. several questions including whether she kept her belongings in the apartment and received mail to the apartment. R. at 30. Officer Nelson only proceeded with W.M.'s consent after the questions were answered in the affirmative, and W.M. provided more information. R. at 30. Thus, W.M.'s consent was valid because Officer Nelson did not blindly accept W.M.'s claim of authority. It was only after determining, through questioning, that W.M. had the necessary authority to consent, that Officer Nelson proceeded.

2. Officer Nelson reasonably believed W.M. had common authority to consent to the search of the apartment.

Based on the facts known to Officer Nelson, at the time of search, he reasonably concluded W.M. had authority to consent. "[T]he Fourth Amendment is not violated when officers enter without a warrant, when they reasonably, although erroneously, believe the person who consents to their entry has the authority to consent to this entry." *Kimoana*, 383 F.3d at 1221–22. The reasonableness of the officer's finding is determined by surrounding circumstances. *Rodriguez*, 497 U.S. at 188. Courts have established several factors relevant in the determination of whether the finding of mutual use was reasonable. Factors indicating a third-party may have authority of a property include:

> (1) possession of a key to the premises; (2) a person's admission that she lives at the residence in question; (3) possession of a driver's license listing the residence as the driver's legal address; (4) receiving mail and bills at that residence; (5) keeping clothing at the residence; (6) having one's children reside at that address; (7) keeping personal belongings such as a diary or a pet at that residence; (8) performing household chores at the home; (9) being on the lease for the premises and/or paying rent; and (10) being allowed into the home when the owner is not present.

United States v. Groves, 530 F.3d 506, 509–10 (7th Cir. 2008); *see McCurdy*, 480 F.Supp.2d at 387. (finding sufficient factors present to determine the officer reasonably believed the third-party had authority); *United States v. McGee*, 564 F.3d 136, 141 (2d Cir. 2009) (conducting an analysis of the circumstances present and finding defendant's girlfriend possessed adequate authority to consent).

In this case, based on the facts available to Officer Nelson, W.M. had joint control of the apartment as Mr. Larson's girlfriend, and had sufficient authority to consent to the search of it. W.M. told Officer Nelson she lived in the apartment with Mr. Larson for about one (1) year. R. at 4, 29, 36. *See United States v. Hudson*, 405 F.3d 425, 441 (6th Cir. 2005) (finding apparent authority where defendant's girlfriend stated she lived at the home and produced a key). W.M.'s lack of rent payment does not, alone, extinguish apparent authority. *See, e.g.*, *United States v. Weeks*, 666 F.Supp.2d 1354, 1378 (N.D. Ga. 2009) (finding defendant's live-in girlfriend had authority despite not having her own set of keys and not making rent payments). Likewise, W.M.'s age does not belittle her claim to authority of the apartment. *See United States v. Gutierrez-Hermosillo*, 142 F.3d 1125, 1231 (10th Cir. 1998) (upholding consent provided by a fourteen (14) year old); *see also United States v. Sanchez*, 608 F.3d 685, 690 (10th Cir. 2010) (finding a "sophisticated" fifteen (15) year old had authority). W.M., while not carrying a key on

her person, knew exactly where to locate the spare key and enter the property without the assistance of Mr. Larson. R. at 31.

Although access alone is not sufficient to show apparent authority, W.M. had much more than simple access. *See United States v. Turner*, 23 F.Supp.3d 290, 308 (S.D.N.Y. 2014) (finding simple access where a third party did not use the premises did not establish apparent authority). W.M. kept her belongings she had at the apartment. R. at 30. In addition, W.M. was allotted a separate section in the closet of the room she shared with Mr. Larson. R. at 33. W.M. also regularly did all the house chores. R. at 33. W.M. received her personal mail to the apartment including her medical bills. R. at 31. Lastly, W.M. also hosted her friends at the apartment. R. at 38. The majority of the factors support and weigh in favor of W.M. having the appearance of common authority. Thus, it was reasonable for Officer Nelson, based on these facts known to him at the time of search, to find W.M. had authority to consent to the search of the apartment.

B. Under the totality of the circumstances known by Officer Nelson at the time W.M. consented, Officer Nelson reasonably believed W.M. had authority to consent to the search of the cell phone.

W.M. had sufficient authority to consent to the search of the cell phone, independently from her authority to consent to the search of the apartment. Even a person who has access to a property may lack authority to consent to the search of an item therein. *See Randolph*, 547 U.S. at 112. Whether apparent authority exists in relation to an object, the relevant inquiry is an objective totality of the circumstance test. *United States v. Andrus*, 483 F.3d 711, 717 (10th Cir. 2007). The Court should inquire whether the totality of the circumstances would lead a reasonable officer to believe the individual had joint access or control of the object being searched. *United States v. Ruiz*,

F.3d 877, 880 (9th Cir. 2005). The totality of the circumstances relevant in determining authority, include a number of factors that establish access and the use of an object. *See, e.g.*, *United States v. Buckner*, 473 F.3d 551,555 (4th Cir. 2007); *United States v. Morgan*, 435 F.3d 660, 663–64 (6th Cir. 2006).

1. W.M. told Officer Nelson she shared the phone with Mr. Larson, and no indicia indicated Mr. Larson exclusively owned the cell phone.

W.M. told Officer Nelson she shared the phone with Mr. Larson. R. at 30. Additionally, the cell phone carried no indicia indicating that it belonged exclusively to Mr. Larson. An officer may not rely on consent of an individual where they know the individual does not own the item. *James*, 353 F.3d at 615. (finding an individual lacked authority to consent to a search where officers knew the discs belonged to defendant). *Id.* Dissimilar from James, the cell phone carried no indicia that it exclusively belonged to Mr. Larson. The cell phone displayed a sticker belonging to Mr. Larson. R. at 32. However, the cell phone's lock screen prominently displayed a photograph featuring W.M. R. at 34, 33. The mere fact the password of the phone was linked to the gang numbers does not, by itself, indicate Mr. Larson owned the phone. The cell phone displayed an "S" and "W". Both W.M. and Mr. Larson have a tattoo with those letters. R. at 4, 37. Lastly, the cell phone is the only phone W.M. had access to. R. at 30. Thus, Officer Nelson had no reason to believe Mr. Larson owned the cell phone exclusively.

2. W.M. was capable of accessing the phone and the contents of the cell phone without Mr. Larson's assistance.

W.M. had access to the area where the cell phone was found because it was located in a room she shared with Mr. Larson. Where an item is located in a common area is a relevant factor. *Morgan*, 435 F.3d at 663–664. In this case, the cell phone was

found on a nightstand in a room W.M. shared with Mr. Larson. R. at 33. Notably, the cell phone was placed openly on top of the nightstand, in a room W.M. had general access to. The room had two nightstands. Despite the different contents on the two nightstands, Officer Nelson reiterated the nightstand on which the cell phone was placed could have belonged to either a woman or a man. R. at 35. Therefore, W.M. had access to the area in which the phone was located and had ability to obtain the cell phone.

W.M. also had access to the contents of the cell phone because she knew the password to unlock the phone. An important factor includes whether the documents on the device were password protected. *United States v. Clutter*, 674 F.3d 980, 984 (8th Cir. 2012). *See Trulock v. Freeh*, 275 F.3d 391, 403 (4th Cir. 2001) (finding an individual did not have authority where they did not know the password to a computer). Dissimilar from the case in *Trulock*, W.M. had the password to the cell phone and granted Officer Nelson access to it without the assistance of Mr. Larson. R. at 4. Additionally, W.M. had access to the phone without having to ask Mr. Larson on a regular basis. Officer Nelson reasonably believed, W.M. had authority based on the totality of the circumstances including W.M.'s visible access to the cell phone.

3. W.M. kept all of her applications on the cell phone, sent personal text messages, and made phone calls on the cell phone.

Officer Nelson reasonably believed W.M. had joint control of the cell phone where she used the cell phone and kept all of her applications on the cell phone. Where a person uses a device even for small tasks, the person may manifest authority to consent to a search of that device. *Buckner* 473 F.3d at 555. W.M. extensively used the cell phone for her personal use. W.M. kept her Instagram, Snapchat, and Facebook social media

apps on the cell phone. R. at 32. W.M. also placed phone calls and sent personal text messages on the phone. R. at 32. Based on the totality of the circumstances present, Officer Nelson reasonably believed W.M. had joint access of the cell phone at the time of the search.

C. W.M.'s consent to both searches was voluntarily, and knowingly provided.

Consent provided must be knowing and voluntary to be deemed valid. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). There is no dispute that W.M.'s consent was voluntarily and knowingly provided. R. at 19. Thus, because W.M. provided Officer Nelson with valid consent, the search of the apartment and the cell phone was proper, and the ruling of the Thirteenth Circuit Court of Appeals should be reversed.

CONCLUSION

For the reasons stated above, the United States of America respectfully submits this Court reverse the ruling of the United States Court of Appeals for the Thirteenth Circuit.

Respectfully Submitted,

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Team #P12