Case No. 03-240

In The
Supreme Court of the United States

OCTOBER TERM, 2016

United States of America,
Petitioner,

v.

William Larson,
Respondent.

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

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Under the special needs exception to the Fourth Amendment, governments may conduct searches pursuant to a special need beyond the normal need for law enforcement. In response to concerns about increased sex trafficking of minors during the All-Star Game, Victoria City passed Local Ordinance 1923, which allowed police officers to search hotel guests on reasonable suspicion of sex trafficking. Are searches under Local Ordinance 1923 permitted under the special needs exception to the Fourth Amendment?
2. Under the Fourth Amendment, a warrantless search is valid when a third party consents to the search, and police reasonably believe a third party possesses common authority over the premises or object. W.M. possessed apparent authority to authorize the search of her residence jointly occupied with Larson and the mutually used cell phone because after a reasonable investigation, Officer Nelson reasonably concluded that W.M. had common authority over the residence and cell phone to authorize the searches. Did Officer Nelson reasonably believe W.M. had the authority to consent to the search of the apartment at 621 Sasha Lane or the cell phone found inside?

STATEMENT OF FACTS

In March 2013, the Professional Baseball Association ("PBA") selected Victoria City, Victoria ("Victoria City") to host the league's 2015 All-Star Game ("All-Star Game"). R. 2. The Victoria City Board of Supervisors ("Board") and the PBA agreed that the game would be held on July 14, 2015. R. 2. They also agreed the game would be held at Cadbury Park, a stadium in the Starwood Park neighborhood in the downtown area of Victoria City. R. 2.

Gang activity is a prevalent problem in the Starwood Park area. R. 2. Two rival gangs control the area: Starwood Homeboyz and 707 Hermanos. R. 2. These gangs engage in a variety of illegal activities, but their most profitable venture is human trafficking. R. 2. Gangs in the area are estimated to control up to 1,500 conscripted sex workers, many of which are likely children. R. 2. Gangs use webpages like backpage.com to advertise, which law enforcement has a difficult time tracking. R. 2.

City officials expected the All-Star Game would draw tens of thousands of visitors to Starwood Park. R. 2. Citizen groups raised concerns that the game would cause more human trafficking activity in the neighborhood. R. 2. They argued that other cities, hosting large sporting events, experienced large increases in sex trafficking because of the event. R. 2.

Local Ordinance 1923

In response to the public outcry, the Board passed Local Ordinance 1923 ("L.O. 1923") on May 5, 2015. R. 2. L.O. 1923 allows law enforcement officers to search an individual obtaining a room in a "hotel, motel, or public lodging facility" in the Starwood Park neighborhood, if the officers have reasonable suspicion that the individual is either "[a] minor engaging in a commercial sex act as defined by federal law" or "an adult or minor who is facilitating, or attempting to facilitate the use of a minor for a commercial sex act as defined by federal law." R. 2. The ordinance provided that such searches must be "limited in scope and

duration to that which is reasonably necessary to ascertain whether the individual searched is engaged in the conduct described in [the ordinance]." R. 2. The ordinance was only valid from July 11, 2015 to July 17, 2015 spanning the duration of the All-Star Game. R. 2. Additionally, the ordinance was only valid in the Starwood Park neighborhood. R. 3–4.

On May 6, 2016, the Board released a press release announcing L.O. 1923. R. 3. The Board explained that the ordinance was needed because of the prevalence of child sex trafficking in the Starwood Park area. R. 3. The press release focused on the horrifying personal stories of trafficking victims. R. 40–41. With the Board specifically focusing on the damaging effect sex trafficking has on minor victims. R. 40–41. It also focused on studies showing that child sex trafficking surges in response to major sporting events like the All-Star Game. R. 40–41.

The Initial Search

On the night of July 12, 2015, Officer Joseph Richols and Officer Zachary Nelson were positioned at the front desk of the Stripes Motel to prevent the exploitation of minors subjected to sex trafficking under L.O. 1923. R. 3. At 11:22 p.m., William Larson ("Larson") and a much younger female in revealing clothing that appeared to be a minor entered the hotel. R. 3. The officers noticed two visible tattoos on Larson identifying him as a member of the Starwood Homeboyz street gang. R. 2–3. The first tattoo was located on Mr. Larson's forearm, containing the letters "S" and "W" imprinted on a wizard's hat. R. 3. The second identifying tattoo was located on the back of his neck and read "4-11-5-11." R. 3. Based on 12 years of training and experience, Officer Nelson knew that these numbers corresponded to the letters "d", "k", and "e" standing for the phrase "dinosaur killer, everybody killer." R. 3. Dinosaur is a derogatory term used by the Starwood Homeboyz to describe their rival street gang, the 707 Hermanos. R. 3.

Based on this evidence, Officer Richols and Officer Nelson had reasonable suspicion to search Larson and the minor pursuant to L.O. 1923. R. 3. The search of Larson resulted in the

finding of nine condoms, a butterfly knife, lube, two oxycodone pills, $600 cash, and a list of customers with corresponding allotments of time. R. 3–4. The search of the female companion produced a Victoria State driver's license identifying her as W.M., a 16-year-old minor. R. 4. Officer Richols immediately handcuffed Larson and arrested him for the sex trafficking of a minor in violation of 18 U.S.C. § 1591(a)(1). R. 4.

The Search of the Apartment

Officer Nelson declined to put W.M. under arrest because he believed her to be the victim of a human sex trafficking operation. R. 4. Although W.M. was unsettled by Larson's arrest, Officer Nelson assured her that she was not in any trouble. R. 4. Officer Nelson asked W.M. if she would share a bit more about her relationship with Larson and learned that the two had been together for one year. R. 4. While verifying that W.M. had a safe place to spend the night, W.M. confirmed that she shared an apartment with Larson and considered it to be her permanent residence that she could access at any time. R. 30. After Officer Nelson conducted some follow up questions, W.M. provided that Larson shared everything with her. R. 29. Officer Nelson also learned W.M. kept all of her belongings at the apartment, including medical bills and personal mail. R. 30–31. Upon concluding that W.M. had mutual use of the apartment as her permanent residence, Officer Nelson asked permission to search the apartment and W.M. affirmatively consented. R. 31. After W.M. used a spare key to open the apartment, Officer Nelson found a loaded black semi-automatic handgun under the bed with the serial number scratched off. R. 4.

Officer Nelson then found a cell phone on a nightstand in the bedroom with a custom cover displaying the letters "S" and "W" wrapped in a wizard's hat similar to the tattoo on Larson's forearm. R. 4. Similarly, W.M. has a tattoo of the letters "S" and "W" on her ankle that was visible to Officer Nelson. R. 37. When Officer Nelson asked W.M. who owned the cell phone, W.M. asserted that she shared the phone with Larson. R. 4. Larson demanded that W.M. use only

the subject phone after becoming infuriated and physically abusing W.M. for texting a male classmate about a school project. R. 30. W.M. had unrestricted access to the phone for all purposes, including social media platforms. R. 30. Upon learning both W.M. and Larson used the phone, Officer Nelson received consent from W.M. to search the phone and she provided the password to access the phone. R. 30. The phone contained inappropriate pictures of W.M. and a video of Larson rapping about pimping. R. 4.

The Criminal Proceedings

On August 1, 2015, a federal grand jury indicted Larson and charged him with one count of sex trafficking of children in violation of 18 U.S.C. § 1591(a)(1) and one count of a felon being in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). R. 5. The District Court denied Larson's motion to suppress all relevant evidence, and allowed the Government to use the evidence and incident search under the special needs exception to the Fourth Amendment, as well as the results of the searches provided by W.M.'s voluntary consent. R. 15. The Thirteenth Circuit reversed the District Court on both issues, and remanded the case for a new trial. R. 15.

SUMMARY OF ARGUMENT

The Thirteenth Circuit erroneously reversed the District Court's denial of Larson's motion to suppress evidence for two reasons. First, the District Court correctly found that the special needs exception to the Fourth Amendment applies to L.O. 1923 because it addressed the special need of sex trafficking and was reasonable. Second, the District Court correctly found that the searches of W.M. and Larson's apartment and cellphone were justified because the Officer reasonably believed that W.M. had common authority and could consent to the searches.

First, L.O. 1923 qualifies under the special needs exception to the Fourth Amendment. The Board passed the ordinance for the primary purpose of protecting minors forced to engage in sex

trafficking. This need was beyond the normal needs of law enforcement and qualifies as a special need under the exception. The fact that law enforcement participated in the searches is not relevant as this Court has never held that law enforcement cannot be involved in special needs searches. Searches under the statute are also reasonable because the balance of interests weighs in favor of the government. This is because the subjects of the searches had diminished privacy expectations, the ordinance limited the searches in scope, and the governmental interest was severe and important.

The Thirteenth Circuit incorrectly reversed the District Court's finding that Officer Nelson reasonably concluded, after an extensive and diligent investigation, W.M. had common authority over the apartment at 621 Sasha Lane and the cell phone found within. A warrantless search is valid when an officer reasonably concludes that a third party has common authority over a residence or object. When faced with ambiguous circumstances, an officer has a duty to investigate further to reasonably conclude that the party has common authority. After an extensive investigation, Officer Nelson reasonably concluded that W.M. shared the apartment at 621 Sasha Lane with Larson as her permanent residence and had unrestricted access, and reasonably concluded that W.M. had mutual use and joint access to the cell phone providing her with authority to provide consent to the search. Overall, the Thirteenth Circuit incorrectly overturned the District Court's finding that the voluntary consent provided by W.M. was valid because Officer Nelson made a reasonable conclusion that she held common authority over the apartment and cell phone.

STANDARD OF REVIEW

The application of the special needs exception is a question of law and therefore this Court exercises *de novo* review. *United States v. Ward*, 131 F.3d 335, 338 (3d Cir. 1997). A district court's denial of a motion to suppress is reviewed *de novo*, while its factual findings are reviewed for clear error. *United States v. Ruiz*, 428 F.3d 877, 880 (2005). Whether a person has apparent

authority to consent to a search is a mixed question of law and fact reviewed *de novo*. *United States v. Richards*, 741 F.3d 843, 847 (7th Cir. 2014). Furthermore, determinations on the reasonableness of searches is a question of law that courts review *de novo*. *United States v. Wagers*, 452 F.3d 534, 537 (6th Cir. 2006).

ARGUMENT

I. Local Ordinance 1923 satisfies the special needs exception to the Fourth Amendment because Victoria City's primary purpose for enacting the ordinance was to protect trafficking victims and searches under the ordinance are reasonable.

Searches under L.O. 1923 are valid under the special needs exception to the Fourth Amendment. The Fourth Amendment protects the right of individuals to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. Importantly, the Fourth Amendment only protects against unreasonable searches. *Skinner v. Ry. Labor Exec. Ass'n*, 489 U.S. 602, 619 (1989). Searches are generally unreasonable unless they are "pursuant to a judicial warrant issued upon probable cause." *Id.* However, this Court has recognized several exceptions to the Fourth Amendment's warrant and probable cause requirements. *Id.*

One such exception, is the special needs exception to the Fourth Amendment. *Id.* Courts have generally recognized that "special needs, beyond the normal need for law enforcement" may make the warrant and probable-cause requirements impracticable. *Id.* If a court determines a special need exists, then it must determine whether the special need searches are reasonable by balancing the governmental interest with the individual privacy interests involved in the search. *Id.* Therefore, for searches to meet the special needs exception, two elements must be met: 1) there must be a special need beyond the normal needs of law enforcement, and 2) the special need searches must be reasonable. *Lynch v. City of New York*, 589 F.3d 94, 100 (2d Cir. 2009).

L.O. 1923 meets the special needs exception and thus is valid under the Fourth Amendment. First, the Board passed the ordinance for the purpose of protecting trafficking victims, which is a special need outside the normal need for law enforcement. Second, searches under the ordinance are reasonable because the balance of interests weighs in favor of the government's interests.

A. Local Ordinance 1923 is beyond the normal needs of law enforcement because its primary purpose was to protect trafficking victims.

L.O. 1923 meets the special needs exception because its primary purpose was outside the normal needs of law enforcement. For the special needs exception to apply, the search must be based on a need that is "beyond the normal need for law enforcement." *Skinner*, 489 U.S. at 619. Courts look to the primary purpose of a law to determine whether the law addresses a special need. *Lynch*, 589 F.3d at 100. That requires courts to look at the purpose of the law from a "programmatic level" to determine if it is "unrelated to the government's general interest in crime control." *Id.*

L.O. 1923 meets the first element of the special needs exception because the Board passed it in response to a need outside of normal law enforcement. First, the primary purpose of L.O. 1923 was to protect trafficking victims near the All-Star Game, not to pursue normal law enforcement goals. Second, even if the ordinance helped law enforcement goals, that does not matter as long as the primary goal was not law enforcement related. Finally, the involvement of law enforcement in L.O. 1923 does not invalidate the ordinance, because this Court has never held that law enforcement may not be involved in special needs searches.

1. *The primary purpose of Local Ordinance 1923 is to protect trafficking victims, not to pursue ordinary law enforcement goals.*

L.O. 1923 satisfies the primary purpose test of the special needs exception because its primary purpose was to protect trafficking victims. For a need to qualify as a special need, it must

be "divorced from the State's general interest in law enforcement." *Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001). However, this Court has been clear that this test does "not refer to every 'law enforcement' objective." *Illinois v. Lidster*, 540 U.S. 419, 424 (2004). Typically, this has meant that laws are not justified by a special need if their primary purpose was to "obtain evidence of criminal conduct." *Ferguson*, 532 U.S. at 86.

Griffin v. Wisconsin provides a good example of a special need. 483 U.S. 868, 875 (1987). In *Griffin*, the defendant challenged a statute that allowed the state to search the homes of individuals on probation for probation violations. *Id.* This Court found that the law was justified by two special needs: the need to rehabilitate individuals on probation and the need to protect the surrounding community. *Id.* While the law may have served a law enforcement objective, the Court found that it was not an impermissible objective because its primary purpose was not the state's general interest in crime control. *See Id.*

Like *Griffin*, the Board's goal for L.O. 1923 was to protect the community, not to collect evidence. *Id.* Studies have shown that sex trafficking increases significantly in cities that host major sporting events like the All-Star Game. *See generally* Victoria Hayes, *Human Trafficking for Sexual Exploitation at World Sporting Events*, 85 CHI.-KENT L. REV. 1105 (2010). These same studies have shown that many of the trafficking victims are minors. *Id.* The Board passed L.O. 1923 in response to the "unique prevalence of child sex trafficking" near sporting events like the All-Star Game. The Board's press release about the ordinance focused heavily on the plight of child victims and the studies showing the connection between their plight and major sporting events. The press release shows that the primary purpose of L.O. 1923 was to protect trafficking victims, not to pursue ordinary law enforcement goals, and therefore the ordinance is justified by a special need.

2. *Searches under the special needs exception can have both law enforcement and non-law enforcement purposes and still be valid under the Fourth Amendment.*

As long as the primary purpose for L.O. 1923 was to protect trafficking victims, then it does not matter if it also serves law enforcement purposes. The special needs exception only looks to the primary purpose of a law, not all of its purposes. *Lynch v. City of New York*, 589 F.3d 94, 102 (2d Cir. 2009). "[T]he mere fact that crime control is *one* purpose—but not the *primary* purpose—of a program of searches does not bar the application of the special needs doctrine." *Id.* As Justice Kennedy noted in his concurring opinion in *Ferguson*, every search will have the immediate purpose of obtaining evidence, because searches by their very nature are "designed to collect evidence." *Ferguson v. City of Charleston*, 532 U.S. 67, 86–88 (2001) (Kennedy, J., concurring). Therefore, courts should look to the primary purpose of a search rather than looking at all of the underlying purposes because every search will involve some element of evidence collection.

For example, in *Michigan Department of State Police v. Sitz*, this Court found a DUI checkpoint constitutional under the special needs exception. 496 U.S. 444, 451 (1990). While DUI checkpoints involve investigating a crime (drunk driving), their primary purpose is protecting the safety of other drivers, who may be at risk from drunk driving. *See Id.* This Court found that police officers can collect evidence in such checkpoints because their primary goal is always safety and the collection of evidence is merely a secondary goal. *See Id.*

Like a DUI checkpoint, the primary goal of L.O. 1923 is safety, not evidence collection. The Board's primary purpose for L.O. 1923 was to protect trafficking victims, and therefore it does not matter if the ordinance had other law enforcement purposes. While law enforcement officers may have collected evidence as part of searches under the ordinance, that does not mean that collecting evidence was the primary purpose of the ordinance. Like the DUI checkpoint, the

collection of evidence was merely a secondary point that could be achieved by the law. As long as the primary purpose continued to be focused on the safety of trafficking victims, then the law meets the special needs test. Therefore, L.O. 1923 satisfies the special needs exception because its primary purpose was to protect trafficking victims and no other purposes matter when it comes to deciding whether the exception applies.

3. *Under this Court's precedent, law enforcement officers can be involved in searches under the special needs exception.*

This Court has never held that law enforcement personnel may not be involved in special needs cases. In fact, the "special-needs [exception] was developed, and is ordinarily employed, precisely to enable searches by *law enforcement officials* who, of course, ordinarily have a law enforcement objective." *Ferguson v. City of Charleston*, 532 U.S. 67, 99 (2001) (Scalia, J., dissenting). For example, in *Griffin*, there was involvement by both police officers and probation officers. *Griffin v. Wisconsin*, 483 U.S. 868, 871 (1987). Furthermore, this Court's recent opinion in *Ferguson* does not prohibit the involvement of law enforcement officers, it only required an examination of law enforcement's role in the searches. *See Ferguson*, 532 U.S. at 84–85.

L.O. 1923 does not justify the creation of a new rule prohibiting law enforcement involvement in special needs searches. Unlike in *Ferguson*, law enforcement officials did not create nor advocate for L.O. 1923. *Id.* Instead L.O. 1923 was the result of outcry by citizen groups about the horrific problem of sex trafficking incited by the All-Star Game. While law enforcement officers may have executed the searches under L.O. 1923, they did not create or design the law to serve normal law enforcement needs. Therefore, this case does not serve as justification for creating a new rule banning all law enforcement involvement in special needs cases.

Furthermore, a rule prohibiting law enforcement involvement in special needs searches would be bad public policy. Law enforcement may need to be involved in some searches, because

the use of law enforcement officers may be the only way to accomplish some non-law enforcement goals. *Wagner v. Swarts*, 827 F. Supp. 2d 85, 95 (N.D.N.Y. 2011). For example, in *Griffin*, probation officers may have needed the help of police officers to safely perform their role. 483 U.S. at 871. A blanket rule prohibiting law enforcement involvement could "deter law enforcement officials from properly allocating resources," because they fear their involvement in important operations could make them unconstitutional. *Wagner*, 827 F. Supp. 2d at 95. Given the violent nature of sex trafficking and the involvement of gang members, law enforcement involvement may be the only way to safely conduct searches under L.O. 1923. Therefore, this Court should not adopt a rule that prohibits all law enforcement involvement in special needs exception cases.

B. Searches under Local Ordinance 1923 are reasonable because the subjects of the searches have diminished privacy expectations, the ordinance limits the scope of searches, and the ordinance is justified by a strong governmental interest.

The balance of interests shows that searches under L.O. 1923 are reasonable. If a court finds that the law is justified by a special need, then the court must consider whether the searches under that law are reasonable. *Griffin*, 483 U.S. at 875. When considering whether the searches are reasonable, a court must balance the governmental interests with the privacy interests involved in the search. *Skinner v. Ry. Labor Exec. Ass'n*, 489 U.S. 602, 619 (1989). Courts consider three main factors: 1) the nature of the privacy interest involved, 2) the character of the intrusion that is complained of, and 3) the nature and immediacy of the governmental concern and the efficacy of the law in addressing that concern. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664–65 (1995).

The balance of interests weighs in favor of searches under L.O. 1923 being reasonable. First, the hotel guests searched under the ordinance have a reduced privacy expectation because of the location of the search. Second, the statute limits the searches under the ordinance by both

scope and by the need for reasonable suspicion. Finally, the ordinance was justified by the need to protect trafficking victims, which is an important concern that requires unique policy solutions.

1. *The hotel guests had diminished privacy expectations because hotels are transitory places and because the hotel guests had notice of the searches.*

Searches under L.O. 1923 are reasonable because the subjects of the searches have reduced privacy expectations. This Court has noted that privacy expectations vary by context. *Vernonia*, 515 U.S. at 654. While many special needs cases involve individuals with reduced privacy interests such as prisoners, that is not a requirement under the exception. *MacWade v. Kelly*, 460 F.3d 260, 269 (2d Cir. 2006). Here, though, the subject of the searches had a diminished privacy expectation because they were staying at a hotel and because they had notice that searches were likely to occur.

First, the subject of the searches had limited privacy expectations because of the transient nature of hotels. *United States v. Mankani*, 738 F.2d 538, 544 (2d Cir. 1984). The Fourth Amendment entitles hotel guests to privacy expectations. *Id.* However, guests have less privacy expectations than individuals may normally have because hotels are "truly transitory places." *Id.* This transient nature means that hotel guests should expect less privacy than they would have for example in their homes. *Id.* L.O. 1923 only applied to hotel guests. Therefore, those searched under L.O 1923 have less privacy expectations because of their status as hotel guests.

Furthermore, the guests had limited privacy expectations because it was public knowledge that searches were likely to occur at hotels. Courts have long recognized that searches proceeded by notice are much more reasonable than those effected by surprise. *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 463 (1990) (Stevens, J., dissenting). Here, the Board passed L.O. 1923 over a month before it went into effect. After the Board passed the ordinance, it also released a press release putting a spotlight on the law. Furthermore, the Board passed the law in response to

significant outcry from the public. Together, these facts show that it was public knowledge that police could search hotel guests under the ordinance. Therefore, those choosing to stay in hotels around the Cadbury Park Stadium had a diminished privacy expectation because they could expect to be searched when they chose to stay at a hotel in the area during the All-Star Game.

2. *Searches under Local Ordinance 1923 were limited by both scope and reasonable suspicion.*

L.O. 1923 explicitly limits searches by both their scope and the level of suspicion needed for a search. Courts have generally required that searches be limited and used as narrowly as possible. *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 667 (1989). A major consideration is how much information the search reveals. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995). Searches that only provided limited information are generally more reasonable. *Id.*

First, L.O. 1923 only permits limited pat-down searches. Courts have generally found that pat-down searches are brief and narrowly tailored searches that are only minimally intrusive. *United States v. Place*, 462 U.S. 696, 705 (1983). Additionally, these searches only provide limited information, such as what a person is carrying in his pockets. In contrast, many other special needs searches involve more invasive searches. *See Von Raab*, 489 U.S. at 660. Therefore, L.O. 1923 only permits limited searches that reveal little private information.

Second, L.O. 1923 only permits searches based upon reasonable suspicion. The special needs exception does not require any level of particularized suspicion, but searches based on suspicion are considered more reasonable. *See Skinner v. Ry. Labor Exec. Ass'n*, 489 U.S. 602, 624 (1989). Under L.O. 1923, law enforcement officers can only conduct searches if the officers have reasonable suspicion that an individual is engaged in sex trafficking. Furthermore, law enforcement officers must limit both the duration and scope of their searches to the grounds for

their reasonable suspicion. Therefore, the reasonable suspicion requirement in L.O. 1923 significantly limits the intrusions authorized under the ordinance.

Finally, the ordinance limits searches in three additional ways. First, it only applies to "individual[s] obtaining a room in a hotel, motel, or other public lodging facility." Second, it only applies in Starwood, which is the area within a three-mile radius of the Cadbury Park Stadium. Finally, the ordinance was only valid during a seven-day period. These three restrictions ensure that the character of the intrusion would be extremely minimal.

3. *The Victoria City Board had an important interest in protecting minor victims from sex trafficking and there were no other methods available to achieve that interest.*

L.O. 1923 is justified by a strong need to protect trafficking victims. While a strong governmental interest alone may not be enough to justify a search, the strength of the governmental interest does matter. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664–65 (1995). Courts have often found that empirical data is important in showing the strength of a governmental interest. *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 454–55 (1990). For example, in *Von Raab*, this Court found persuasive the significant empirical data showing the problem of drug trafficking in the United States. *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 668–69 (1989).

The severity of the trafficking problem justifies searches under L.O. 1923. As previously discussed, studies have shown that incidents of sex trafficking in minors increase greatly in cities that host major sporting events. *See generally* Victoria Hayes, *Human Trafficking for Sexual Exploitation at World Sporting Events*, 85 CHI.-KENT L. REV. 1105 (2010). Therefore, there is empirical evidence that the All-Star Game would significantly increase sex trafficking in the Starwood Park area. The result would be "tremendously damaging effects" for the victims of that trafficking. L.O. 1923 is justified by the need to protect these minor victims.

Finally, L.O. 1923 represents the only practical method of solving the trafficking problem given its temporary nature. This Court has recognized that the government's interest is at its strongest when the warrant requirement would "frustrate the governmental purpose behind the search." *Skinner v. Ry. Labor Exec. Ass'n*, 489 U.S. 602, 623 (1989). If the warrant requirement would delay that search to the point it is ineffective, then the special needs exception is likely to apply. *See Griffin v. Wisconsin*, 483 U.S. 868, 876 (1987). Trafficking victims are often brought into an area for a limited period of time and often stay in transient locations like hotels. Both those locations and timeframes makes it difficult for authorities to get warrants to actually address the problem. Traffickers may have already moved victims out of the area before law enforcement, even begin the process to get a warrant. The balance of interests weighs in favor of the searches being reasonable given the reduced privacy expectations of hotel guests, the minimal intrusions authorized by the ordinance, and the strength of the governmental interests.

II. The warrantless search of the apartment and cell phone at 621 Sasha Lane are valid under the Fourth Amendment because Officer Nelson conducted an extensive investigation to resolve any uncertainty and reasonably concluded that W.M. had common authority to consent to the search.

It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a valid warrant are considered presumptively unreasonable. *Kentucky v. King*, 563 U.S. 452, 459 (2011). However, this presumption may be overcome under certain conditions because the touchstone of the Fourth Amendment is reasonableness. *Id.* This Court has recognized many categories of permissible warrantless searches, including searches conducted pursuant to consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). A properly conducted search pursuant to voluntary consent is a constitutionally permissible and wholly legitimate aspect of effective police activity. *Id.* at 228; *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). The Fourth Amendment consent exception applies where an officer obtains voluntary consent, either from the individual

whose property is searched or from a third party with authority to consent. *United States v. Matlock*, 415 U.S. 164, 171 (1974).

In addition to the party that a police officer seeks to gather evidence against, a third party may consent to a search if he or she shares common authority over the residence or object. *Id.* at 170. Courts do not determine a third party's common authority based on a mere property interest, but instead look to whether the third party has mutual use, joint access, or a sufficient relationship to the premises or effects sought to be searched. *Id.* at 171. It is well established that to satisfy the "reasonableness" requirement of the Fourth Amendment, a government agent's factual determination regarding common authority does not have to be correct but must be reasonable. *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990).

A warrantless search is valid based upon the consent of a third party whom police at the time of entry reasonably believe possesses common authority over the premises or object, even if the third party in fact lacked that authority. *Id.* at 185–86. Courts evaluate the officer's determination using an objective standard, focusing on whether the facts available to the officer would "warrant a man of reasonable caution" to believe that the consenting party had authority over the premises. *Id.* at 188. When a police officer is presented with ambiguous facts related to authority, the officer has a duty to investigate further before simply relying on the consent of the third party. *United States v. Kimoana*, 383 F.3d 1215, 1222 (10th Cir. 2004). If an officer fails to investigate further when faced with uncertain authority, the warrantless entry is unlawful unless actual authority exists. *Rodriguez*, 497 U.S. at 188–89.

Officer Nelson reasonably concluded that W.M. had common authority over the apartment and the cell phone because an officer of reasonable caution in his position would have believed W.M. had authority to authorize the searches. After performing a reasonable investigation, W.M.'s

stated authority along with corroborating evidence allowed Officer Nelson to reasonably conclude W.M. had authority to consent to the search of the apartment. Similarly, Officer Nelson performed an independent and extensive investigation to determine whether W.M. had common authority over the phone. Officer Nelson then reasonably concluded, based on W.M.'s mutual use and joint access to the cell phone, that she had authority to consent to the search. Lastly, W.M.'s consent to both searches was voluntary because Officer Nelson's conduct was reasonable and he never coerced W.M. to provide consent.

A. Officer Nelson reasonably believed that W.M. had authority to consent to the search of the apartment at 621 Sasha Lane because he conducted an extensive investigation and found W.M. shared all aspects of the apartment with Larson and had unlimited access.

W.M. had apparent authority to consent to the search of the apartment at 621 Sasha Lane because Officer Nelson reasonably believed she had common authority to consent to the search. W.M's joint access and mutual control over the apartment provided significant evidence of common authority, which would have led an officer of reasonable caution to conclude that she had authority over the premises. Additionally, Officer Nelson conducted a diligent investigation prior to relying on W.M's stated authority to resolve any doubt or ambiguity present under the circumstances. Overall, the warrantless search was valid under the Fourth Amendment because Officer Nelson reasonably concluded W.M. had authority to consent to the search.

1. *Officer Nelson reasonably believed that W.M. had common authority over the apartment at 621 Sasha Lane because it acted as her permanent residence and she had unrestricted access to the apartment.*

Officer Nelson reasonably believed that W.M. had common authority over the apartment at 621 Sasha Lane because she had both joint access and mutual use of the apartment. A third party may provide valid consent for a search if they have common authority over the premises to be searched, based upon the third party's mutual use or joint access to the premises. *United States*

v. Matlock, 415 U.S. 164, 169–71 (1974). Additionally, when a police officer reasonably believes that the third party has common authority over the residence, it is not required that the determination be factually accurate as long as the determination was reasonable. *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990).

To determine whether a third party has authority to consent to a search, courts have used the following factors: (1) possession of a key to the premises; (2) a person's assertion that they live at the subject residence; (3) possession of a driver's license listing the residence as the driver's legal address; (4) receiving mail and bills at the residence; (5) keeping clothing at the residence; (6) having one's children reside at the home; (7) keeping personal belongings at the residence; (8) the performance of household chores at the home; (9) being the lease owner and/or paying the bills; (10) having access to the home when the owner is not present. *United States v. Groves*, 530 F.3d 506, 509–10 (7th Cir. 2008); *United States v. McGee*, 564 F.3d 136, 140–41 (2d Cir. 2009). While these factors provide a framework to determine common authority, this list is not exhaustive and the surrounding circumstances should be utilized. *Groves*, 530 F.3d at 509.

The facts presented to Officer Nelson led to the reasonable conclusion that W.M. had unrestricted access to the apartment and considered it to be her permanent residence. A live-in girlfriend may have apparent authority, even when she is not on the lease of the residence to be searched and does not own her own set of keys to the apartment. *United States v. Clay*, 630 F. App'x 377, 384–85 (6th Cir. 2015); *United States v. Weeks*, 666 F. Supp. 2d 1354, 1378 (N.D. Ga. 2006). It is immaterial that W.M. is not on the apartment lease because the determination of authority does not rest on a mere property interest, but hinges on whether the third party had mutual use or joint access to the residence. *Matlock*, 415 U.S. at 171 n.7. W.M. has consistently lived in the apartment with Larson for over a year and has unrestricted access through the use of a spare

key. Larson has never restricted W.M.'s use of the apartment, and the two share everything inside the apartment with the exception of food. W.M. and Larson's romantic relationship is extremely similar to the countless number of similar young couples who share a permanent residence. After W.M. explained their relationship and confirmed unrestricted access to the apartment, Officer Nelson could have reasonably concluded that W.M. had equal access to the apartment.

After W.M. provided significant evidence of joint access and mutual use, Officer Nelson further corroborated common authority over the residence before asking permission to search. While W.M. does not own a wealth of possessions, the apartment contains every belonging she owns. W.M. also has the apartment listed as her permanent residence for mail delivery, including personal medical information. While W.M. does not pay rent for the apartment, she provides a significant contribution by performing any and all household chores. In *United States v. Goins*, a defendant's girlfriend had apparent authority to consent to the search of shared apartment even when the girlfriend did not live at the apartment full time, did not receive mail at that location, and kept only minimal personal belongings at the residence. *United States v. Goins*, 437 F.3d 644, 648–49 (7th Cir. 2006). The extent of W.M.'s property at the apartment, personal mail, and contribution of household chores provides substantial corroborating evidence that W.M. had common authority over the apartment. Overall, Officer Nelson reasonably concluded that W.M. had common authority over the apartment because W.M. had unrestricted joint access and had mutual control over the apartment for all purposes.

2. *Officer Nelson performed an extensive investigation to resolve any ambiguity and reasonably concluded W.M. had authority to consent to the search.*

W.M.'s relationship with Larson prompted Officer Nelson to engage in an extensive and thorough investigation to resolve any ambiguity or uncertainty regarding W.M.'s authority to consent to the search of the apartment. "[W]here an officer is presented with ambiguous facts

related to authority, he or she has a duty to investigate further before relying on the consent." *United States v. Kimoana*, 383 F.3d 1215, 1222 (10th Cir. 2004). Even when consent is accompanied by an explicit assertion of residency, if the surrounding circumstances cause a reasonable person to doubt the party's authority, the officer must proceed with further inquiry. *United States v. Rosario*, 962 F.2d 733, 738 (7th Cir. 1992). However, an officer's determination of authority is not required to be correct because "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment." *Hill v. California*, 401 U.S. 797, 803–04 (1971). If the officer conducts a sufficient investigation and reasonably concludes the party has common authority, the warrantless search is valid regardless of accuracy.

Before conducting a search of the apartment, Officer Nelson engaged in an extensive investigation to determine that W.M. had sufficient authority to consent to the search. After W.M. explicitly asserted the apartment was her personal residence, Officer Nelson investigated the nature of W.M. and Larson's relationship, learning that they not only live together but are also in a long-term relationship. Knowing that this information alone did not result in common authority, Officer Nelson verified that W.M. had been living at the residence for one year and had unrestricted access to the apartment. While this information is likely enough to reasonably conclude W.M. had common authority, Officer Nelson investigated further learning that W.M. kept all of her possessions at the apartment, including personal mail and medical bills. Only after conducting a diligent investigation did Officer Nelson reasonably conclude W.M. had authority to consent to the search of the shared residence. Officer Nelson's inquiries resulted in extensive evidence that surpassed the level of requisite knowledge that would lead a similar officer of reasonable caution to conclude that W.M. had authority to consent to the search.

B. Officer Nelson reasonably believed that W.M had authority to consent to the search of the cell phone because he conducted an extensive investigation and found that W.M. used the cellphone for all practical purposes.

Officer Nelson reasonably concluded that W.M. had common authority to consent to the search of the cell phone because she had joint access and mutual use of the cell phone shared with Larson. Like a residence, to determine whether a third party's has apparent authority to consent to the search of an object or container, the court must look at the third party's common authority or other sufficient relationship to the object. *United States v. Matlock*, 415 U.S. 164, 171 (1974). Courts measure apparent authority under an objective standard of reasonableness, and focus on whether the facts available to the officer at the time of the search "warrant a man of reasonable caution" to believe the third party had authority to consent to the search. *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990). While authority to consent to a search of a residence does not automatically provide authority to search containers, an officer may make a reasonable conclusion that a third party has common authority based on their joint access and mutual use of the object to be searched. *United States v. Ruiz*, 428 F.3d 877, 882 (9th Cir. 2005).

Officer Nelson reasonably concluded that W.M. had common authority over the cell phone for three reasons. First, W.M. used the cell phone for all purposes and had access to the phone at all times. Second, the outside appearance of the phone conveyed that W.M. and Larson shared the phone equally. Finally, Larson voluntarily limited his expectation of privacy by forcing W.M. to use the shared cell phone.

1. *Officer Nelson reasonably concluded W.M. had authority to consent to the search of the cell phone because she had unrestricted access and used it as her personal phone.*

W.M had common authority over the cell phone because she had equal access and used the phone as her own for all purposes without restriction. Courts use multiple factors to determine whether a person has common authority to consent to the search of an electronic device. An

electronic device that is located in a common area of the home and that is accessible to its residents indicates that residents are not excluded from using the device. *United States v. Andrus*, 483 F.3d 711, 719 (10th Cir. 2007). However, a third party likely lacks common authority when prevented from accessing a device by either undisclosed password protections or separate usernames. *United States v. Morgan*, 435 F.3d 660, 663 (6th Cir. 2006). Additionally, a person may use a device for menial tasks, such as playing games and still have authority to consent to the search of the device. *United States v. Buckner*, 473 F.3d 551, 555 (4th Cir. 2007). Overall, courts uniformly provide that when a third party has sufficient access to an electronic device they have common authority to consent to a search.

Officer Nelson reasonably concluded that W.M. had common authority to consent to the search of the cell phone found within the apartment because W.M. and Larson shared the cell phone equally. Larson physically forced W.M. to dispose of her personal phone and required her to only use the cell phone he provided. Larson required W.M. to use the shared cell phone for all purposes, including regular calls, texting, web browsing, and social media. While the phone was password protected, Larson provided W.M. with the password and never restricted access to the phone. By forcing W.M. to use the shared cell phone and failing to restrict her usage, Larson provided her with common authority over the cell phone, thereby limiting his reasonable expectation of privacy and his Fourth Amendment protections. *Rodriguez*, 497 U.S. at 190.

The outside appearance of the phone provides additional evidence that Larson and W.M. shared the cell phone. The phone case had a sticker on the back with the letters "S" and "W" wrapped around a wizard's hat signifying affiliation with the Starwood Homeboyz. W.M. has a tattoo on her ankle of the letters "S" and "W" that was clearly visible to Officer Larson. Additionally, Larson has a tattoo on his forearm of the letters "S" and "W" wrapped around a

wizard's hat. Therefore, Officer Nelson could have reasonably concluded that the phone belonged to either W.M. or Larson because both had tattoos similar to the sticker on the phone case. Additionally, the lock screen of the phone is a picture of both W.M. and Larson. In combination with W.M.'s unrestricted access of the cell phone, the outside appearance of the phone indicates that W.M. had common authority and joint access to the phone.

Officer Nelson reasonably concluded W.M. had authority to consent to the search because Larson voluntarily limited his Fourth Amendment privacy protections by forcing W.M. to use the shared cell phone for all purposes. Generally, a party has an increased expectation of privacy in a cell phone. *Riley v. California*, 134 S. Ct. 2473, 2489–91 (2014). However, when a party fails to limit the use of an object by "allowing others to exercise authority over his possessions" the party voluntarily limits their expectation of privacy under the Fourth Amendment. *Rodriguez*, 497 U.S. at 190. In *United States v. Thomas*, the court found that even though the defendant had an increased expectation of privacy in his home computer, the defendant's wife had valid authority to consent to the computer's search because the computer was located in a common area and the wife's access was not prevented by password protections. *United States v. Thomas*, 818 F.3d 1230, 1241–42 (11th Cir. 2016). Similar to *Thomas*, Larson voluntarily limited his protection under the Fourth Amendment because the phone was kept in a common area and he granted W.M. unlimited access to the cell phone. Overall, Officer Nelson reasonably concluded that W.M. had authority to consent to the cell phone's search because she had unrestricted common authority over the object.

2. *Officer Nelson conducted a reasonable and independent investigation under the circumstances to determine W.M. had common authority over the shared cell phone.*

Prior to conducting the search of the cell phone, Officer Nelson conducted an independent investigation to reasonably conclude that W.M. had authority to consent to the search. When a

police officer is presented with ambiguous facts related to authority, the officer has a duty to investigate further before relying on the consent of the third party. *United States v. Kimoana,* 383 F.3d 1215, 1222 (10th Cir. 2004). When faced with factual ambiguities regarding authority, an officer is required to conduct further inquiries to resolve uncertainty and reasonably conclude that the third party has authority to provide consent to the search. *Rodriguez,* 497 U.S. at 188–89. After W.M. asserted authority over the cell phone, Officer Nelson conducted an independent investigation to reasonably conclude W.M. had authority to consent to the search.

The circumstance of a single cell phone in the apartment, prompted Officer Nelson to engage in a lengthy investigation regarding W.M.'s use of the cell phone before determining that she had common authority. W.M. provided that she shared the cell phone with Larson. Although W.M. didn't pay for the cell phone, Larson forced her to dispose of her previous phone and solely use the one that was searched. W.M. uses the phone for all purposes and had all of her social media platforms downloaded on the cell phone, including Instagram, Facebook, and Snapchat. While the phone was found on a nightstand that seemed to be belong to Larson, W.M. also slept in the bedroom and shared all aspects of the apartment with Larson. Overall, Officer Nelson's investigation presented substantial evidence that the phone was located in a common area, W.M. was forced to use the phone, and W.M. had unrestricted access resulting in the reasonable conclusion that W.M. had common authority over the cell phone.

C. W.M.'s consent to search her apartment and cell phone was voluntary because Officer Nelson conducted a reasonable investigation and did not subject W.M. to duress or coercion.

W.M.'s consent to search the apartment and the cell phone was voluntary because W.M. was not under duress or subject to coercion by Officer Nelson. The Fourth Amendment requires that a search based upon a party's consent be voluntarily, and not the result of either duress or coercion. *Schneckloth v. Bustamonte,* 412 U.S. 218, 248 (1973). Voluntariness is to be determined

from the totality of the circumstances. *Id.* To determine if consent was voluntary the court may look at numerous factors, including the conduct of the officers, threats posed by the officers, the officer's show of force, the consenter's level of intelligence, and the age of the consenter. *United States v. Groves*, 530 F.3d 506, 512–13 (7th Cir. 2008). While a consenter's youth is a factor when determining voluntariness, courts have expressly held that minors have the capacity to consent to a search if the officers reasonably believe the minor has common authority over the premises or object. *United States v. Gutierrez-Hermosillo*, 142 F.3d 1225, 1231 (10th Cir. 1998).

Officer Nelson reasonably acquired W.M's consent to search the apartment and the cell phone within. After searching W.M., Officer Nelson advised her that she was not under arrest and asked if she would be willing to talk. After confirming W.M. had common authority over the apartment, Officer Nelson asked W.M. if she would allow him to conduct a search and did not force or coerce W.M. into providing her consent. While W.M. is a minor, she portrayed common authority over the apartment and provided every indication that the apartment was her permanent residence. Prior to providing consent, W.M. was fully advised that she was not under arrest and no physical coercion was conducted. Overall, W.M. voluntarily consented to the search of the apartment and cell phone within and was not subject to duress or coercion.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the United States Court of Appeals for the Thirteenth Circuit.

Respectfully submitted,

Counsel for Petitioner

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