No. 03-240

In The
Supreme Court of the United States

THE 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 of Petitioner

Counsel for Petitioner

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I. The special needs doctrine permits searches that deviate from the warrant requirement of the Fourth Amendment provided that the underlying program serves an immediate purpose distinct from ordinary law enforcement and that the search is reasonable when balancing private interests against public needs. Victoria City passed Local Ordinance 1923 for the express purpose of protecting child victims of commercial sex trafficking, permitted only searches restricted in time, place, and scope to that need, and required individualized suspicion before their execution. Was the warrantless search of William Larson's person valid under the special needs doctrine?

II. A police officer may reasonably rely on a third party's consent once she has demonstrated mutual use of and joint access to the property or effects to be searched. The facts known to Officer Nelson at the time of his search indicated that W.M. lived at 621 Sasha Lane with William Larson, and that she shared a cell phone with him for most purposes. Did Officer Nelson reasonably rely on W.M.'s consent to search the apartment and phone?

STATEMENT OF THE CASE

I. Facts

This case concerns the constitutionality of a city ordinance permitting officers, under narrow circumstances, to forego the warrant requirement of the Fourth Amendment via the "special needs" exception and the correct application of the doctrine of apparent authority to consent to search under the same. In March of 2013, Victoria City, Victoria ("the City") was selected as the site of the Professional Baseball Association's 2015 All-Star Game to be held on July 14, 2015 at Cadbury Park, a stadium located in the Starwood Park neighborhood of downtown Victoria City. R. at 2. Starwood Park is plagued by gang activity primarily from the "Starwood Homeboyz," but also by the "707 Hermanos." *Id.* Though both gangs engage in traditional criminal activities, their most lucrative enterprise is human sex trafficking, often of minors. *Id.* Indeed, the City cites an academic study estimating that there may be as many as 8,000 child victims throughout Victoria City, of which nearly of 1,500 are likely enslaved in Starwood Park, three times the amount of any other area in the city. R. at 40.

Drawing on multiple sources, the City demonstrated the uniquely dangerous situation for child sex trafficking victims at major sporting events and their already high concentration in Starwood Park. *Id*. The press release demonstrates that the City's overriding interest in passing L.O. 1923 was the protection of minors. *Id*. Moreover, it made no mention of criminal prosecution or the reduction of gang activity nor even commented on the abominable criminality of those engaged in sex trafficking. *Id.* Specifically, L.O. 1923 permitted the personal search of an individual reasonably suspected to be engaged in or facilitating the commercial sex acts of a minor. R. at 2. It went into effect on July 11, 2015, expired on July 17, 2015, and was restricted to the three square miles surrounding the Cadbury Park Stadium. *Id.*

On the night of July 12, Victoria City Police officers Zachary Nelson and Joseph Richols were stationed at the front desk of the Stripes Motel, located in the center of Starwood Park. R. at 3. When William Larson ("Larson") and W.M. approached the front desk, Officer Nelson observed that neither carried any luggage and that Larson bore two gang tattoos unequivocally indicating his affiliation with the "Starwood Homeboyz." *Id.* Additionally, the officers observed that W.M. appeared both very young, much younger than Larson, and was wearing revealing clothing. *Id*. These observations supplied reasonable suspicion for the officers to believe that Larson was engaged in the commercial sex trafficking of a minor. *Id.* Accordingly, they conducted a search of Larson's person authorized under L.O. 1923, uncovering two oxycodone pills for which he apparently did not have a prescription, a "butterfly" folding knife, nine condoms, personal lubrication, $600 in cash, and a handwritten list of names and time slots associated with a dollar amount. R. at 4.

Following Larson's arrest, the officers interviewed and searched W.M., at which time she produced a driver's license that indicated that she was sixteen years old. *Id.* This led the officers to believe that she was most likely a victim of sex trafficking. *Id.* When they inquired into her living situation to determine if she had a safe place to spend the night, she volunteered that she lived with Larson, was his girlfriend, and offered to take the officers to their shared apartment. R. at 37, 38. They arrived at 621 Sasha Lane, and W.M. allowed them inside, noting that it was "messy" because she had recently hosted friends there. R. at 38. Though she did not pay rent or have her own key, she regarded herself as a co-occupant, noting that she carried out "almost all" of the household chores, kept her own supply of food in the kitchen, received mail, and stored all of her personal effects in her "part" of the bedroom closet. R. at 12, 33. She had maintained this arrangement with Larson for "about a year," having run away from home about six months prior

to that. R. at 30. Officer Nelson then asked W.M. if she would allow him to search the apartment, to which she agreed. R. at 4. Officer Nelson discovered underneath the bed a defaced pistol that Larson later admitted belonged to him. *Id.*

Upon further search of the bedroom, Officer Nelson noticed on a nightstand an Apple iPhone 5S housed inside of a custom case. The case bore a sticker of a symbol, identical to one of Larson's tattoos, plainly indicating the holder's affiliation with the "Starwood Homeboyz" gang. *Id.* Officer Nelson asked W.M. if he could access the phone, and she agreed that he could, providing him with the password. *Id.* The phone's lock-screen displayed a picture of Larson and W.M. together. R. at 34. She told Officer Nelson that Larson paid for the bill and chose the custom case but allowed her to use the phone without his permission for a variety of social media purposes, indicating that she maintained her Snapchat, Instagram, and Facebook on the phone. R. at 32. She also said that she routinely made personal calls and texts on the phone. *Id.* The password was a numerical sequence that contained a coded gang message. R. at 4. Officer Nelson discovered incriminating images and videos on the phone, including images linking him to the defaced pistol and depicting W.M. in sexually suggestive poses. *Id.* The trial court admitted everything recovered from both searches into evidence.

II. Procedural History

On August 1, 2014, a federal grand jury indicted Larson in the Western District Court of Victoria on charges of sex trafficking of children and being a felon in possession of a firearm. R. at 1. Larson moved to suppress the evidence seized during a search of his person and apartment. *Id*. The district court denied his motion, and a jury convicted him on both counts. R. at 15. On February 3, 2016, the Thirteenth Circuit Court of Appeals reversed Larson's convictions and remanded the case for a new trial, holding as error the lower court's denial of his motion to

suppress. *Id.* The case is now before this Court on a grant of the United States of America's petition for Writ of Certiorari. R. at 24.

STANDARD OF REVIEW

This Court reviews *de novo* the denial of a motion to suppress evidence seized during a warrantless search. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). Conversely, it reviews the trial court's findings of fact only for clear error, giving "due weight" to the inferences drawn from those findings. *Id*.

SUMMARY OF ARGUMENT

Though its ultimate purpose may be the eradication of a uniquely heinous child sex offense through criminal prosecution, the immediate purpose of L.O. 1923 is distinct from the need for general law enforcement insofar as the City designed it specifically to identify and separate child victims from their abusers. The City struck a reasonable balance between privacy intrusion and the need to secure the evidence necessary to protect children and did so by limiting the ordinance in both time and place and requiring that officers base all searches on reasonable suspicion that the subject is engaged in or facilitating the commercial sex act of a minor. Moreover, the City required that these searches extend no further than necessary to make such a determination. Though the privacy interest at stake in one's own body is significant, the City restricted the scope, time, and place of each search while advancing a compelling government interest—shielding children from sex trafficking. Accordingly, L.O. 1923 was reasonable on balance and did not violate the Fourth Amendment.

The touchstone of the Fourth Amendment is reasonableness. Officer Nelson's actions, from start to finish, were eminently reasonable. W.M. gave him ample reason to believe that she resided

at 621 Sasha Lane; therefore, she had apparent authority to consent to Officer Nelson's search of their residence. W.M. kept all of her belongings in their shared apartment, and she had access to the apartment when Larson was not present. While she was not on the lease, this Court has made clear that it is a third party's mutual use of, and not her property right to, a residence which diminishes a suspect's expectation of privacy in that residence. Further, Larson should not benefit from W.M.'s minority—to hold otherwise would allow Larson to benefit from his victim's status as a juvenile. W.M. also demonstrated that she had joint access to and shared use of the cell phone, thus giving Officer Nelson reason to believe she had common authority to consent to its search. W.M.'s knowledge of the phone's password was a clear indication of her authority to use the phone, as was her ability to access the phone to manage her social media profiles and to make personal phone calls and texts. As with the lease issue, that Larson paid the bill is less important than their shared use of the phone. Finally, the Thirteenth Circuit overstated the importance of the sticker and Starwood Homeboyz-related code: W.M. also had a gang-related tattoo, which Officer Nelson could reasonably have believed demonstrated her shared affiliation with the gang.

ARGUMENT

I. OFFICER NELSON'S SEARCH OF LARSON'S PERSON WAS JUSTIFIED UNDER THE "SPECIAL NEEDS" DOCTRINE BECAUSE THE IMMEDIATE PURPOSE OF L.O. 1923 WAS THE PROTECTION OF SEX TRAFFICKED MINORS AMID UNIQUELY DANGEROUS CIRCUMSTANCES, AND THE CITY REASONABLY BALANCED ITS ORDINANCE TO PROTECT CHILD VICTIMS WITHOUT UNDUE PRIVACY INTRUSION

The Fourth Amendment prohibits only "unreasonable searches and seizures." U.S. Const. amend. IV. Thus the reasonableness of a particular search is the "touchstone" of its constitutionality. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 822 (2002). Though a warrantless search is presumptively unreasonable, "neither a warrant

nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989). Ultimately, the Framers did not intend for the Fourth Amendment to "eliminate all contact between the police and the citizenry, but rather 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" *United States v. Mendenhall*, 446 U.S. 544, 553–54 (1980) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)).

There are multiple ways to justify a warrantless search, including through the "special needs" doctrine. *City of Indianapolis v. Edmond*, 531 U.S. 32, 41 (2000). The doctrine requires that the government show (1) "that the search serves a purpose related to a special need that is separate from ordinary law enforcement" and (2) "that this special need makes the ordinary requirement of a warrant impracticable under the circumstances." *Von Raab*, 489 U.S. at 665. Determining if a warrant is "impracticable" requires that the Court balance the purpose of the search against the personal privacy interest that it intrudes upon. *Id.* Searches authorized under L.O. 1923 are reasonable under the special needs doctrine, as the law had the immediate purpose of protecting the child victims of sex trafficking, the search program was limited to a single week in a single area, and the searches themselves limited in scope, duration, and extent, and were supported by individualized suspicion. Accordingly, the Thirteenth Circuit is due to be reversed and Larson's convictions reinstated.

A. The immediate purpose of L.O. 1923 is the protection of child sex trafficking victims and extends beyond the general need for law enforcement

This Court has defined a permissible special need as a "concern other than crime detection." *Chandler v. Miller*, 520 U.S. 305, 314 (1997). To distinguish a special need from the

ordinary need for crime detection, the Court looks to the "immediate purpose" of the law. *Ferguson v. City of Charleston*, 532 U.S. 67, 81 (2001). Specifically, this Court asks if that immediate purpose is "distinct from the ordinary evidence gathering associated with crime investigation." *Nicholas v. Goord*, 430 F.3d 652, 663 (2d Cir. 2005). To answer that question, this Court considers the complete record to determine that immediate "programmatic purpose" of the law, separating it from whatever its ultimate purpose may be. *Edmond*, 531 U.S. 32 at 45.

The mere involvement of law enforcement in a search in no way precludes the finding of a special need. *See, e.g., Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 453 (1990) (upholding suspicionless police DUI checkpoints); *Griffin v. Wisconsin*, 483 U.S. 868, 873-75 (1987) (upholding policy permitting probation officers to search of probationers' homes without a warrant); *Illinois v. Lidster*, 540 U.S. 419, 419 (2004) (upholding police checkpoint asking public for help in solving a hit-and-run). *But see Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 407 (5th Cir. 2002) (holding that *Ferguson* requires traditional Fourth Amendment analysis apply to a child protective service worker's cavity search of minor that was "intimately intertwined with law enforcement"). Implicit in this Court's willingness to allow law enforcement to engage in special needs searches is the recognition that police officers are "jack(s)-of-all-emergencies" and often must perform a variety of tasks that extend well beyond investigating crimes. WAYNE R. LAFAVE, 3 SEARCH & SEIZURE § 5.4(c) (5th ed.). Indeed, officers are expected to "aid those in distress, combat actual hazards, prevent potential hazards from materializing, and provide an infinite variety of services *to preserve and protect community safety*." *United States v. Rodriguez-Morales*, 929 F.2d 780, 784–85 (1st Cir. 1991) (emphasis added).

Accordingly, a search program extends beyond normal law enforcement when it is designed to target a "special problem" associated with a specific criminal behavior. *United States*

v. Green, 293 F.3d 855, 858 (5th Cir. 2002); cf. *Chandler*, 520 U.S. at 322 (need for politician drug testing program in response to a non-existent problem was "symbolic," not special). Critically, this Court expressly clarified that a "general interest in crime control" does not cover every "law enforcement objective." *Lidster*, 540 U.S. at 424. This provides room for officers to address special problems created by criminal behavior without removing their searches from the scope of the special needs doctrine.

In fact, some special needs may be advanced collaterally through crime detection. In *Edmond*, this Court identified the non-law-enforcement purpose of the checkpoint in *Sitz* as the need to combat the "immediate vehicle-bound threat to life and limb" posed by drunk drivers. 531 U.S. at 43. Though the program involved the enforcement of a criminal DUI statute and resulted in two prosecutions, this Court acknowledged that there are some offenses that threaten public safety in such a way that taking action to curb them transcends general law enforcement. *Id.* The same principle held true for the investigatory immigration checkpoints upheld in *Martinez-Fuerte*, which also resulted in criminal prosecutions. 428 U.S. at 445. Though the Border Patrol officers were acting to enforce a criminal immigration statute, their immediate purpose was border security and the high volume of traffic made it nearly impossible to obtain individualized suspicion on any particular car. *Id*. Conversely, the traffic checkpoint in *Edmond* was a matter of general law enforcement when Indianapolis attempted to combat drug trafficking along a major road. 531 U.S. at 42-43. This Court reasoned that the city failed to demonstrate the same sort of immediate and special problem in *Sitz* and *Martinez-Fuerte* because intercepting drugs only advanced a broad goal of community safety and did not serve an immediate public safety function. *Id.* at 43.

In addition to special problems associated with certain crimes establishing a permissible purpose, certain areas may be at such a high risk for exceptionally harmful crime that warrantless

police screening searches have the immediate purpose of protecting the public. This Court noted in *Edmond* that suspicionless searches in governmental buildings, airports, and subways were justified in part because they occurred in places where the need "to ensure public safety can be particularly acute." 531 U.S. at 48. Lower courts have shown deference to governmental policy determinations that particular places are at a high risk for violent crime, especially terrorism. *See, e.g.*, *MacWade v. Kelly*, 460 F.3d 260, 270 (2d Cir. 2006) (holding that suspicionless bag searches to deter and detect bombs in New York City subways was not a matter of general law enforcement); *United States v. Marquez*, 410 F.3d 612, 617 (9th Cir. 2005) (holding that airport security screening "to prevent passengers from carrying weapons or explosives onto the aircraft; and second, to deter passengers from even attempting to do so" was not a matter of general law enforcement).

Here, the City's immediate purpose in passing L.O. 1923 was the separation of these child victims from their tormentors, not standard evidence gathering for criminal prosecutions. Furthermore, it addressed a special problem associated with a specific crime in a high risk area. The City's Board of Supervisors produced evidence that the Starwood Park area includes a disproportionately large number of sex trafficked children, some 1,500 of the estimated 8,000 in Victoria City itself. R. at 40. Moreover, there was a strong likelihood that the All-Star Game, consistent with major sporting events in general, would cause a sharp increase in child sex trafficking in the Starwood Park area, thus increasing the imminence of harm. R. at 9. Indeed, the ordinance itself authorized the search of suspected *victims* as well as perpetrators, and only of those who were suspected of being involved with the sexual abuse of *minors*. R. at 2. Put differently, L.O. 1923 did *not* authorize the search of anyone thought to be engaged in the sex trafficking of *adults* or even the non-commercial sexual abuse of children. *Id.* Much as the NYPD targeted a

highly specific illegal object, a bomb, in its special needs subway searches upheld in *McWade*, the City sharpened its focus on child sex trafficking to a razor edge. The immediate purpose here was ultimately a defensive one, a preventative measure applied to protect a uniquely vulnerable population, child sex slaves, in dangerous area and at a time when their abuse is likely to be at its worst. As in *Sitz*, *Griffin*, and *Martinez-Fuerte*, arrests stemming from L.O. 1923 were collateral to its immediate purpose. That the City also carried its sword when shielding victims under L.O. 1923 did not transform the ordinance into one of general criminal enforcement.

Just as an army may counterattack at key locations during an enemy offensive without leaving its overall defensive position, the City arrested child predators while acting primarily to protect victims. In sum, it utilized its police force to mitigate an immediate threat to a highly vulnerable class of victims by deterring predation and separating victims from abusers in a uniquely dangerous area during a major sporting event, plainly demonstrating a valid special need separate from ordinary law enforcement.

B. The Limited Search That L.O. 1923 Authorized Was, On Balance, a Reasonable and Effective Means of Protecting Child Victims of Sex Trafficking in a High Risk Environment and During a Dangerous Event

Upon finding that the immediate purpose of the ordinance extends beyond the need for general law enforcement, this Court will engage in "a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Chandler*, 520 U.S. at 306. Specifically, it has turned to a three-pronged balancing test to determine the reasonableness of the challenged search that considers: "(1) the nature of the privacy interest upon which the search intrudes, (2) the character of the search, and (3) the nature and immediacy of the governmental concern at issue, and the efficacy of the means for meeting it." *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 647 (1995). When the "balance of interests" weighs against an "insistence"

on probable cause, this Court "usually requires" some amount of individualized suspicion before finding a search reasonable, but has permitted a variety of suspicionless searches as well. *See Skinner v. Railway Labor Executives' Association, 489 U.S. 624(1989).*

1. Though not particularly invasive, searches under L.O. 1923 admittedly intruded upon a reasonable expectation of privacy in one's own body

This Court will first determine the existence of a reasonable privacy interest and then consider its character. *Von Raab,* 489 U.S. at 671. Whatever the gravity of the privacy interest at stake may be, however, it is not dispositive and instead must be weighed against the City's interest and nature of the search. *Id.* "People are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks." *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). With that principle in mind, the government concedes that there is no reduced expectation of privacy upon entering a hotel lobby and that L.O. 1923 did intrude upon a legitimate privacy interest insofar as it authorized the search of an individual's person. *Terry v. Ohio,* 392 U.S. 1, 21 (1968) (noting reasonable expectation of privacy in one's body and in the contents of one's pockets). Still, the search of pockets is a far cry from the extreme intrusion of a strip search, which the government may conduct on misdemeanor arrestees with reasonable suspicion that they possess contraband or a weapon. *See, e.g., Swain v. Spinney,* 117 F.3d 1, 7 (1st Cir. 1997). Though this intrusion does weigh against reasonableness, the government interest far outbalances it.

2. Searches authorized under L.O. 1923 required individualized suspicion and were no more intrusive than necessary to protect child sex trafficking victims

When considering the character of a search, the Court will examine the precise facts surrounding it to determine its obtrusiveness as balanced against its effectiveness. *Grady v. North Carolina*, 135 S. Ct. 1368, 1371 (U.S. 2015) (Court must consider the totality of the circumstances

when analyzing a search). The reasonableness of a search does not turn on the possibility of a "less intrusive" alternative, though such a possibility could weigh against it. *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983).

First, to execute a search under L.O. 1923, an officer needed to have reasonable suspicion that a person was engaged in or facilitating the commercial sex act of a minor. R. at 2-3. L.O. 1923 thus limited officer discretion significantly in that it only authorized a search when an officer stated specific, articulable grounds to suspect that an individual was engaged in a single narrowly defined criminal activity. *See Terry*, 392 U.S. at 21. Such individualized suspicion "is the shield the Framers selected to guard against the evils of arbitrary action, caprice, and harassment." *Samson v. California*, 547 U.S. 843, 866 (2006) (Souter, J. dissenting). Here, reasonable suspicion serves as a bulwark of liberty, securing the vast majority of those in the Starwood Park area from government inspection. Only those drawing the trained and experienced attention of officers were even potentially subject to search.

Second, L.O. 1923 provides officers with a limiting instruction requiring that searches extend no further and last no longer than necessary to determine if the subject is engaged in or facilitating child sex trafficking. Given the narrowness of the offense and the need for an officer to link reasonable suspicion directly to it, officer discretion was significantly reduced. Third, the law was limited both in time and space, lasting only one week and covering only the Starwood Park neighborhood. Just as commuters in *McWade* were free to avoid the subway or use a station in a different area, those seeking to avoid the possibility of a search were free to stay elsewhere in the city during the week—officers were only authorized to search those "obtaining a hotel room" in the target area. R. at 2. The inconvenience of staying farther away from the stadium and potentially paying more for transportation was the extent of their burden.

Finally, the City issued a press release explaining in plain language each of these limitations, providing residents and guests alike with notice of exactly what they could expect from the officers stationed at hotel front desks throughout Starwood Park. R. at 40-41. These limitations, taken together, reveal a law carefully measured and balanced to minimize the intrusiveness of a special needs search. To expect officers to seek a warrant to rescue potentially hundreds of victims being trafficked in the area ignores the time-sensitivity of the game week and the unique opportunity that it presented to counter a surge in abuse.

3. The City's Interest in Deterring Child Sex Trafficking and Protecting its Victims in a Dangerous Area and During a Uniquely Dangerous Time was Both Immediate and Compelling, and Its Selected Means for Advancing that Interest Was Reasonably Effective

When weighing the governmental interest in conducting a search, this Court considers its nature and immediacy. *Acton,* 515 U.S. at 654-61. The interest need not necessarily be compelling but rather only "*important enough* to justify the particular search." *Id.* at 661 (emphasis in original). This Court has often given special solicitude to laws when the government interest at stake involves the safety and well-being of children, *See, e.g., id.* at 661 ("deterring drug use by our Nation's schoolchildren"); *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985) ("maintaining discipline in the classroom" to promote learning). This Court generally views the immediacy of the interest as a function of its urgency but permits local governments to react defensively to prevent "an otherwise pervasive social problem" from "spreading" to citizens. *See Von Raab*, 489 U.S. at 675 n. 3.

The City's two-fold interest here is clearly immediate and compelling: deterring child sex trafficking and liberating sex trafficked minors from modern slavery. These children suffer, often permanently, from a variety of physical, emotional, psychiatric disorders stemming from their

traumatic abuse, with many resorting to drugs to cope with the pain. R. at 41. The government interest was also immediate, as the All-Star Game provided a unique opportunity to rescue victims given the surge of trafficking anticipated in the area surrounding the stadium during game week. R. at 41. Moreover, victims are often smuggled with ease and "marketed" on notoriously difficult to track sites on the "deep web," making ordinary detection difficult. R. at 2.

In determining the effectiveness of special needs laws, this Court will not "transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger." *Sitz*, 496 U.S.at 453. Thus so long as the law is reasonably effective, the potential existence of better ways to confront child sex trafficking is of no legal consequence. *See United States v. Lifshitz*, 369 F.3d 173, 193 (2d Cir. 2004) (law must at least be "sufficiently effective to justify its implementation"). To be sure, it is unclear if there even would have been a more effective means of doing so during the game week than L.O. 1923. In *Sitz*, the Court regarded the program's two arrests, 1.6% of the motorists stopped, as evidence of its reasonableness as a means of protecting public safety. *Id.* at 455; *see also Von Raab*, 489 U.S. at 674 (holding that "the mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity"). These cases underscore the broad deference that this Court affords to political authorities in determining whether a search program is reasonably effective in its design. Here, the fact that officers were able to identify W.M. as a victim and rescue her from a predator like Larson is instant evidence that L.O. 1923 is reasonably effective.

On balance, L.O. 1923 featured an urgent and compelling government interest in protecting a singularly vulnerable group of children, advanced that interest effectively, and was designed with multiple limitations to trench narrowly on a reasonable expectation of privacy in one's own body.

Far more than just reasonable, the ordinance was an indispensable tool to liberate children from a heinous enterprise that robs them of their innocence and destroys their futures.

II. OFFICER NELSON'S SEARCH OF LARSON'S SHARED APARTMENT AND PHONE WERE REASONABLE AND THEREFORE DID NOT VIOLATE HIS FOURTH AMENDMENT RIGHTS

The Fourth Amendment of the United States Constitution protects "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. amend. IV. As the text of the Amendment makes clear, the reasonableness of police action is the "touchstone" of its prohibition. *Riley v. California*, 134 S. Ct. 2473, 2482 (2014); *Kentucky v. King*, 563 U.S. 452, 459 (2011). Thus, the Fourth Amendment requires only that a police officer execute his judgment *reasonably*; it does not require him to be proven correct after the fact. *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990). Officer Nelson's actions were eminently reasonable; thus, he did not violate Larson's Fourth Amendment right to be free from an unreasonable search. Based on the facts available to him at the time of his entry, it was reasonable to believe that W.M. possessed common authority to consent to his search of the premises at 621 Sasha Lane. Based on the facts available to him at the time of his search, it was reasonable to believe that W.M. shared the cell phone with Larson. Accordingly, the Thirteenth Circuit's holding is due to be reversed.

A. W.M. Possessed Apparent Authority to Consent to a Search of the Apartment at 621 Sasha Lane

It is certainly true that physical entry of the home is the "chief evil" against which the Fourth Amendment protects. *Payton v. New York*, 445 U.S. 573, 585 (1980). As such, this Court typically prefers a warrant. *Id.* However, this Court has long held that consent to a search, freely given, abrogates the need for one. *Florida v. Bostick*, 501 U.S. 429, 438 (1991). Consent to a warrantless search may also be given by a third party, such as a cotenant, with common authority

over the premises. *United States v. Matlock*, 415 U.S. 164, 171 (1974). From that proposition, this Court has held that a police officer may also rely on the consent of a third party who does not in fact have common authority so long as, at the time of entry, the officer reasonably believes that person to have common authority over the premises. *Rodriguez*, 497 U.S. at 186.

W.M.'s apparent authority to consent to the search of 621 Sasha Lane is the only major issue in dispute. Larson did not challenge whether W.M. freely gave her consent to the search in the lower courts and thus waived the issue. *See* R. at 19. Similarly, the United States did not contend that W.M. had actual authority to consent to the search. *See* R. at 20.

Whether W.M. had apparent authority to consent to the search depends on whether "the facts available to the officer at the moment [of the search would] warrant a man of reasonable caution in the belief that the consenting party had authority over the premises." *Rodriguez*, 497 U.S. at 188. "[M]utual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right," warrants such a belief. *Matlock*, 415 U.S. at 171 n. 7. Facts that can establish actual or apparent authority over premises 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 also United States v. McGee*, 564 F.3d 136, 141 (2d Cir. 2009) (discussing similar factors establishing a third party's "access" to a residence). Obviously, to require Officer Nelson to establish and verify every factor on this list would render the doctrine of "apparent" authority a nullity. The Seventh Circuit recognized

this in upholding a search consented to by a significant other who neither lived at a residence full-time nor received mail there. *United States v. Goins*, 437 F.3d 644, 648 (7th Cir. 2006). Rather, these factors comprise different aspects of a "recurring factual question" to which police officers must apply their judgment. *Rodriguez*, 497 U.S. at 186. Thus, this Court does not require that Officer Nelson have been correct; he owes only his judgment, reasonably exercised. *Id*. Determining whether he has done so "requires an intensively fact-specific inquiry," the results of which might change based on "slight variations in the facts." *United States v. Shelton*, 337 F.3d 539, 535 (5th Cir. 2003). And while it is true that "sometimes facts known by the police cry out for further inquiry," *United States v. Cos*, 498 F.3d 1115, 1128 (10th Cir. 2007) (cited by the Thirteenth Circuit at R. 20), all that the Constitution requires is "sufficient probability, not certainty" that W.M. was a resident of the premises searched. *Rodriguez*, 497 U.S. at 185–86.

Officer Nelson concluded that "they were probably sharing the apartment," R. at 31, only after W.M. had demonstrated a sufficient factual basis to warrant that belief. First, she voluntarily stated that she shared an apartment with Larson as soon as he asked her if she had a safe place to spend the night. R. at 29. When Officer Nelson sought to clarify her statement, she confirmed that she and Larson "shared everything." *Id.* She was allowed into the home when he was not present. She performed household chores. She received "extremely personal mail" at the apartment, including her medical bills. R. at 12. She kept personal belongings and clothing at the residence. A 16-year-old, as a matter of course, will not have accumulated many worldly possessions, and it would be odd to expect W.M. to have furniture and other household effects spread around the apartment. This is especially true of a young woman who ran away from home. Everything she did own—her clothes, some food, some magazines, a sleep mask—she kept at the apartment she shared with Larson. Taken together, these facts are more than enough to "warrant a man of

reasonable caution in the belief," *Rodriguez*, 497 U.S. at 188 (quoting *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968), that she was a co-occupant of 621 Sasha Lane.

That she had to use a spare key should not affect this analysis, as this Court has upheld a search consented to by a third party who took a key without her significant other's knowledge. *Rodriguez*, 497 U.S. at 181. Further, that she could access the key indicates that the lock on the door clearly was not meant to exclude W.M. from Larson's home. *See McGee*, 564 F.3d at 140–41 (neither the presence of a lock nor the possession of a key determinative, as third party's access depended on understandings communicated to her by titular owner).

This Court should correct the Thirteenth Circuit's undue emphasis on W.M.'s lack of a property interest in the apartment. Precedent is clear that common authority is "not to be implied from the mere property interest a third party has in the property." *Matlock*, 415 U.S. at 171 n. 7. Rather, it is the "mutual use of the property by persons generally having joint access or control for most purposes." *Id.* Lower courts have thus determined a live-in girlfriend to have apparent authority where she "was not on [the] lease, did not have her own set of keys to the apartment, and was not contributing to rental payments or utilities." *United States v. Weeks*, 666 F.Supp.2d 1354, 1378 (N.D. Ga. 2009). To the contrary, the owner of a residence may not have even apparent authority to consent to a search if he does not have a sufficient relationship with the tenant or lessee. *See, e.g.*, *Chapman v. United States*, 365 U.S. 610 (1961) (landlord could not validly consent to the search of a house he had rented to another); *Stoner v. California*, 376 U.S. 483 (1964) (hotel clerk could not consent to the search of a customer's room). This line of precedent allowed the court in *United States v. Turner*, 23 F.Supp.3d 290 (S.D.N.Y. 2014) (cited by the Thirteenth Circuit at R. 20), to say that a building's superintendent lacked apparent authority to enter into an apartment building he did not use—it is the shared *use* of a residence that allows for

apparent authority. Thus, a cohabitant, even one like W.M. with no property interest in the residence to be searched, differs from a hotel clerk, a landlord, or a building superintendent because she is allowed to use the area to be searched for her own purposes. In this sense, it does not matter that Officer Nelson "knew she was probably the victim here," R. at 29, because she was also plainly a resident with unfettered access to the apartment—the two circumstances are not mutually exclusive in this case. Finally, it should be of little consequence that W.M.'s name was not on the lease: W.M. *cannot* legally sign one at age 16 because she is a minor. Nor should it should make a difference that W.M. did not have her own bedroom. The record does not even confirm that there was a second bedroom in the apartment. Furthermore, "untold millions" of boyfriends and girlfriends share bedrooms across this country. R. at 12. That does not deprive them of shared authority over their homes.

W.M.'s age cannot be the determining factor in whether she could have consented to the search; to hold otherwise would press an unfair wrinkle into the law. While this Court has not squarely addressed the issue, the courts of appeals have held that a minor may give consent to search her place of residence. *See Lenz v. Wilburn*, 51 F.3d 1540, 1548 (11th Cir. 1995); *United States v. Clutter*, 914 F.2d 775, 778 (6th Cir. 1990) (children of 12 and 14 years of age could consent to search of their father's home); *United States v. Gutierrez-Hermosillo*, 142 F.3d 1225, 1231 (10th Cir. 1998) (officers reasonably believed that a 14-year-old girl could consent to a search of her father's motel room). Granted, these cases involved kinship rather than romantic relationships. However, they underscore the notion that "the third-party consent rule recognizes that sharing space with another lessens the expectation of privacy in that space." *Lenz*, 51 F.3d at 1549. A minor may consent to a search once she demonstrates shared residence and "free access" to various portions of a home. *Id.* Those conditions are clearly established in W.M.'s case—by

sharing his residence with W.M., Larson's expectations of privacy were necessarily lessened. This statement is as true when sharing space with a 16-year-old minor as it would be if Mr. Larson had been sharing space with an 86-year-old adult. *See United States v. Richards*, 741 F.3d 843, 850 (7th Cir. 2014) ("A defendant assumes the risk that a co-occupant may expose a common area of a house to a police search."). The Thirteenth Circuit suggests that, had the facts been the same except for W.M.'s age, the search would have been reasonable. R. at 21. This wrinkle—a diminished expectation of privacy, unless you are a child predator—is unfair and allows W.M.'s minority to work in Larson's favor. This Court has not heightened expectations for police officers who obtain consent to a search from a co-occupant who is also the victim of a crime perpetrated by the suspect. *See Fernandez v. California*, 134 S. Ct. 1126, 1134 (2014) (consent obtained from co-occupant victim of domestic violence). This Court should not now invalidate a co-occupant's consent simply because she is the victim of a crime.

In spite of the nature of their relationship, W.M. clearly appeared to share a residence with Larson and therefore to have authority to consent to a search. Their relationship was abnormal and clearly warranted further scrutiny. Officer Nelson noted as much during his cross-examination. R. at 34. But that is no reason an officer with 12 years' experience could not believe that W.M. shared the apartment with Larson. The Thirteenth Circuit makes unsupported assumptions that obscure this fact. With no support from the record, the Court of Appeals asserted that "W.M. was likely being deceived about the nature of her relationship with Petitioner" and that Officer Nelson "had ample evidence that something much more sinister was actually going on." *Id.* Even if this were so, it would not change the fact that W.M. resided at the apartment with Larson. Regardless, the Court did not provide particulars to support either claim. The actual record provides no reason to believe that Larson did not take W.M. in off the street when she was homeless. R. at 30. It provides

no reason for an officer in Nelson's position to believe that the two did not form a romantic attachment over time based in part off of Larson's kindness. *Id.* Larson purchased her clothes, perfume, and a phone which they shared. *Id.* W.M. had friends over to their apartment. R. at 38. W.M. remained in school after moving in with Larson. R. at 29. W.M. did complain to Officer Larson about having to do "almost all" of the chores, R. at 33, but surely she is not the first person to express frustration with her significant other's lack of contributions to household chores. Officer Nelson was not unreasonable in taking W.M. at her word—the assumptions the Court of Appeals would like for him to have made notwithstanding—at the time of his entry. W.M. had given him ample reason to believe she voluntarily shared the apartment with Larson.

B. Based on Her Joint Access to and Use of the Phone, Officer Nelson Reasonably Believed that W.M. Had Authority to Consent to Its Search

A third party may give valid consent to the search of an item so long as she has "common authority over or other sufficient relationship to the…effects sought to be inspected." *Matlock,* 415 U.S. at 171. Even in cases where actual authority to consent is lacking, "a third party may have apparent authority to consent to a search when an officer reasonably, even if erroneously, believes the third party possesses authority to consent." *U.S. v. Andrus*, 483 F.3d 711, 716 (10th Cir. 2007) (citing *Georgia v. Randolph,* 547 U.S. 103, 126 (2006)). Joint users of personal items may consent to their search, and this Court will not engage in "metaphysical subtleties" to determine where common authority begins and ends. *Frazier v. Cupp*, 394 U.S. 731, 740 (1969). Individuals who share such items "assume the risk" that the person they share them with may allow someone else to access them. *Id.* A police officer's conclusion in such cases is measured by an objective standard of reasonableness that takes into account the totality of the circumstances at the time of his search. *Randolph,* 547 U.S. at 125 (Breyer, J. concurring).

Other courts have held that a minor who shares a cell phone with a defendant, including for the arrangement of commercial sex dates, has actual authority to consent to a search of the phone. *See United States v. Gardner*, 2016 WL 5110190 1, *6 (E.D. Mich. Sept. 21, 2016). The facts in *Gardner* were much like those here: the minor victim was caught up in a sex trafficking operation; she was able to use the phone that she shared with the defendant without restrictions when he was not present; he shared the password to the phone with her; and a search of the phone revealed lewd photos of the minor victim. That Court, like all federal appellate courts to have analyzed the use of shared personal electronic devices without separate passwords,[1] found the minor's knowledge of the phone's password—which defendant set and changed regularly—to be "a clear indication of authority to use the phone." *Id.* The Court appropriately focused on the victim's "mutual use of and joint access to the cell phone." *Id.* Even if she had lacked actual authority, the *Gardner* court also realized that knowledge of the phone's passcode and uninhibited use of the phone allowed officers at the time to "reasonabl[y] … conclude from the facts available that the third party had authority to consent to the search." *Id.* at *7 (quoting *United States v. Gillis*, 358 F.3d 386, 390 (6th Cir. 2004); *see also Rodriguez*, 497 U.S. at 188–89.

W.M. demonstrated to Officer Nelson that she had "joint access" to the phone and "control for most purposes." *Matlock*, 415 U.S. at 172 n. 7; *see also United States v. Peyton*, 745 F.3d 546, 554 (D.C. Cir. 2014) (apparent authority established by joint use of and access to an item). W.M. had installed several social media accounts on the phone. She was able to access the phone via its password and use these accounts any time without asking Larson's permission. She made personal calls and sent personal texts from the phone. She and Larson jointly appeared in the photo on the

[1] See discussion of *United States v. Morgan*, 435 F.3d 660 (6th Cir. 2006), and *United States v. Buckner*, 473 F.3d 551 (8th Cir. 2012), *infra* at 24.

lock screen. While it is true that Larson purchased the phone and paid the bills, this Court in *Matlock* made clear that "the authority which justifies third-party consent does not rest upon the law of property" and that it is "mutual use of the property" that diminishes an individual's expectation of privacy. 415 U.S. at 172 n. 7. The Thirteenth Circuit's interpretation of *James*, that "where a police officer knows that the consenting party does not own the item, that officer may not rely on that party's apparent authority to conduct a search," R. at 22, is therefore plainly in error. Rather than ownership, it is mutual use—and the concomitant diminished expectations of privacy—that guides this Court's inquiry.

The lower court's reliance on *United States v. Taylor*, 600 F.3d 678 (6th Cir. 2010), is also misplaced. While it is true that some locations and surroundings will indicate that a device belongs to somebody other than the party giving consent, *id.* at 681–82, no such surroundings existed in this case. In *Taylor*, an apartment tenant allowed a third party to store personal belongings in a shoebox in a closet in a spare bedroom which she did not use. *Id.* at 679–80. W.M.'s connection to the phone was not nearly so tenuous. W.M. stated to Officer Nelson that she and Larson shared the phone, just like they shared everything. When two individuals share an item, it will always be true that one of them used it last. Therefore, the Thirteenth Circuit's statement that Officer Nelson "should have doubted W.M.'s access to the cell phone as soon as he recognized that it was located on [Larson]'s nightstand," R. at 22, is a red herring. To truly be analogous would require that the tenant in *Taylor* shared the shoebox storage space with the defendant. Obviously this was not the case. The nature of sharing is such that, if W.M. had used the phone last, it would probably have been on her nightstand.

That W.M. had installed her own apps onto the phone, and had unfettered access to them, supports Officer Nelson's belief that she had authority to consent to a search. Installing one's own

software onto a computer, without maintaining a separate user name or password, supports the conclusion that one has access to that computer. *United States v. Morgan*, 435 F.3d 660, 663 (6th Cir. 2006). Further, when there is no other computer in the home, it is more likely that two occupants share a single device. *Id.* Even permission to play games on a shared device may demonstrate authority to consent to a search. *United States v. Buckner*, 473 F.3d 551, 555 (8th Cir. 2012). On the contrary, when individuals share a device but maintain separate password-protected files, one may not give consent to search the password-protected files of the other. *See United States v. Clutter*, 674 F.3d 980, 984 (8th Cir. 2012); *United States v. Stanley*, 653 F.3d 946, 950–51 (9th Cir. 2011); *Trulock v. Freeh*, 275 F.3d 391, 403 (4th Cir. 2001). W.M. and Larson did not maintain separate passwords, and she did far more than play games on the phone. Not only had she installed her own social media apps—and there is little more important to the average 16-year-old than her social media profiles—but she was also able to access them at *any time* without Larson's permission. This makes their shared use of the phone more akin to *Morgan* than to any of the cases involving separate user profiles.

Finally, that W.M. also had a Starwood Homeboyz tattoo belies the Thirteenth Circuit's conclusion that Officer Nelson's search of the phone was unreasonable. W.M. testified that she had an SW tattoo on her ankle and believed that Officer Nelson could see it. R. at 37. That she and Larson both had a similar, gang-affiliated tattoo diminishes the importance of the similar sticker on the phone itself. Similarly, the numbers 4-11-5-11, while indeed "a series of digits related to [Larson's] gang affiliation," R. at 23, seem to be common code to all members of the Starwood Homeboyz. R. at 3. If W.M. had been initiated into or spent a great deal of time with the gang, a conclusion reasonably supported by her tattoo, then both the sticker and the numbers would relate to both of them.

CONCLUSION

L.O. 1923 authorized reasonable special needs searches, and W.M. had apparent authority to consent to the search of the apartment and cell phone that she shared with William Larson. The United States of America requests that this Court overturn the Thirteenth Circuit and reinstate Larson's convictions.