SUPREME COURT OF THE UNITED STATES

October Term 2016

Docket No. 03-240

United States of America,

Petitioner

v.

William Larson,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR PETITIONER

October 15, 2016

Counsel for Petitioner,
UNITED STATES OF AMERICA

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ISSUES PRESENTED

I. Whether preventing sex trafficking and protecting child victims constitutes a special need distinct from ordinary crime control considering searches pursuant to L.O. 1923 were limited in scope, duration, and required reasonable suspicion?

II. Whether an officer was reasonable in relying on apparent authority when the consenting party lived at the residence, had access to a key, stored personal items in the bedroom, was given unrestricted use of a shared phone, and possessed the password unlock the device?

STATEMENT OF THE CASE

The Starwood Park neighborhood of Victoria City, Victoria has long been afflicted by gang activity. R. at 2. The Starwood Homeboyz and the 707 Hermanos are rival gangs that engage in robbery, narcotics sales, murder, and sex trafficking. R. at 2. Every year, there are more than 8,000 child sex trafficking victims in the city. R. at 40. The average age of entry into sex trafficking is 16 years old. R. at 40. In March 2013, Victoria City was selected to host the Professional Baseball Association's 2015 All-Star Game. R. at 2. The game was scheduled on July 14, 2015, at Cadbury Park, in the Starwood Park neighborhood. R. at 2. The event was expected to draw tens of thousands of visitors. R. at 2. Several citizen groups raised concerns the game would create "a swell of human trafficking activity in their neighborhood," citing the surge of human trafficking that accompanies major sporting events. R. at 2–3.

To combat the anticipated increase in sex trafficking, the Victoria City Board of Supervisors ("Board") passed Local Ordinance 1923 ("L.O. 1923") on May 5, 2015. R. at 2. On May 6, 2015, the Board released a press statement announcing L.O. 1923 and the intent to protect the safety of local and visiting children. R. at 3, 41. L.O. 1923 allowed brief investigatory searches only if an officer had reasonable suspicion to believe a minor or adult companion were facilitating, attempting, or engaging in a commercial sex act during the week of the All-Star Game. R. at 2. L.O. 1923 was narrow in scope and only applied to hotels located within three miles of the stadium, the area identified as having the greatest likelihood of sex trafficking. R. at 2. The duration of any detention was expressly limited to the time "reasonably necessary to ascertain if a minor was a victim of sex trafficking." R. at 2.

On July 12, 2015, Officers Zachary Nelson and Joseph Richols were attempting to prevent sex trafficking at the Stripes Motel, located in the Starwood Park neighborhood. R. at 3,

26. At approximately 11:22 p.m., the officers observed defendant William Larson with a "much younger" female wearing a low-cut top and tight fitting shorts that exposed much of her legs. R. at 3. Neither were carrying luggage, which indicated to the officers that they were not actually travelling. R. at 3, 28. The officers noticed the defendant had two separate tattoos identifying him as a member of the Starwood Homeboyz street gang. R. at 3.

Based on the officers' training and experience, they had reasonable suspicion to search the defendant and his female companion pursuant to L.O. 1923. R. at 3. The following items were recovered during the search of his large jacket: (1) nine condoms; (2) a butterfly knife; (3) lube; (4) two oxycodone pills; (5) a list of names and how long they paid for (i.e. "1 hour", "45 min", and "15 min"); (6) $600 in cash; (7) and a pair of house keys. R. 3, 28. Officer Richols arrested the defendant for sex trafficking of a minor in violation of 18 U.S.C. § 1591(a)(1). R. at 3. When the female was searched, the officers found a Gucci wallet and her driver's license, identifying W.M. as a minor. R. at 36. Officer Nelson was concerned for W.M.'s wellbeing and asked if she "had a safe place to stay." R. at 29. W.M. responded that she lived with the defendant for about a year after running away from home and "could stay there even though he was arrested." R. at 36. W.M. told Officer Nelson that she was not on the lease but had medical bills and other mail sent to the apartment. R. at 30. She informed Officer Nelson that the defendant "held all the money" and paid their rent from the money they made together. R. at 29–30. W.M. said they "shared everything" and slept in the same bed as the defendant and kept her clothes in the bedroom closet. R. at 33. W.M. further informed Officer Nelson that she was responsible for the household chores, but the apartment might be messy because she hosted friends the night before. R. at 30, 38. Officer Nelson would later testify that at this point he

believed W.M. had authority to consent to a search of the apartment based on her joint access and mutual control. R. at 31.

Officer Nelson accompanied W.M. to the nearby residence where she retrieved a spare key from under a fake rock. R. at 31. Inside the bedroom, the officer found a loaded semi-automatic handgun with the serial number scratched off under the bed. R. at 31. Officer Nelson found a cell phone on top of a nightstand in the shared bedroom which displayed a photo of W.M. and the defendant as the lock screen. R. at 31, 34. Officer Nelson asked W.M. if it was "her phone" and she replied it was the "phone they shared." R. at 31. W.M. further explained she no longer had her own phone because the defendant hit her after she had texted a male classmate about a school project. R. at 30–31. Officer Nelson learned the defendant used the phone to conduct their "shared business" and paid the bill from the illicit proceeds. R. at 32. W.M. stated "she could use the phone without asking the defendant" to make personal calls and send text messages. R. at 32. W.M. also explained she accessed her personal social media accounts from the phone. R. at 32. After establishing W.M. had mutual use of the phone, Officer Nelson asked if he could search the device. R. at 32. W.M. agreed to the search, and provided the password to unlock the device. R. at 32. Officer Nelson found inappropriate pictures of W.M., which he concluded were part of "the shared business," and a video of the defendant rapping about pimping. R. at 32.

On August 1, 2015, the defendant was charged by indictment with Sex Trafficking of Children in violation of 18 U.S.C. § 1591(a)(1) and one count of felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). R. at 1. It was further alleged that the defendant recruited, enticed, harbored, transported, provided, obtained, advertised, maintained, patronized, or solicited four minor females knowing that each of them would be caused to engage in

commercial sex acts as defined in 18 U.S.C. §1591(e)(3). R. at 1. The defendant filed a motion to suppress the evidence. R. at 5. The district court denied the motion, finding the special need to protect child victims from sex trafficking warranted the limited search. R. at 5. The district court also properly found W.M. had apparent authority to consent to the search of their shared apartment based on the totality of the circumstances. R. at 11.

The defendant appealed the district court's ruling to the United States Court of Appeals for the Thirteenth Circuit. R. at 15. The Thirteenth Circuit reversed, finding the dire need to protect child victims of sex trafficking did not serve a purpose separate from the general interest in law enforcement. R. at 15, 16. The court also found W.M.'s age and status as a victim precluded her from having apparent authority to consent to a search despite her lengthy residence at the apartment. R. at 20. The United States filed a Petition for Writ of Certiorari, which was granted by this Court. R. at 22.

SUMMARY OF ARGUMENT

The evidence obtained during the search at the Stripes Motel should not be suppressed. The increased threat of sex trafficking during the All-Star Game created a valid special need to prevent sex trafficking and protect children. The Board's press release indicated the primary purpose of the search was to help officers identify victims of sex trafficking, not to prosecute criminal activity. Officers must act immediately to protect children, which made the Fourth Amendment's warrant requirement impracticable. The restricted scope and duration, coupled with the requirement of individualized suspicion, limited the intrusiveness of the search.

It was reasonable for Officer Nelson to believe W.M. had apparent authority to consent to the search of 621 Sasha Court and the cell phone found within. Searches conducted pursuant to third party consent are a valuable law enforcement technique and constitutionally permissible.

W.M.'s yearlong residence, access to a key, storage of personal belongings, and unrestricted use of the premises was objective evidence supporting apparent authority. Officer Nelson also established W.M. had authority to consent to a search of the cell phone based on her use of the device to place personal phone calls, send text messages, and access her social media accounts.

STANDARD OF REVIEW

This Court reviews the denial of a defendant's motion to suppress evidence *de novo*. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). It reviews finding of historical fact only for clear error. *Id.*

ARGUMENT

I. THE EVIDENCE OBTAINED AT THE STRIPES MOTEL SHOULD NOT BE SUPPRESSED, BECAUSE THE INCREASED THREAT TO CHILDREN DURING THE ALL-STAR GAME MADE THE WARRANT REQUIREMENT IMPRACTICABLE.

The Fourth Amendment guarantees the "right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. CONST. amend. IV. A warrantless search is presumed to be unreasonable and therefore invalid under the Fourth Amendment. *Katz v. United States*, 389 U.S. 347, 357 (1967). Ordinarily, the Constitution requires the government to obtain a warrant supported by probable cause to search a person or his property. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). If a search is conducted without a neutral magistrate issuing a warrant, then it is the government's burden to show an exception to the general warrant requirement makes that search reasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971). A "special needs" or "community caretaking" exception allows a temporary seizure of a person if there is a compelling governmental purpose other than law enforcement. *Sutterfield v. City of Milwaukee*, 751 F.3d 542, 553 (7th Cir. 2014). Under the special needs analysis, the government is not required to show probable cause or even individualized suspicion for a search.

New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment). "If the primary purpose is originally law enforcement, the special needs doctrine does not apply." *United States v. Sczubelek*, 255 F. Supp. 2d 315, 320 (D. Del. 2003).

To justify a warrantless search under the special needs exception, the government must demonstrate: (1) the search serves a purpose related to a special need that is separate from ordinary law enforcement; and (2) this special need makes the ordinary requirement of a warrant impracticable under the circumstances. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989). After a valid special need is identified, courts conduct a general test of reasonableness. *Ferguson v. City of Charleston*, 532 U.S. 67, 81 (2001). To determine if the warrant requirement is impracticable, the individual's privacy interests must be balanced against the government's special need. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989); *Von Raab*, 489 U.S. at 665–66.

A. The Need to Protect Vulnerable Children During an Acute Increase in Sex Trafficking Is Not an Ordinary Law Enforcement Purpose.

Although human trafficking remains a problem every week of the year, there is a drastic increase in the demand for sex services during major sporting events. R. at 41. Leading up to the 2015 Super Bowl, online advertisements for sex services increased by 30.3 percent. R. at 41. Experts predicted that ads selling sex would triple during the 2015 Men's College Basketball Championship.[1] During the 2010 Super Bowl, the National Center for Missing and Exploited Children estimated 10,000 individuals were trafficked. R. at 41. Preceding the 2012 Super Bowl, over a quarter of the online sex advertisements were directed at fans attending the game. R. at 41. The additional tens of thousands of people attending the All-Star Game would increase

[1] Aisie Hasna, *Sex Trafficking will Spike During Final Four, Predicts Expert*, FOX 59 (April 1, 2015) http://fox59.com/2015/04/01/sex-trafficking-will-spike-during-final-four-predicts-expert/.

demand, turning the existing trafficking problem in this community into an epidemic. Citizens worried they would "confront a similar rush of human trafficking victims." R. at 41. The increased threat of child victimization during the All-Star Game compelled the Board to pass L.O. 1923. The ordinance permitted law enforcement to briefly search guests checking into motels near the stadium if officers had reasonable suspicion guests were committing a commercial sex act. R. at 2. The need to protect children from sex trafficking is distinguishable from a general interest in crime control. The ordinance was enacted to prevent an increase in sex trafficking, not to prosecute individuals that recruit sex workers.

For a special needs exception to apply, the primary purpose cannot be ordinary law enforcement. The special needs search must have an "immediate purpose . . . distinct from the ordinary evidence gathering associated with crime investigation." *United States v. Amerson*, 483 F.3d 73, 81 (2nd Cir. 2007). The district court correctly relied on *Griffin* when it found L.O. 1923's enactment was a result of a special need outside the general interest in law enforcement. R. at 7. In *Griffin*, this Court upheld a Wisconsin regulation based on the state's compelling interest to protect the community and monitor the rehabilitation of probationers. 483 U.S. at 873–75. The regulation permitted any probation officer to search a probationer's home without a warrant as long as his supervisor approved and there were "reasonable grounds." *Id.* at 870, 871. The need to supervise probationers justified the Wisconsin regulation, and the resulting search was reasonable. *Id.* at 875–880. L.O. 1923 is similar to the Wisconsin regulation that authorized the search in *Griffin*. The documented increase in sex trafficking during major sporting events created a need to protect Starwood Park's vulnerable youth during the All-Star Game. Any criminal sanctions resulting from the search were collateral to the larger goal being served.

Not every activity undertaken by law enforcement falls under general crime control. In *Illinois v. Lidster*, police set up a checkpoint to obtain information about a fatal hit-and-run. 540 U.S. 419, 422 (2004). The checkpoint was at the same location and at the same time of night as the accident. *Id.* at 427. Officers stopped motorists for 10 to 15 seconds, and asked occupants if they had information regarding the accident. *Id.* This Court held the stop's primary purpose was to seek information from members of the public about a crime that already occurred, not to determine whether a vehicle's occupants committed a crime. *Id.* at 423. The stop conducted pursuant to L.O. 1923 is analogous to the stop conducted in *Lidster*. The primary purpose of the Stripes Motel search was not to determine whether the defendant was committing a crime, but to prevent sex trafficking and to protect potential victims during a major sporting event. The officers were simply inquiring into the welfare of a potential child victim in an area known for sex trafficking.

This Court's holding in *Skinner* is also instructive. There, this Court held that railroads may administer blood, urine, and breath tests for employees who are involved in certain train accidents. 489 U.S. at 612–13. Preventing "accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs" qualified as a special need. *Id.* at 620–21. This Court noted the "overarching concern was 'safety' and was not 'to assist in the prosecution of employees.'" *Id.* Here, L.O. 1923 was enacted to prevent sex trafficking of minors and not to collect evidence to prosecute sex traffickers.

1. Preventing child sex trafficking can be divorced from the ordinary law enforcement objectives found in *Edmond* and *Charleston*.

The district court correctly ruled the purpose of L.O. 1923 could be divorced from the state's general interest in law enforcement. The Thirteenth Circuit erred in relying on *City of Indianapolis v. Edmond* and *Ferguson v. Charleston*, and instead should have relied on this

Court's rationale in *Lidster*, *Skinner*, and *Griffin*. In *Edmond*, this Court held a narcotics checkpoint contravened the Fourth Amendment, because its primary purpose was to uncover evidence of criminal wrongdoing. 531 U.S. 32, 48 (2000). There, without reasonable suspicion, police stopped vehicles at a checkpoint to search for evidence of drug crimes committed by occupants of stopped vehicles. *Id.* The only purpose of the narcotics checkpoints' was to uncover evidence of criminal wrongdoing and did not serve any special need. *Id.* at 44. In *Charleston*, this Court addressed whether a public hospital could lawfully share pregnant women's positive drug tests with law enforcement. 532 U.S. at 71. This Court held suspicionless drug screening of patients' urine did not serve a special need, because the program was designed to uncover criminal drug use, not to provide medical treatment. *Id.* The policy of conducting warrantless drug testing on pregnant women and threatening prosecution for positive results could not be divorced from ordinary law enforcement. *Id.* at 71–73.

Here, the Board's press release explicitly stated the purpose of L.O. 1923 was to "protect the safety of our local children." R. at 41. Although the search eventually led to the defendant's arrest, L.O. 1923's primary purpose was to prevent sex trafficking and protect potential victims, not to collect evidence. If crime control is *one* purpose—but not the *primary* purpose—of a program, the ancillary effect of crime control does not bar the constitutionality of the special needs exception. *Lynch v. City of New York*, 589 F.3d 94, 102 (2nd Cir. 2009); *see also United States v. Hook*, 471 F.3d 766, 773 (7th Cir. 2006) (DNA testing of supervised releasees fits within special needs analysis, since it is not for the investigation of a specific crime, even though it may be used at a later date in relation to law enforcement.).

A special need to protect the community can also have a secondary purpose of aiding law enforcement. In *Michigan Dep't of State Police v. Sitz*, this Court upheld sobriety checkpoints

whose primary purpose was to reduce the immediate hazard posed by drunk drivers. 496 U.S. 444 (1990). Likewise, in *United States v. Martinez–Fuerte,* this Court upheld border patrol checkpoints whose primary purpose was to "intercept illegal aliens" and promote "the Government's interests in policing the Nation's borders." 428 U.S. 543, 561–64 (1976). Special needs searches can have secondary law enforcement consequences without invalidating an otherwise special need. *Lynch,* 589 F.3d at 102; s*ee United States v. Davis,* 482 F.2d 893, 908 (9th Cir. 1973) ("This practical consequence does not alter the essentially administrative nature of the screening process, however, or render the searches unconstitutional."). Even though the search resulted in the defendant's arrest, it does not negate L.O. 1923's primary purpose of preventing sex trafficking and detecting victims. Although the search had "the ancillary effect of furthering ordinary law enforcement concerns, [it] does not negate the applicability of the special needs doctrine." *Neumeyer v. Beard,* 421 F.3d 210, 215 (3rd Cir. 2005).

B. The Dangers Posed by Modern Day Sex Trafficking Requires Immediate Action, Making the Ordinary Warrant Requirement Impracticable.

After establishing that preventing sex trafficking and protecting child victims are valid special needs, the government must next demonstrate the special needs make the ordinary requirement of a warrant impracticable. *Von Raab,* 489 U.S. at 665. "When faced with special law enforcement needs . . . the Court has found that certain general, or individual circumstances may render a warrantless search or seizure reasonable." *Illinois v. McArthur*, 531 U.S. 326, 330 (2001). In *Skinner,* the dissipation of drug and alcohol levels provided a level of immediacy that made the traditional warrant requirement impracticable. 489 U.S. at 621. Adhering to the warrant requirement would prevent the effective supervision of probationers in *Griffin*. 483 U.S. at 875. Here, the delay inherent in obtaining a warrant makes it impossible for officers to respond quickly to evidence of victimization. This Court recognizes when the government faces

urgent circumstances requiring immediate action it can "justify departures from the usual warrant requirement." *Griffin*, 483 U.S. at 874.

Modern technology makes preventing and detecting sex trafficking even more difficult, creating a perilous situation that renders the warrant requirement impracticable. R. at 2. Gangs advertise on the "deep web" and conscripted sex workers are shuttled between hotel rooms, making a warrant to search prior locations futile. R. at 2. In response to the anticipated surge of sex trafficking, L.O. 1923 was intentionally designed to prevent traffickers from using local motels to prostitute their victims. Officer Nelson testified that L.O. 1923 allowed him to "help additional potential victims" by disrupting the cycle of sex trafficking. R. at 27. This Court evaluates three factors when determining if the special need makes the warrant requirement impracticable: (1) the nature of the privacy interest upon which the search intrudes; (2) the character and degree of the governmental intrusion; and (3) the importance of the government interest at stake. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654–61 (1995).

1. L.O. 1923 created a diminished expectation of privacy, because it increased regulation of local motels during the All-Star Game.

Under the special needs exception, a search is judged by balancing the intrusion on the individual against the legitimate governmental interest. *Wilcher v. City of Wilmington*, 139 F.3d 366, 374 (3rd Cir. 1998). In *Skinner*, train employees had a diminished expectation of privacy due to their participation in an industry that is regulated pervasively to ensure safety. 489 U.S. at 627; s*ee Edmond*, 531 U.S. at 47–48 ("Our holding also does not affect the validity of . . . searches at places . . . where the need for such measures to ensure public safety can be particularly acute."); *see also Chandler v. Miller*, 520 U.S. 305, 323 (1997) ("[W]here the risk to public safety is substantial and real, blanket suspicionless searches . . . may rank as 'reasonable.'"). The defendant had a diminished expectation of privacy while checking in into

the Stripes Motel. *See Horton v. California*, 496 U.S. 128, 137 (1990) (holding officers may observe an individual from a public place, such as a motel lobby, without violating any reasonable expectation of privacy). The Board also released a statement to the press about the preventive ordinance two months before it went into effect. R. at 3. Therefore, the defendant was put on notice that L.O. 1923 authorized officers to search individuals checking into motels that particular week.

2. The search conducted was minimally intrusive, because L.O. 1923 was limited in scope and duration and required reasonable suspicion.

Courts have held far more intrusive searches are not in violation of the Fourth Amendment. *See Bell v. Wolfish*, 441 U.S. 520, 558–60 (1979) (suspicionless body cavity searches of inmates during which male inmates "must lift [their] genitals and bend over to spread [their] buttocks for visual inspection [and wherein t]he vaginal and anal cavities of female inmates also are visually inspected"); *Griffin*, 483 U.S. at 879–80 (upholding a warrantless search of a probationer's residence); *Skinner*, 489 U.S. at 614 (breath, blood, and urine test for railroad employees); *Von Raab*, 489 U.S. at 666 (upholding suspicionless drug testing of U.S. Customs officials); *Reynolds v. City of Anchorage*, 379 F.3d 358, 366 (6th Cir. 2004) (strip search of minor living in group home); *Miller v. United States Parole Comm'n*, 259 F. Supp. 2d 1166, 1175 (D. Kan. 2003) (providing blood sample for DNA database).

The privacy intrusions authorized by L.O. 1923 were limited to motels surrounding the stadium during a specified week. In *Skinner*, the Government was authorized to test without a showing of individualized suspicion after a train accident occurred. 489 U.S. at 633. Railroads were not required to point to specific facts giving rise to a reasonable suspicion of impairment before testing an employee. *Id.* Providing a urine sample is significantly more intrusive than a brief pat down of an individual's jacket. *See United States v. Doe*, 61 F.3d 107, 109–10 (1st Cir.

1995) (routine security searches at airport checkpoints pass constitutional muster because compelling public interest in curbing air piracy generally outweighs their limited intrusiveness). Victoria City saw a need to protect children, enacted L.O. 1923 as a preventative measure, and granted officers the authority to search suspicious individuals.

Here, the district court ruled the most important consideration was that L.O. 1923 required officers to have reasonable suspicion in order to initiate a search. R. at 9. Courts have noted the presence of individualized suspicion is more likely to make a search reasonable. *Roe v. Marcotte*, 193 F.3d 72, 78 (2nd Cir. 1999) (citing *Von Raab*, 489 U.S. at 665). This Court has held the special needs exception can apply even when there is no reasonable suspicion to conduct the search. *See Bd. of Educ. of Indep. Sch. Dist. of No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 837 (2002); *see also Vernonia Sch. Dist. 47J*, 515 U.S. at 646 (policy authorizing random urinalysis drug testing for participation in interscholastic athletics valid). L.O. 1923 required an officer to have reasonable suspicion that an individual was engaging in a commercial sex act before it authorized any action. The officers pointed to specific and articulable facts prior to conducting the search: (1) the defendant was checking into the Stripes Motel at 11:22 p.m.; (2) the motel was located in an area known for a high level of sex trafficking; (3) the defendant was with a female that appeared to be much younger than him; (4) the child was wearing a low-cut top and tight fitting shorts at night; (5) neither had any luggage; and (6) the defendant had visible tattoos on his forearm identifying him as a member of the Starwood Homeboyz street gang, whose most profitable venture is sex trafficking. R. at 2. These circumstances provided officers with reasonable suspicion as required by L.O. 1923 to conduct the search.

The limited intrusion authorized by L.O. 1923 was reasonable, because it is analogous to the brief investigatory detentions found in *Terry v. Ohio*. 392 U.S. 1, 21 (1968) (reasonable

investigatory detentions comply with the Fourth Amendment). *Terry*, 392 U.S. at 21. Here, the officers can point to specific facts that led to the brief search of the defendant. R. at 3. L.O. 1923 only affected areas with the highest incidents of sex trafficking in a territory run by rival gangs, so it was possible the defendant was armed and dangerous. R. at 3. Following this Court's rationale in *Terry*, it was reasonable for the officers to be suspicious of potential sex trafficking and the search was no longer than necessary to complete that inquiry.

3. The immediate threat of sex trafficking and harm to potential victims outweighs the defendant's diminished expectation of privacy.

L.O. 1923 served important public safety interests. The unparalleled increase in sex trafficking during major sporting events highlights the inability to prevent this type of criminal activity using the traditional warrant requirement. *See Von Raab*, 489 U.S. at 678 (balancing public interest of drug testing program against individual privacy concerns). Any delay, no matter how small, allows sex traffickers to operate with impunity. Warrants can only be issued for prior locations, and victims and traffickers move quickly.

The emotional and physical impact of childhood sexual exploitation is a grave public concern magnified by the expected increase in trafficking during the All-Star Game. R. at 40. The damage that occurs in the custody of sex traffickers is "not easily undone," and is best addressed by preventing its occurrence entirely. R. at 7. Victims are unable to escape the cycle if law enforcement cannot detect or identify victims of gang trafficking. Jan Fox, *Into Hell: Gang-Prostitution of Minors*, 20 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 591, 603 (2014). Gangs often target at-risk women by recruiting or kidnapping near homeless shelters, detention centers, and public housing developments. *Id.* at 602. Minors involved in gang prostitution are often physically beaten, intimidated, and threatened. *Id.* at 603. In gang-controlled youth prostitution, clients are found online rather than street solicitation. *Id.* Sexual activity is often

confined to secret, private spaces such as motel rooms. Victims cannot be rescued if they cannot be identified, so it is vital that law enforcement detects child victims early and quickly.

These government concerns outweigh the defendant's diminished expectation of privacy. The scope of the search was limited, and reasonable suspicion was required before officers could conduct the search. The search pursuant to L.O. 1923 comports with the Fourth Amendment's mandate that a search be reasonable, because the special need outweighed the minimal intrusion. The special needs exception allows Victoria City to prioritize the safety of children.

II. W.M. HAD APPARENT AUTHORITY TO CONSENT TO A SEARCH BASED ON HER YEAR LONG RESIDENCE, ACCESS TO THE APARTMENT, STORAGE OF PERSONAL PROPERTY, AND GENERAL USE OF THE APARTMENT AND CELL PHONE FOUND WITHIN.

A search of a private home "conducted without a warrant issued upon probable cause is 'per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.'" *Schneckloth v. Bustamonte*, 412 U.S 218, 219 (1973) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). Private homes receive the highest degree of protection from searches conducted without a warrant. *Payton v. New York*, 445 U.S. 573, 585 (1980). The presumption against searches conducted without a warrant is not an absolute prohibition. *Katz*, 389 U.S. at 357. Certain narrowly tailored categories of searches are considered reasonable even when conducted without obtaining a warrant. *Id*; s*ee also Kentucky v. King*, 563 U.S. 454, 459 (2011) ("The ultimate touchstone of the Fourth Amendment is reasonableness.").

A search conducted based on consent is a "carefully drawn exception to the warrant requirement." *Jones v. United States*, 357 U.S. 493, 499 (1958); *see also Davis v. United States*, 328 U.S. 582, 593–94 (1946) ("One of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent."). Consent searches are standard "investigatory techniques of law enforcement agencies . . . and are

constitutionally permissible and wholly legitimate." *Schneckloth*, 412 U.S at 228. To ensure consent searches are narrowly tailored, the prosecution must prove consent was "freely and voluntarily given." *Bumper v. North Carolina*, 391 U.S. 543, 548 (1973); *see also Florida v. Bostick*, 501 U.S. 429, 438 (1991).

Consent can be given by anyone who possessed "common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock*, 415 U.S. 164, 171 (1974). In *Matlock*, the defendant was arrested on charges of bank robbery. *Id.* at 166. Investigators received consent to search the defendant's home from the defendant's girlfriend, who lived at the residence. *Id*. at 167. This Court reasoned each resident of the home had individual authority to admit guests including the police, and co-residents assume the risk the other resident will consent to a search of the residence. *Id.* at 171. Joint use of the home provided the girlfriend autonomy to consent to a search without "vicariously waiving the defendant's rights." *Id*. at 167.

Third party consent is also valid when police believe the person has apparent authority over the place or objects to be searched. *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). In *Rodriguez*, the police relied on consent from the defendant's girlfriend to search his apartment, but she did not actually live at the residence. *Id.* Although the defendant's girlfriend did not have actual authority to consent, it may have been reasonable for the police to believe that she did. *Id.* at 183. This Court explained "the constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises, than it is violated when they enter without a warrant because they reasonably (though erroneously) believe they are in pursuit of a violent felon who is about to escape." *Id.*

A. It Was Reasonable for Officer Nelson to Believe W.M. had Authority to Consent Based on the Totality of the Circumstances.

The question of whether W.M. had actual authority was not raised in the district court, so this Court only needs to consider if W.M. had apparent authority. The touchstone of apparent authority is "whether the officer reasonably believed that the person had authority to consent based on the facts known to him at the time." *United States v. Richards*, 741 F.3d 843, 850 (7th Cir. 2014) (quoting *Rodriguez*, 497 U.S. at 184). Unlike actual authority, apparent authority to consent to a search is not bound by the laws of property and does not require the third party to have an ownership interest in the places or objects being searched. *Matlock*, 415 U.S. at 171. Apparent authority to consent to a search is broader than the rights accorded by property law. *Georgia v. Randolph*, 547 U.S. 103, 110 (2006). Apparent authority is a "social concept based on whether the consenting person had joint access or control of the area being searched." *Richards*, 741 F.3d at 850.

Apparent authority is usually reasonable when the consenting party is currently living at the home being searched. *Fernandez v. California*, 134 S.Ct. 1126, 1133 (2014) ("[C]onsent by one resident of jointly occupied premises is generally sufficient to justify a warrantless search."). Access to the shared residence while the other party is absent also strongly supports apparent authority over the premises. *United States v. Turner*, 23 F. Supp. 3d 290, 305 (S.D. N.Y. 2014). Residency and access are not the only considerations in determining apparent authority. This Court has recognized certain types of co-resident relationships do not give rise to apparent authority. *Randolph*, 547 U.S. at 112. In recognition of the varied co-tenant relationships, this Court noted "the constant element in assessing Fourth Amendment reasonableness in the consent cases, then, is the great significance given to widely shared social expectations." *Id.* at 111. Co-residents who are merely roommates do not have authority to consent to a search of the other

roommate's private areas. *Randolph*, 547 U.S. at 111. In contrast, amorous relationships, such as marriages or cohabitating romantic partnerships give rise to a presumption that either resident can consent to a search. *United States v. Whitfield*, 929 F.2d 1071, 1074–75 (D.C. Cir. 1991); *United States v. Morning*, 64 F.3d 531, 534 (9th Cir. 1995).

The district court applied these principles while finding Officer Nelson was reasonable in relying on W.M.'s apparent authority. The district court noted specific facts supporting W.M.'s authority from a list of factors identified by the Seventh Circuit in *United States v. Groves*, 530 F.3d 506, 509–10 (7th Cir. 2008). A majority of factors from *Groves* were present: (1) possession of a key to the premises; (2) W.M.'s admission that she lived at the residence; (3) receiving mail and bills; (4) storing personal belongings in the bedroom closet; (5) performing household chores; and (6) access to the home while the owner is not present. *Id.* The district court identified two factors from *Groves* that were not present here: (1) being on the lease; and (2) possession of a driver's license with the same address. *Id.* Not all factors have to be present, because apparent authority is based on the totality of the circumstances. *Id.* at 510 ("[D]istrict courts should not use this as a checklist of factors . . . rather it is offered to show the types of facts that should and could be considered in evaluating the issue.").

1. Officer Nelson actively investigated the details of W.M's residency at the apartment to determine her ability to consent to the search.

An additional consideration that bears heavily on the reasonableness of apparent authority is the degree of diligence used to make the determination. *United States v. Maeda*, 408 F.3d 14, 21 (1st Cir. 2005) ("officers cannot rely on a bare assertion of residence"). Police cannot rely on consent in ambiguous circumstances, but courts should not delve into "metaphysical subtleties" to determine the boundaries of a consenting party's authority. *Frazier v. Cupp*, 394 U.S. 741, 750 (1969). Officers have an obligation to eliminate any ambiguity over

the individual's authority prior to conducting a search. *United States v. Salinas-Cano*, 959 F.2d 861, 864 (10th Cir. 1992). Even when a third party explicitly asserts they live at the residence, if the "surrounding circumstances could conceivably be such that a reasonable person would doubt its truth" the officer has a duty to "not act upon it without further inquiry." *Rodriguez*, 497 U.S. at 188.

Officer Nelson conducted an objectively reasonable inquiry into W.M.'s ability to provide consent as required by this Court in *Rodriguez*. Officer Nelson initiated the inquiry into W.M.'s residence when he asked her if she "had a safe place to stay." R. at 29. W.M. replied she lived with her boyfriend, the defendant, for almost a year and she had his permission to continue living at their shared apartment despite his arrest. R. at 36. W.M.'s assertion of a cohabitating romantic relationship with the defendant gave rise to a presumption of authority over the apartment. *See Morning*, 64 F.3d at 534. W.M.'s apparent authority was further supported, because she informed Officer Nelson she had access to a spare key. *See United States v. Hudson*, 405 F.3d 425, 441 (6th Cir. 2005). The combination of a cohabitating relationship and access to the apartment supported Officer Nelson's determination W.M. had apparent authority. *See United States v. Rodriguez*, 888 F.2d 519, 522 (7th Cir. 1989) (finding residence and possession of a key strongly support apparent authority).

W.M. said she was not on the lease, but she "shared everything equally" and the defendant paid the rent with proceeds from the "business they shared." R. at 29. This informal rental agreement supports W.M.'s apparent authority, because courts recognize a third party is not required to be on the lease to find apparent authority reasonable. *See United States v. Goins*, 437 F.3d 644, 649 (7th Cir. 2006) (officers are entitled to accept a claim of residence as true even if consenting person is not on the lease). W.M. did not contribute to rent from separate

funds, but apparent authority is determined by the details of the shared living arrangement, not traditional residency requirements based in property law. *See Randolph*, 547 U.S. at 110; s*ee also Hudson*, 405 F.3d at 442 (holding a girlfriend who did not pay rent had apparent authority).

Officer Nelson was cognizant of his duty to establish apparent authority and inquired into the details of W.M.'s relationship with the defendant to resolve any ambiguity. *United States v. Cos*, 498 F.3d 1115, 1128 (10th Cir. 2007) (ruling it is not reasonable for police to proceed on theory "ignorance is bliss"). W.M.'s equal access to the entire apartment and responsibility for cleaning and household chores weigh heavily in favor of finding apparent authority. R. at 33; *see United States v. Aghedo*, 159 F.3d 308, 310–11 (7th Cir. 1998) (holding storage of personal items and completing household chores supports apparent authority). W.M. also told Officer Nelson she hosted friends the night before. R. at 38. This final point is especially illustrative of the scope of W.M.'s general authority over the residence. This Court's social expectation theory explains the ability to admit a guest is analogous to the authority to admit the police to search a residence. *See Fernandez*, 134 S.Ct. at 1135 (authority to invite guests is a hallmark of apparent authority because of the widely shared social expectations in cohabitating relationships).

2. W.M. should not be precluded from providing consent to a search of the shared residence because she was a 16 year old victim of sex trafficking.

The Thirteenth Circuit improperly emphasized W.M.'s age in determining it was unreasonable for Officer Nelson to believe W.M. had apparent authority. The court correctly noted "minority does not, per se, bar a finding of authority" but failed to apply this rule properly. *United States v. Gutierrez-Hermosillo*, 142 F.3d 1225, 1229 (10th Cir. 1998). In *Gutierrez-Hermosillo*, the court ruled a 14 year old girl had apparent authority to consent to a search of a motel room rented by her father, because the girl had "mutual use of the motel room." *Id.* at

1231. The court noted age is not dispositive and was only one factor in the totality of the circumstances. *Gutierrez-Hermosillo*, 142 F.3d at 1231.

This Court has contemplated it can be reasonable for a minor to have apparent authority. *Randolph*, 547 U.S. at 111 ("[A] child of eight might well be considered to have power to consent to the police crossing the threshold."). Other circuit courts have addressed this issue and reached similar conclusions. In *Lenz v. Winburn*, the Eleventh Circuit found as a matter of law a minor can give third party consent to law enforcement officers to enter. 51 F.3d 1540, 1548–49 (11th Cir. 1995). The court reasoned legal sophistication is not required for adults to give consent and apparent authority is based on the totality of the circumstances. *Id.* The defendant's expectation of privacy was no more violated because W.M. was a minor than if she was an adult. *Id.* The Tenth Circuit recognized as minors advance in age they acquire greater discretion to admit visitors on their own. *United States v. Sanchez*, 608 F.3d 685, 690 (10th Cir. 2010). Although W.M. was a minor, she was residing with the defendant in an adult cohabitating relationship signaling her authority over the residence. R. at 36.

W.M.'s status as a sex trafficking victim should not preclude her ability to consent to a search. *See United States v. McAlpine*, 919 F.2d 1461, 1464–65 (10th Cir. 1990) (holding a kidnapping victim can have apparent authority to consent to a search). In *McAlpine*, the court noted "as *Matlock* makes clear, the relevant analysis in third-party consent cases focuses on the relationship between the consenter and the property searched, not the relationship between the consenter and the defendant." *Id*. There, the victim had "access to the home giving rise to the same authority given to any other co-resident." *Id.* Here, there is no indication the defendant revoked W.M.'s access to the apartment prior to his arrest. Affirmative steps by a defendant to revoke previous authority are given great weight and are a common factor in cases where

apparent authority is found unreasonable. *States v. Jackson*, 910 F. Supp. 2d 1146, 1153 (E.D. Wis. 2012) (apparent authority unreasonable if consenting party has been told to move out).

B. W.M.'s Consent to Search the Apartment Included Her Consent to Search the Shared Bedroom Where the Evidence Was Located.

The extent of a search is limited to the scope of authority and access to the property conferred on the consenting party by the defendant. *See United States v. McGee*, 564 F.3d 136, 140 (2nd Cir. 2009). Here, W.M. had unfettered access to the shared bedroom, because she slept in the same bed as the defendant and stored her clothes in the bedroom closet. R. at 38. Cohabitating partners are able to maintain privacy in certain areas, but they have the burden of making that desire known. *Richards*, 741 F.3d at 851; *see also Moore v. Andreno*, 505 F.3d 203, 209 (2nd Cir. 2007) (finding an assertion an area is private prevents another party from having authority to consent to a search). There was no indication W.M. lacked access to any area of the shared bedroom. Therefore, Officer Nelson was reasonable in concluding W.M. had authority to consent to a search of the entire room. *United States v. McCurdy*, 480 F. Supp. 2d 380, 388 (D. Me. 2007) (holding authority to consent to a search includes all areas where it was reasonable the consenting party had access).

1. W.M.'s authority over the bedroom extended to the area underneath the bed where the gun was found.

Whether a search remains within the boundaries of consent is a "question of fact to be determined by the totalities of the circumstances." *United States v. Kimoana*, 383 F.3d 1215, 1223 (10th Cir. 2004). A trial court's findings will be upheld unless they are clearly erroneous. *Id.* After W.M. provided consent, Officer Nelson could search places and objects W.M had authority over. *See United States v. James*, 353 F.3d 606, 615 (8th Cir. 2003). W.M.'s authority extended to the area beneath the bed where Officer Nelson found the handgun. R. at 31. W.M.

slept in the bed with the defendant, and unlike in *United States v. Peyton*, the defendant had not limited W.M.'s access to the area underneath the bed. 745 F.3d 546, 553 (D.C. Cir. 2014) (holding apparent authority does not exist when consenting party informed officers she did not have access to the area under a bed); *see also United States v. Samairat*, 503 F. Supp. 2d 973, 991 (N.D. Ill. 2007). The gun was not inside a closed container that would objectively signal an increased expectation of privacy. *United States v. Taylor*, 600 F.3d 678, 683 (6th Cir. 2010) (finding even a closed shoe box can signal an expectation of privacy); *see also United States v. Waller*, 426 F.3d 838, 848 (6th Cir. 2005). Once Officer Nelson found the gun, he immediately noticed the serial number had been removed, providing probable cause to seize the firearm.

2. The contents of the cell phone should not be suppressed, because W.M. had unrestricted use of the phone and the password to unlock the device.

General authority to enter and search a room does not automatically extend to searching electronic devices found within. *United States v. Andrus*, 483 F.3d 711, 717 (10th Cir. 2011). The consenting individual must have access and general use of the device in order to provide valid consent. *Id.* As this Court stated in *Matlock*, "the relevant inquiry must address the third party's relationship to the object." 415 U.S. at 171. Apparent authority to consent to a search of a computer or electronic device is based on the totality of the circumstances known to the officers at the time of the search. *United States v. Buckner*, 473 F.3d 551, 556 (4th Cir. 2007). An assertion of access or use of an electronic device can be enough to support apparent authority absent any contrary evidence. *United States v. Ruiz*, 428 F.3d 877, 882 (9th Cir. 2005); *see also United States v. Morgan*, 435 F.3d 660, 664 (6th Cir. 2005) (access to a computer is enough to support apparent authority even when the consenting party normally used a different computer).

Courts recognize electronic devices may contain an individual's most private content. *United States v. Clutter*, 674 F.3d 980, 984 (8th Cir. 2012); *see also Andrus*, 483 F.3d at 717

("[F]or most people, their computers are their most private spaces."). The most important factor in determining third party authority is whether a defendant's electronic device is secured with a password. *Clutter*, 674 F.3d at 984. When the consenting party does not know the defendant's personal password, apparent authority is difficult to establish. *Id*. Courts find apparent authority is reasonable when the defendant does not protect the device with a password or when the password is shared with the consenting party. *Buckner*, 473 F.3d at 551; *see also United States v. Gardner*, No. 16-cr-20135, 2016 U.S. Dist. LEXIS 62043, at *21 (E.D. Mich. May 11, 2016) (ruling a teenage victim of sex trafficking had apparent authority over the defendant's cell phone because the defendant allowed her to use the phone and provided her with the password).

This Court should reverse the Thirteenth Circuit's decision and hold the cell phone should not be suppressed. W.M. informed Officer Nelson she was allowed to use the phone to make personal calls and send text messages. R. at 32. W.M.'s photo was displayed on the lock screen of the phone, and she used the device to access her personal social media accounts. R. at 32; *see Buckner*, 473 F.3d at 555 (using an electronic device to play games supports apparent authority). The defendant also provided W.M. with the password to unlock and access the phone, providing a clear indication of W.M.'s authority to consent to a search. The Thirteenth Circuit erred in applying *California v. Riley*, which prohibits the search of a cell phone incident to arrest. 134 S.Ct. 2471, 2489 (2014). *Riley* emphasized defendants may have an increased expectation of privacy over their cell phone. *Id.* However, that holding does not affect the validity of searches conducted pursuant to apparent authority. The defendant assumed the risk W.M. would consent to a search of the device when he allowed her to use the phone and provided her with the password.

CONCLUSION

Searches conducted pursuant to L.O. 1923 do not violate the Fourth Amendment, because the need to prevent sex trafficking and protect child victims made the ordinary warrant requirement impracticable. L.O. 1923 served an important public interest that could be divorced from ordinary law enforcement. Victoria City prioritized the protection of its most vulnerable citizens and attempted to increase public safety in gang-controlled areas afflicted by sex trafficking. L.O. 1923 explicitly limited the scope and duration of searches and provided officers with the authority to protect at-risk children during the All-Star Game.

This Court should reverse the Thirteenth Circuit and dismiss the motion to suppress evidence. W.M. provided valid consent to search the shared apartment and cell phone. Officer Nelson reasonably established apparent authority based on W.M.'s yearlong residence, access to the apartment, and general use of the bedroom prior to asking for consent to conduct the search. The defendant assumed the risk W.M. would consent to a search of the device by providing W.M. with the password and unrestricted use of the cell phone.