Team: P1
Petitioner

No. 03-240

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

WILLIAM LARSON

Respondent.

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

BRIEF FOR PETITIONER
UNITED STATES OF AMERICA

Counsel for Petitioner

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STATEMENT OF THE ISSUES PRESENTED

1. Are searches conducted pursuant to L.O. 1923 constitutionally permissible under the special needs exception when an All-Star baseball game is likely to cause a surge in child sex trafficking, and when the ordinance is limited in its duration, scope, and geographic location?

2. Did W.M. possess authority to consent to Officer Nelson's search of the apartment and cell phone when W.M., Respondent's girlfriend, had full access to the apartment, including the bedroom where the cell phone was located, and used the cell phone for multiple purposes?

JURISDICTIONAL STATEMENT

In accordance with University of San Diego School of Law's Competition Rules, the Jurisdictional Statement has been omitted.

STATEMENT OF FACTS

On August 1, 2015 William Larson was charged with one count of Sex Trafficking of Children in violation of 18 U.S.C. § 1591(a)(1) and one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The district court denied Respondent's motion to suppress finding that the search under L.O. 1923 did not violate his Fourth Amendment rights under the Special Needs exception and that Officer Nelson obtained valid consent from W.M. to search both the apartment and the phone.

Victoria City, Victoria was selected as the host for the 2015 All-Star Game by the Professional Baseball Association. R. at 2. Expected to draw tens of thousands of visitors to the area, the citizens of the city feared that it would create a "swell of human trafficking activity in their neighborhood." *Id.* This fear stemmed from the fact that the Starwood Park neighborhood has been stricken with gang activity due to the presence of two gangs, the Starwood Homeboyz and the 707 Hermanos. *Id.* The most profitable activity that these gangs benefit from is human trafficking, controlling about 1,500 sex workers, many of them are believed to be children. *Id.* They utilize the "deep web" to advertise, making them hard to monitor and difficult to locate. *Id.*

In response to community fears, the city passed Local Ordinance 1923 ("L.O. 1923). *Id.* L.O. 1923 states:

> L.O. 1923 reads:
> "1. Any individual obtaining a room in a hotel, motel, or other public lodging facility shall be subject to search by an authorized law enforcement officer if that officer has reasonable suspicion to believe that the individual is:
> a. A minor engaging in a commercial sex act as defined by federal law
> b. An adult or a minor who is facilitating or attempting to facilitate the use of a minor for a commercial sex act as defined by federal law.
> 2. This ordinance shall be valid only from Monday July 11, 2015, through Sunday July 17, 2015.
> 3. A search conducted under the authority of this provision shall be limited in scope and duration to that which is reasonably necessary to ascertain whether the

individual searched is engaging in the conduct described in subsection (1).

4. This ordinance shall be valid only in the Starwood Park neighborhood.

a. Starwood Park is defined to encompass the area within a three-mile radius of Cadbury Park Stadium."

R. at 2-3. The day after the ordinance passed, the city put out a press release announcing the ordinance and the reasoning behind it. R. at 3. Utilizing personal stories and recent statistics, it emphasized the prevalence of child sex trafficking in Starwood Park. *Id.* It also detailed the damaging effects child sex trafficking causes to its victims. *Id.*

During the week L.O. was active, Officer Richols and Officer Nelson were posted at the front desk of the Stripes Motel, located within the covered area of Starwood Park. *Id.* Close to midnight, Respondent entered the hotel with a young girl in revealing clothing. *Id.* Neither of them had luggage with them. *Id.* The officers also noted that Respondent had two tattoos that identified him as a Starwood Homeboyz gang member. *Id.* One tattoo had the letters "S" and "W" on a wizards hat on his forearm. *Id.* The other tattoo was of the numbers "4-11-5-11" on the back of his neck. *Id.* Based on his training and experience, Officer nelson recognized them as code for "d-k-e-k" aka "dinosaur killer, everybody killer." *Id.* The term "dinosaur" is known to be a derogatory term to describe the Starwood Homeboyz rival gang. *Id.* The officers believed these circumstances gave them reasonable suspicion to search Respondent and the young girl under the new ordinance. *Id.* Appellant has conceded that there was not probable cause. *Id.* A search of Respondent's jacket resulted in "nine condoms, a butterfly knife, lube, two oxycodone pills, a list of names and corresponding allotments of time (i.e. '1 hour', '45 min', and 15 min'), and $600 in cash." R. at 4. The search of the young girl revealed only a driver's licence identifying her name as W.M and her age as sixteen. *Id.* Officer Richols then arrested Respondent. *Id.*

Upon arresting Respondent, Officer Nelson searched W.M. R. at 28. The search produced a Victoria's Driver's license, which revealed that W.M. was sixteen-years-old. R. at 29. Perceiving W.M. as the victim in the situation, Officer Nelson did not arrest her but simply asked if "she would be willing to talk a little." *Id.* W.M. agreed. *Id.*

Upon questioning, W.M. informed Officer Nelson that she was Respondent's girlfriend and had been living with him for about a year. R. at 29-30. She further told Officer Nelson that her and Respondent shared the apartment, to which Officer Nelson probed further. R. at 29. W.M. clarified by telling Officer Nelson that she shared a business with Respondent, including its cash flow, and reiterated that she lived with him. *Id.* She also explained that she was homeless after running away from home but before moving in with Respondent, and she spoke highly of him by stating that he gave her lots of compliments, treated her well, and gave her money to buy items like clothes. R. at 30.

Still uncertain about W.M.'s access to the apartment, Officer Nelson asked her if she kept personal belongings within the apartment. *Id.* W.M. affirmed and said that she kept a backpack and spare clothes within the apartment. *Id.* She further explained that she had personal mail, such as medical bills, sent to the apartment. R. at 30-31. Although W.M. admitted that her and Respondent got into a physical altercation for a particular text message, Officer Nelson believed that W.M. equally shared the apartment with Respondent, based on what W.M. told him, and asked her if he could search the apartment; she agreed. R. at 30-31. After telling him that the apartment was messy due to her "hosting friends" the previous night, W.M. granted him access with a key she retrieved under a fake rock. R. at 31.

After finishing the search, Officer Nelson recovered a loaded black semi-automatic handgun and a cell phone on one of the two nightstands.[1] *Id.* The cell phone had a sticker on it similar to Respondent's tattoo, and W.M. stated that the sticker belonged to Respondent. R. at 32, 34. However, W.M. knew the password to access the cell phone, though it included the same numbers that were tattooed on Respondent. R. at 34. W.M. told Officer Nelson that Respondent paid for the cell phone and used it for business purposes, and she used the phone to send personal text messages, make personal calls, and check her social media sites. R. at 32. After she consented to a search of the cell phone, Officer Nelson noticed that the lock screen had a picture of both Respondent and W.M. smiling while making an inappropriate gesture toward the camera.[2] R. at 34.

SUMMARY OF ARGUMENT

While warrantless searches are presumed to be unreasonable, there are a few well-delineated exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967). One such exception occurs when there is when there is a "special need" beyond normal law enforcement needs and obtaining a warrant would be impractical for the situation. *Ferguson v. City of Charleston*, 532 U.S. 67, 74 (2001); *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989). The fact that law enforcement is involved, or that an arrest results, does not by itself disqualify a policy from being justified under this exception; it is permissible to have some law

[1] The nightstand with the cell-phone contained men's glasses, a fake Rolex men's watch, and a

[2] Within the phone, Officer Nelson found a few inappropriate pictures of W.M. and Respondent rapping about pimping. R. at 32.

enforcement objectives within a special needs search as long as its primary purpose extends beyond the needs of everyday law enforcement. *See Illinois v. Lidster*, 540 U.S. 419, 424 (2004).

In this case, the surge in child sex trafficking expected to surround the All-Star game in Starwood Park, especially due to its prevalence in the neighborhood, represents a special need beyond normal law enforcement purposes. In addition to this, the balancing of interests at stake and the immediacy of the serious concern about child sex trafficking, a warrant would be impracticable. Because of this special need and the impracticability of requiring a warrant, searches conducted in accordance to L.O. 1923 are constitutionally permissible.

When dealing with third party consent searches, an exception to the warrant requirement, police officers merely need to have a reasonable belief that a third party had the requisite authority to consent to a search of the place or item. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 228 (1973); *United States v. Matlock*, 415 U.S. 164, 170 (1974). Officers do not need to establish that a third party had actual authority; they simply need to reasonably believe that the third party's authority was apparent based on the facts at hand. *See Illinois v. Rodriguez*, 497 U.S. 177, 185-86, 188 (1990). If the facts present an ambiguous situation, officers must inquire further before obtaining valid consent. *Id.* at 188.

Officer Nelson reasonably believed that W.M. had the authority to consent to a search for both the apartment and the cell phone. W.M. made statements to Officer Nelson that would lead a reasonable officer to believe that she had authority to consent: she was Respondent's girlfriend; her and Respondent "shared everything," including the bedroom; she kept personal items in the apartment like spare clothes; she had personal mail and medical bills sent to the apartment; and she previously "hosted friends" in the apartment. Taken together, these facts painted W.M. as

having "mutual use" of the apartment for all purposes. Even though Officer Nelson confronted some ambiguity when interviewing W.M., he diligently investigated further to gather more facts that dispelled the ambiguity. As for the cell phone, W.M. told Officer Nelson that her and Respondent shared the phone, that she used it for texting, calling, and checking social media. Nothing about the appearance or location of the cell phone eluded to Respondent having exclusive control over it because, though it was located on a nightstand with men's items, it was not hidden from W.M. and she had full access to the bedroom where it was located. Based on the totality of the circumstances, Officer Nelson's belief that W.M. possessed the requisite authority to consent to a search was reasonable.

STANDARD OF REVIEW

This Court reviews legal findings *de novo* and only sets aside findings of fact if clearly erroneous. See *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 388-93 (1990).

ARGUMENT

The Fourth Amendment [3] provides protection for individuals with a reasonable expectation of privacy against "arbitrary invasions" by the government *Katz v. United States*, 381 U.S. 347, 351 (1967) (Harlan, J., concurring). Usually warrantless searches are *per se* unreasonable; however, this Court has carved out a number of exceptions to the Fourth Amendment's warrant requirement. *Id.* at 357.

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[3] U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized").

I. SEARCHES PURSUANT TO L.O. 1923 SERVED TO REMOVE CHILDREN POTENTIALLY BEING USED AS SEX SLAVES BEFORE MORE HARM COULD COME TO THEM ARE CONSTITUTINALLY PERMISSLBE UNDER THE SPECIAL NEEDS DOCTRINE

While warrantless searches are presumed to be unreasonable, there are a few well-delineated exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967) (Harlan, J., concurring). One such exception occurs when there is when there is a "special need" beyond normal law enforcement needs and obtaining a warrant would be impractical for the situation. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987); *T.L.O.*, 469 U.S. at 351; *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989). The fact that law enforcement is involved, or that an arrest results, does not by itself disqualify a policy from being justified under this exception; it is permissible to have some law enforcement objectives within a special needs search as long as its primary purpose extends beyond the needs of everyday law enforcement. *Compare Illinois v. Lidster*, 540 U.S. 419, 424 (2004) (upholding investigatory stops on a highway to inquire about a hit and run) *and Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 447 (1990) (upholding the validity of suspicionless checkpoint stop to combat drunk driving) *with City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000) (striking down a checkpoint for narcotics that served no other purpose than general crime solving) *and Ferguson*, 532 U.S. at 81; (striking down a hospital policy aimed at collecting evidence for the police). The Court prefers searches be based on at least some indicia of suspicion, but sometimes these "special needs" justify suspicionless searches. *See, e.g.*, *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 606 (1998); *Veronia School Dist. 47J v. Acton*, 515 U.S. 646 (1995).

If a court decides that there is a "special need," the question then becomes one of reasonability and the balancing of interests. *See United States v. Knights*, 534 U.S. 112, 114 (2001) (Reasonableness is the touchstone of the Fourth Amendment). Whether or not the search

is constitutional is a context-specific inquiry. *Chandler v. Miller*, 520 U.S. 305, 314 (1997). In analyzing whether a warrant is impractical, courts look at the totality of the circumstances and weigh the following three factors: (1) the privacy interest of the person being searched, (2) the nature of the intrusion; and (3) the immediacy of the government's interest. *See Vernonia School District 47J v. Acton*, 515 U.S. 646, 654-61 (1995).

A. L.O. 1923 Serves a Special Need Outside of Law Enforcement Purposes

To determine whether or not the claimed purpose is a special need, a court conducts a "close review" of the policy or program and considers the totality of the circumstances within the case-specific context. *Ferguson v. City of Charleston*, 532 U.S. 67, 81 (2001); *Chandler v. Miller*, 520 U.S. 305, 314 (1997). This close review includes looking at the primary purpose of the policy. *Ferguson*, 532 U.S. at 81.

This Court has often held that checkpoints and roadblocks are constitutional when they serve public health and safety concerns, so long as they were designed in a way that either requires reasonable suspicion, or if lacking suspicion, the policies were implemented in a systematic way. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 45-46 (2000); *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). This has been the case even for intrusions into a one's person by way of drug testing employees and students. *See, e.g.*, *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 606 (1998) (upholding regulations mandating blood and urine tests for railroad workers after accidents and allowing for breath and urine tests who violated safety rules); *Veronia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (allowing random drug tests of student athletes). In *Skinner*, the Court faced the question of whether or not drug testing of employees violated the Fourth Amendment. *Skinner*, 489 U.S. at 612. The relevant law allowed the railroad company to run blood and urine tests on their employees in order to test for alcohol or drug use.

Id. at 621. The law was directed at safety, instead of law enforcement, aiming at "prevent[ing] accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs." *Id.* at 620-21. The policy also stated that the samples would be retained for at least six months and may be available to "a party in litigation upon service of appropriate compulsory process on the custodian." *Id.* at 621, n.5. Noting that this can be read as allowing for samples to be used for law enforcement purposes, this Court stated, "[a]bsent a persuasive showing that the FRA's testing program is pretexual, we assess the FRA's scheme in light of its obvious administrative purpose." *Id.*

A case in which this "persuasive showing" was made is found in *Ferguson v. City of Charleston*, 532 U.S. 67, where this Court confronted a hospital policy designed and administrated with heavy influence by law enforcement and prosecutors. *Id.* at 70-72, 82. The policy included nine factors, only one of which was required to be met for this testing. *Id.* at 71, 77, n.10 (disagreeing that these factors provided suspicion because there was no evidence indicating that meeting any of the criteria was more likely caused by cocaine use than some other factor). The policy also included discussion of chain of custody and what crimes would be charged. *Id.* at 71-73. While the hospital had been trying to curb drug abuse by pregnant women before, the policy at issue included not only the above-mentioned pieces, but also added "the threat of law enforcement intervention that provided the necessary leverage to make the policy effective." *Id.* at 72 (internal quotation marks omitted). Notably, other than the treatment to be offered to those testing positive, "the policy made no mention of any change in the prenatal care of such patients, nor did it prescribe any special treatment for the newborns." *Id.* at 73.

The hospital claimed that the primary purpose of the policy was child welfare and was in response to cocaine by pregnant patients. *Ferguson*, 532 U.S. at 70-72. This Court stated that,

while public health may have been the ultimate goal, the primary purpose "was to use the threat of arrest and prosecution in order to force women into treatment." *Id.* at 80, 84. In addition to this, the invasion of privacy was significant. *Id.* at 78.

The district court was correct when it found that "L.O. 1923 serves a valid, non-law enforcement purpose, namely the protection of Starwood Park's vulnerable youth." R. at 6. The court of appeals disagreed; however, missing from its opinion is an in-depth analysis or any justification beyond mere conclusory statements. Citing to *Ferguson* and *Edmund*, the Respondent argues, and the court of appeals held, that the ordinance "cannot be divorced from the state's general interest in law enforcement." R. at 17. Not only are *Edmund* and *Ferguson* distinguishable from the case at bar, but the quoted statement misrepresents the actual test; it is not whether the policy is completely separate from law enforcement, but whether the special needs underlying that policy goes *beyond* normal law enforcement needs. *See Illinois v. Lidster*, 540 U.S. 419, 424 (2004) (citing *Indianapolis v. Edmond*, 531 U.S. 32, 44, n.1 (2000) (emphasis added)). In fact, as mentioned above, this Court has rejected the idea that the search must not have law enforcement objectives. *Id.* ("[T]he phrase 'general interest in crime control' does not refer to every 'law enforcement' objective.").

In *Edmond*, this Court held that stops designed to combat everyday crime are unconstitutional. *Edmond*, 531 U.S. at 48 (noting the checkpoint was completely indistinguishable from a general interest in crime solving). Over a four-month period the city conducted six roadblocks, affecting 1,161 vehicles, resulting in 104 arrests. *Id.* at 34-35 (describing the "hit rate" at nine percent). The procedure was well written in that the officers stopped a predetermined amount of vehicles, they did not have discretion to stop vehicles out of sequence, and could not search the vehicles unless there was consent or a quantum of

particularized suspicion. *Id.* at 35. The problem, however, is that this Court has never approved "of a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing." *Id.* at 38. Unlike in *Michigan Department of State Police v. Sitz*, where the checkpoint was aimed at preventing loss of life on the roads due to the pervasive problem of drinking and driving, the roadblock in *Edmond* was only targeting drug violations in general. *Id.*; *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 451 (1990). While drug use may represent a serious problem, simple possession of these drugs did not pose the type of immediate threat, or special need, that drinking and driving did in *Sitz*. This difference is what makes the roadblock in *Edmond* unconstitutional and what makes the checkpoint in *Sitz*, as well as the ordinance in this case, constitutionally permissible.

L.O. 1923 was passed specifically to "allow law enforcement to protect children by removing them from dangerous situations before they can escalate." R. at 41. In order to protect privacy interests, the board also made sure that law enforcement limits the scope of their searches and required reasonable suspicion. R. at 2-3, 41. As the district court found, the protection of Starwood Park's vulnerable youth constitutes a special need. R. at 6. From the language of the ordinance itself to the press release provided by the board, the primary focus has always been on the protection of potentially exploited children, not on the capture or prosecution of the abusers. R. at 6, 40. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 621, n.5 (1998) ("Absent a persuasive showing that the [policy] is pretexual, we assess the [policy's] scheme in light of its obvious administrative purpose.").

The ordinance was limited in both duration and location, lending credibility to the belief that L.O. 1923's primary purpose is something beyond regular law enforcement needs. R. at 2, 8. The Ordinance is limited to the week of the All-star game and to the Starwood Park

neighborhood, encompassing a three-mile radius from the stadium. R. at 2-3, 8. The district court found it especially persuasive that the press release cited three different university studies, as well as numerous news articles, describing the surge in the trafficking of sex slaves during big sporting events as well as the specific statistics relating to Victoria City, and Starwood Park neighborhood specifically R. at 8, 40. One of these studies found that Starwood Park accounts for approximately 1,500 sex trafficking victims, a number that almost triples any other area of the city. R. at 40. It is believed that over a third of human slaves today are minors. *Id.* Notably, there has been a dramatic increase in sex trafficking and sex services around the time of large sporting events. R. at 41 (noting the National Center for Missing and Exploited Children estimated that roughly 10,000 people were trafficked into Miami during the 2010 super bowl and a that a university study found a 30.3% increase in postings in the days surrounding the event).

The facts of this case help to distinguish it from both *Ferguson* and *Edmond*. In *Ferguson*, the main problem was that, by its very design, the policy's immediate purpose was to obtain evidence of criminal wrongdoing. *Ferguson*, 532 U.S. at 83, 86. As this Court stated, "[t]he threat of law enforcement may ultimately have been intended as a means to an end, but the direct and primary purpose of MUSC's policy was to ensure the use of those means. In our opinion, this distinction is critical." *Ferguson*, 532 U.S. at 83-84. Basically, the hospital used law enforcement as a middleman to push patients into the treatment – it was either that, or face criminal charges. *Id.* While the court of appeals states that L.O. 1923 would almost certainly result in prosecutions if evidence of child sex trafficking were found, and therefore is impermissible as in *Ferguson*, it misses the real question asked within a special needs analysis: whether *general* law enforcement is the *primary* purpose of the policy. R. at 19. The hospital stated that the law enforcement piece was critical achieving the goal of curbing drug use.

Ferguson, 532 U.S. at 72. Missing from this policy was anything about a change in treatment (other than information on treatment programs), or a directive for any special treatment for the infants born to those who tested positive; however, it did detail chain of custody directives, police procedures in how to handle and interrogate women testing positive, and the charges that may be filed. *Ferguson*, 532 U.S. at 73. In our case, the L.O. 1923 and its press release do not include mention of punishment but does discuss the importance of privacy protections while placing limitations on its use, including requiring a reasonable suspicion threshold. R. at 2-3, 41.

This case also differs from *Edmond*, in which the stops focused solely on getting drugs out of the community and the actual policy stated that it was the purpose as well. During the stops, the police walked a dog around the car to detect illegal drugs. The reason this was invalid was because the stops served no special need beyond a normal law enforcement goal of getting drugs out of the town. Unlike in *Edmond*, L.O. 1923 did not target the general crime of trafficking anywhere the police chose to set up in town. Also unlike *Edmond*, L.O. 1923 did not discuss eradicating Victoria City of the perpetrators of the crime; instead the ordinance solely talks about protecting children, targets only the three-mile radius of the stadium, and provides limiting instructions with an eye towards privacy protection. R. at 2-3, 40.

B. When The Risk Of Being Sexually Exploited Raises Significantly During a Set Period of Time, and the City Government Passes An Ordinance Permitting Limited Searches Based on Reasonable Suspicion, a Warrant is Unnecessary And Would Hinder The Constitutionally Appropriate Goal Of Protecting Children

The three elements courts look to in balancing of interests are: (1) the individual's privacy interest, (2) The character of the intrusion, and (3) the nature and immediacy of the government's concern. *Vernonia School District 47J v. Acton*, 515 U.S. 646, 654-61 (1995).

For someone to have a reasonable expectation of privacy, the individual must have a subjective expectation of privacy that society would deem to be reasonable; if deemed reasonable, the individual has constitutional protections against unreasonable searches and seizures by the government in that area.. *Katz v. United States*, 381 U.S. 347, 351 (1967) (Harlan, J., concurring). This protection was put in place to guard against "arbitrary invasions" by the government and, while it clearly applies to criminal investigations, its purpose necessitates the extension of these protections beyond when one is suspected of a crime. *New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985); *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967). A person does not have a reasonable expectation of privacy in public places, for example, a hotel lobby. *See Florida v. Jardines*, 133 S. Ct. 1409, 1415 (2013). However, this only means that the police are not required to "shield their eyes" from what they may see before them; it does not extend to searching someone's pockets absent probable cause or a warrant. *See id.* While the special needs exception allows the threshold to be lowered, it does not affect the reasonable expectation of that privacy, only the analysis of whether or not the search will be deemed reasonable. *O'Connor v. Ortega*, 480 U.S. 709, 731 (1987) (Scalia, J., concurring). Appellant agrees with the district court that simply being in public does not allow a search by itself. R. at 8. Respondent's privacy interest is recognized by all sides.

This privacy interest must be balanced against the character of the intrusion and the government's concern. Here, the district court found the nature of the intrusion to be minimal, due to the factors mentioned in the previous section, including the requirement of probable cause, limited duration and geographic area in which the ordinance was valid, as well as the requirement to limit the search to what was reasonably necessary. R. at 2-3, 7. As evidenced by the search that took place, the officers only commenced the search once they had a reasonable

suspicion that Respondent was engaged in the specific act of child sex trafficking and only searched his pockets, finding, among other things, a list of clients and time that they had paid for. R. at 28. The district court also found that the immediacy and height of government concern, the trafficking of children, could not seriously be challenged. R. at 9. (holding the threat to be both "substantial and real") (quoting *Chandler*, 520 U.S. at 323).

Child sex trafficking is a problem, not only for the city in general, but it was likely to become significantly larger during the week of the event. R. at 40 (noting studies and reports that show this occurrence). As the district court held, the immediacy of the threat was "substantial and real." R. at 9 (citing *Chandler*, 520 U.S. 305, 323). This case lines up more with this Court's decision in *Sitz*, regarding drunk driving. *Sitz*, 496 U.S. 444, 451. Noting the pervasive issue of drunk driving, the Court held that the roadblocks at issue were unconstitutional because while people are driving drunk, it is an immediate threat to human life. *Id*. Similarly, this ordinance protects the immediate threat, during a specific time, and directing the search be as limited as possible, to protect the lives and safety of children being trafficked as sex slaves. The major difference between this ordinance and the roadblock in *Sitz*, is that here the officers were required to have reasonable suspicion before searching anyone; in *Sitz*, the stops were suspicionless, but justified under the Special Needs exception. Based on these facts, it is hard to believe that if the court of appeals had bothered to do the balancing test, that it would not have agreed with this finding. R. at 19 (declining to perform the test after finding no special need). In light of the minimal and restricted intrusion, the privacy interest held by the Respondent is outweighed by the grave threat to children in Starwood Park during the All-Star game.

When a constitutionally permissible policy would be interfered with so much so that it would hinder the ability to effectuate its objectives by getting a warrant, this Court has held that

the special needs of the situation may demand that a warrant not be obtained before the search. *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987). Here, when officers notice the signs of sexual exploitation, they need to act quickly in order to get the child away from his or her abuser; if required to obtain a warrant beforehand, they run the grave risk of being unable to stop the harm before it occurs. *See id.*

C. Considering the Totality of the Circumstances, the Search of Larson Was Reasonable

Even when there is a special need present and the government's interest outweighs that of an individual's privacy interest, the search must still be reasonable. It is reasonable if it is permissible at its inception and in scope. Because L.O. 1923 is constitutionally permissible and the officers had reasonable suspicion before the search (in compliance with the ordinance) it was reasonable in its inception. Regarding scope, "[w]hile individualized suspicion may not be an 'indispensable component of reasonableness in every circumstance,' it is certainly true that its presence is more likely to make a search reasonable." *See Von Raab*, 489 U.S. at 665.

In this case the officers had a reasonable suspicion that Respondent was using a minor for a commercial sex act. Noticing that he had a tattoo of a local gang known for its involvement in sex trafficking, not traveling with any bags, as well as in the company of an underage girl, who was not only dressed in a manner consistent with a potential victim, but also was of the average age of those exploited, Officers Richols and Nelson determined that they had reasonable suspicion to search Larson. R. at 3, 28. The officers searched Respondent's pockets and found, among other things, nine condoms, lube, and list of names, indicating how long they had paid for. R. at 28. At that point the officers discontinued the search and arrested the Respondent. *Id.* Based on the totality of the circumstances, this search is objectively reasonable and the suppression of evidence should be overturned.

II. BASED ON THE FACTS AVAILABLE TO OFFICER NELSON AT THE TIME OF THE SEARCH, W.M. HAD THE AUTHORITY TO CONSENT TO THE SEARCH OF BOTH THE APARTMENT AND THE CELLPHONE.

Though warrantless searches of the home are considered unreasonable *per se* under the Fourth Amendment, this Court has recognized an exception where police officers obtain valid consent from an individual with the authority to grant it. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 228 (1973). To be valid, consent must be freely and voluntarily given. *See id.* at 228.[4] However, consent does not have to come directly from the homeowner; a cohabiting third party can also provide valid consent so long as that person has the authority to do so. *See United States v. Matlock*, 415 U.S. 164, 170 (1974). The underlying rationale for this exception is that a person that grants a third party authority over his premises "assume[s] the risk that the third party might permit access to others, including government agents." *See id.* at 171, n.7.

Valid consent from a third party requires that she have "common authority over or [a] sufficient relationship to" the place or items being searched. *See id.* at 171. "Common authority" does not rest on the consenting party's property interest but rather on whether she has "mutual use of" or "joint access or control" over the property. *See id.* at 171, n.7; *United States v. Richards*, 741 F.3d 843, 850 (7th Cir. 2014). Of course, "mutual use" and "joint access" are not determined by a set standard; the inquiry is a fact-sensitive one based on the information available to the officers at the time of the search. *See United States v. Groves*, 530 F.3d 506, 509 (7th Cir. 2008) (utilizing multiple factors to guide its determination); *United States v. Cos*, 498 F.3d 1115, 1125 (10th Cir. 2007) (recognizing that determining "mutual use" is a "fact-sensitive inquiry").

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[4] It is undisputed in this case that W.M.'s "consent was given freely and voluntarily." R. at 19.

Where the facts do not support a finding of "mutual use" or "joint access," and in turn actual authority, the consent search may still be valid under the doctrine of apparent authority. *See Illinois v. Rodriguez*, 497 U.S. 177, 185-86 (1990). The determination of apparent authority is based on an objective standard. *See id.* at 188. If "the facts available to the officer at the moment . . . warrant a man of reasonable caution [to believe] that the consenting party had authority over the premises," then apparent authority exists, which validates the search. *See Cos*, 498 F.3d at 1128 (quoting *Rodriguez*, 497 U.S. at 188). The rationale behind this doctrine is perfectly in line with the underpinnings of the Fourth Amendment: that the police officers' actions be *reasonable*. *See Rodriguez*, 497 U.S. at 185 (preferring reasonableness to correctness).

Based on the facts before Officer Nelson at the time of the search, it is quite clear that W.M. had the apparent authority to consent to the search of the apartment and the cell phone.

A. Based on Her Perceived "Mutual Use" or "Joint Access," W.M. had Apparent Authority to Consent to the Search of the Apartment.

Apparent authority only requires that the officer, based on the facts before him, reasonably believed that a third party had the requisite authority to consent to a search. *See Georgia v. Randolph*, 547 U.S. 103, 109 (2006). Determining whether the belief was reasonable is an objective inquiry that entails looking at the surrounding factual circumstances. *See United States v. Andrus*, 483 F.3d 711, 716-17 (10th Cir. 2007); *United States v. Morgan*, 435 F.3d 660, 663 (6th Cir. 2006).

Given that each factual situation is unique in its own right, courts refuse to point to one single fact as being dispositive in the inquiry. *See Groves*, 530 F.3d at 509. For instance, where a girlfriend that told police officers that she performed chores at the defendant's apartment, like cooking, and still had belongings inside, police officers could reasonably believe that she had apparent authority to grant access to the apartment despite her maintaining a separate residence

and not paying rent. *See United States v. Goins*, 437 F.3d 644, 648-49 (7th Cir. 2006). Similarly, police officers reasonably believed a defendant's girlfriend had the authority to consent to an apartment search where she provided highly detailed information about the inside of the apartment, stated that she continued to reside at the apartment, and stated that she was at the apartment that same morning. *See United States v. Gillis*, 358 F.3d 386, 391 (6th Cir. 2004).

A finding of apparent authority is not limited to intimate relationships either. For example, where an overnight hotel guest tells a police officer that he did not rent out a hotel room but stayed there with his friends and presented a room key, that officer could reasonably believe that the guest, based on his "mutual use," had the authority to consent to a search of the room. *See United States v. Kimoana*, 383 F.3d 1215, 1222-23 (10th Cir. 2004). Conversely, where a police officer interacts with an apartment dweller that he knew was not the renter due to the officer's prior investigation, his belief that the dweller had the authority to consent to a search of the apartment would not be reasonable. *See United States v. Reid*, 226 F.3d 1020, 1025-26 (9th Cir. 2000).

Turning to the present case, Officer Nelson had a reasonable belief that W.M. had the authority to consent to the Respondent's apartment. Upon initial questioning, W.M. identified herself as the Respondent's girlfriend and stated that she had lived with him for about a year. R. at 29-30. She told Officer Nelson that her and the Respondent "shared everything." R. at 29. Further, she said that she performed chores at the apartment, received personal and medical bills at the apartment, and kept other personal items at the apartment such as her backpack and spare clothes. R. at 30-31, 33. She also told Officer Nelson that she shared a bedroom with the Respondent, eliminating the need for her own separate room, and had her own section of the closet where she kept her clothing. R. at 33. Lastly, she told Officer Nelson that she "hosted

friends" the night before and expressed no indication that she needed permission to do so. R. at 38.

Combined, all of this information substantiated Officer Nelson's reasonable belief that W.M. had authority to consent. W.M. went beyond merely stating that she lived in the apartment or providing a detailed description of inside the apartment; she maintained personal items and clothing, which she put in her section of the shared closet, and had sensitive mail sent to the apartment. R. at 30-31; *see Gillis*, 358 F.3d at 391 (concluding that girlfriend's statement that she lived in apartment and detailed description of inside apartment was enough for reasonable belief that authority existed). Her claim that she performed most of the household chores also bolstered Officer Nelson's reasonable belief. *See Goins*, 437 F.3d at 646, 649 (reasoning that girlfriend's claim that she performed chores like laundry supported officer's reasonable belief despite washing machine not being present in apartment); R. at 33. Further, the fact that she "hosted friends" the night before indicated that she had, at minimum, "mutual use" of the entire apartment for any purpose.

W.M.'s lack of personal items and failure to produce a key did not cause Officer Nelson's belief to be unreasonable. For starters, simply not having a house key to open an apartment is not dispositive, especially when other facts point to the third party having "mutual use" of the premises, such as having access through alternative means. *See United States v. Penney*, 576 F.3d 297, 308 (6th Cir. 2009) (finding apparent authority for girlfriend despite her not having house keys and using a "trick" to gain access through backdoor); *United States v. McGee*, 564 F.3d 136, 141 (2d Cir. 2009) (noting that absence of keys "does not necessarily answer the question" of apparent authority). Further, the small amount of items that W.M. kept in the apartment did not make Officer Nelson's belief unreasonable because he could have easily

deduced that her lack of personal items resulted from W.M.'s previously being homeless. R. at 30; *see Gillis*, 358 F.3d at 391 (concluding that garbage bag of clothing supported reasonable belief that girlfriend stayed in apartment).

W.M.'s age also does not reduce the reasonableness of Officer Nelson's belief. Officer Nelson knew that W.M. was sixteen-years-old before asking for her consent to search. R. at 29. However, W.M.'s status as a minor does not weaken her consent's validity or Officer Nelson's reasonable belief. Absent evidence to the contrary, Officer Nelson had no reason to believe that W.M.'s age lessened her authority; one's status as a minor is merely one of many factors in the reasonableness inquiry. *See United States v. Gutierrez-Hermosillo*, 142 F.3d 1225, 1230-31 (10th Cir. 1998) (finding that fourteen-year-old had authority to consent); *Lenz v. Winburn*, 51 F.3d 1540, 1543, 1548-49 (11th Cir. 1995) (concluding that nine-year-old could consent). Also, though Officer Nelson viewed W.M.'s living arrangement as "abnormal," this Court has stated that "*Matlock* . . . place[s] no burden on the police to eliminate the possibility of atypical arrangements." *See Randolph*, 547 U.S. at 112; R. at 34.

Finally, Officer Nelson dismissed any ambiguity in the situation before him by persistently questioning W.M. whenever she was unclear. R. at 29-31. Where an officer faces an ambiguous situation, he must inquire further before accepting a third party's consent. *See Rodriguez*, 497 U.S. at 188. However, Officer Nelson effectively eliminated any ambiguity in this case. For example, when W.M. told him that her and the Respondent "shared everything," Officer Nelson asked follow up questions, which led to W.M. informing Officer Nelson that her and the Respondent shared a business, that she was previously homeless before the Respondent put "a roof over her head," and that he treated her well. R. at 29-30. Still uncertain about her "mutual use," Officer Nelson asked her whether she had any belongings in the apartment, to

which she responded affirmatively. R. at 30-31. Officer Nelson diligently investigated W.M.'s statements and dispelled any ambiguity prior to asking for her consent to search the apartment. *See Rodriguez*, 497 U.S. at 185 (noting that officers do not have to be *correct* but merely *reasonable*) (emphasis added).

Requiring Officer Nelson to inquire further into the ambiguity at hand would be impractical and inefficient. Officer Nelson attentively gathered enough information to conclude that W.M. shared the apartment with the Respondent. R. at 31. Compelling Officer Nelson to disprove W.M.'s authority over the apartment would be completely adverse to the touchstone of the Fourth Amendment: that the officer act *reasonably*. *See Fernandez v. California*, 134 S. Ct. 1126, 1132 (2014) (emphasis added). It is inconceivable to require that an officer search beyond a co-occupant's word for undisputed truth where the co-occupant expresses a desire to be cooperative and have any "suspicions [about her] . . . dispelled." *See id.* Officers should not be forced to perform anything similar to an on-the-spot polygraph; the Fourth Amendment does not, and should not, require such harsh obstacles.

B. W.M. Had Apparent Authority to Consent to a Search of the Cell Phone Because She Had "Mutual Use" of It.

Along with a search of a home or apartment, apparent authority to consent can extend to a search of an item or "effect." *See Rodriguez*, 497 U.S. at 181. Though the inquiry for items is independent from that of places, the analysis remains the same: based on the facts before him, would a reasonable officer believe that a third party had authority to consent to a search? *See Andrus*, 483 F.3d at 716. In other words, officers must reasonably believe that a third party had "mutual use" of the "effects" being searched. *See Matlock*, 415 U.S. at 171.

Whether or not a third party has "mutual use" over an item turns on a multitude of factors. For example, a wife that solely used a shared computer for computer games had the

apparent authority to consent to a search where the computer was located in a common living area, leased under her name, and, based on available evidence, contained no password-protected files. *See United States v. Buckner*, 473 F.3d 551, 555 (4th Cir. 2007); *see also Morgan*, 435 F.3d at 663-64 (holding that wife had apparent authority to consent to search of computer where computer was located in common area and did not have individual usernames and passwords). However, it is unreasonable to believe that a prisoner's long-time friend, who received the prisoner's mail, had the apparent authority to consent to the search of the prisoner's computer discs where (1) the prisoner previously asked his long-time friend to merely store the discs, (2) the discs were inside a sealed envelope with the prisoner's name on the front, (3) the top disc had the words "confidential," "personal," and "private" inscribed on it, and (4) the searching officers knew that the prisoner had instructed his long-time friend to destroy the discs. *See James*, 353 F.3d at 615.

Based on her statements to Officer Nelson, W.M. had the apparent authority to consent to a search of the cell phone. W.M. told Officer Nelson that her and the Respondent shared the cell phone even though the Respondent paid the bill. R. at 31-32. W.M. knew the password to the cell phone and used it for multiple reasons: to send personal texts; to make personal phone calls; and to check social media sites like Facebook. R. at 32, 34. Such usage, coupled with her knowledge of the password, bolsters the perception that W.M. had "mutual use" of and, at the very least, "joint access" to the cell phone. *See Morgan*, 435 F.3d at 663-64 (finding that wife had authority to consent to search of computer in part because she told officers that she "had access to and used the computer"). In fact, using social media applications is quite similar to playing computer games in that both are leisurely activities, and some courts have found apparent authority for third parties that used a computer solely for playing computer games. *See Buckner*, 473 F.3d at

555 (concluding that wife had apparent authority over computer though she only used it for computer games). Lastly, W.M.'s "mutual use" of the cell phone appeared reasonable because she knew the password and no evidence existed indicating that Respondent had any password-protected files within the cell phone or otherwise considered it "private." *See Morgan*, 435 F.3d at 663 (noting lack of individual username and passwords as analytical factor).[5]

Nothing about the cell-phone itself called into question W.M.'s authority to access it. The cell-phone had a sticker on it similar to the Respondent's tattoo,[6] and the password included the same numbers that were tattooed on the Respondent. R. at 34. First, nothing about the sticker indicated that the Respondent maintained exclusive control over the cell-phone. For instance, Officer Nelson could have reasonably believed that the parties had a mutual agreement about the appearance of the phone: the Respondent picked the sticker and W.M. picked the lock screen photo. *Id.* Second, the password, which W.M. knew, included numbers that were tattooed on the Respondent; however, it is quite reasonable to believe that both parties chose this password because it was easy for both the remember. *Id.*

The location of the cell phone also did not create any ambiguity as to W.M.'s authority over or access to it. Officer Nelson found the cell phone on one of the two nightstands in the bedroom. R. at 31. However, the fact that it was located on a nightstand with non-feminine items at the time Officer Nelson found it does not mean that W.M. had any less access to it. *Cf. United States v. Waller*, 426 F.3d 838, 848-49 (6th Cir. 2005) (determining that luggage in apartment

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[5] One might argue that the Respondent's telling W.M. that she could only use the phone he had given her is an indication of his limiting her access. R. at 30. However, nothing in the record indicates this; the Respondent never told her that she could only use the phone with his permission but rather that they would share a phone. *Id.*

[6] The tattoo included the letters "S" and "W" wrapped around a wizard's hat. R. at 28.

owner's spare closet was not clearly defendant's because defendant did not permanently stay at apartment and two other persons were inside residence at time of search). Had the Respondent wanted to exert exclusive control over the cell phone, he could have placed the cell phone inside a drawer of his or in a place only he had access to; however, W.M. had unlimited access to the bedroom and nothing indicated that the cell phone was "private" to Respondent. *Cf. James*, 353 F.3d at 615 (noting that computer discs were labeled as "confidential," "personal," and "private," and were contained inside *sealed* envelope) (emphasis added); *Andrus*, 483 F.3d at 720 (finding that computer in question was located in room to which third party had unlimited access). The fact that the cell-phone was on one nightstand and not the other is a "metaphysical subtlet[y]" that should not invalidate W.M.'s authority. *See Frazier v. Cupp*, 394 U.S. 731, 740 (1969).

Officer Nelson reasonably believed that W.M. had authority over the cell phone, and he did not need to tirelessly continue searching for more evidence indicating such. Requiring that law enforcement search out every bit of information and ensure its accuracy would greatly reduce the efficacy of consent searches, one of the most useful investigatory techniques available to law enforcement. The touchstone of the Fourth Amendment is reasonableness for a purpose; it is impractical to require an officer to "fact check" a third party before reasonably relying on the information that she gives him. *See Rodriguez*, 497 U.S. at 185 (noting that reasonableness trumps accuracy).

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court reverse the Thirteenth Circuit's decision and remand with instructions to deny the Respondent's motion to suppress.