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1. Are searches conducted pursuant to L.O. 1923 permitted under the special needs exception to the Fourth Amendment?
2. Did W.M. possess authority to consent to Officer Nelson's search of the apartment at 621 Sasha Lane or the cell phone found therein?

STATEMENT OF FACTS

The Victoria City Board of Supervisors ("Board") and several citizen groups became concerned about hosting the Professional Baseball Association's All-Star Game in its Starwood Park downtown area on July 14, 2015. R. at 2:2-10; 16-20. The concern was because such major sporting events attract a huge influx of both visitors and child sex traffickers. Also, the area around the stadium is largely controlled by the Starwood Homeboyz gang whose most profitable venture is human trafficking involving many child victims. *Id*. at 2:5-6, 10-11. The Board's response was to pass Local Ordinance 1923 ("L.O. 1923") on May 5, 2015, which 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 of 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.

Id. at 2:21-28.

The Board also issued a press release on May 6, 2015, expressing its grave concerns about child sex trafficking in the Starwood Park neighborhood and providing data about the huge increase in demand for sex services associated with major sporting events. *Id*. at 40-41. The Press Release went on to explain that the Board passed L.O. 1923 because of its determination to protect children from the dire threat to their safety around the time of the game. *Id*. at 41 ¶ 2. The ordinance would enable law enforcement to remove children from dangerous situations before matters escalated. *Id*. at 41 ¶ 2. Thus, the Board recognized the need for officers to be able to act in situations where they spotted signs of child sex trafficking. *Id*. at 41 ¶ 2. At the same time, the

Board pointed out the narrow applicability of the ordinance in order to limit potential privacy intrusions to those deemed absolutely necessary. *Id*. at 41 ¶ 2.

On the night of July 12, 2015, Officers Richols and Nelson—a twelve-year veteran with the city police department—were observing patrons checking into the Stripes Motel in the Starwood Park neighborhood. R. at 3:10-13; 26:9-17. This was not Officer Nelson's normal assignment. *Id*. at 27:4-5. Officer Nelson testified that they were looking for signs of human trafficking and wanted to take advantage of L.O. 1923 to help potential victims. *Id*. at 27:1, 7-11. The officers became suspicious that child sex trafficking was afoot when they observed an older man, defendant Mr. Larson, enter the motel with a much younger female, "WM", whose clothes "barely covered anything at all," and without suitcases. *Id*. at 3:13-16; 27:28-28:1-6. "What scared [Officer Nelson] the most" was Mr. Larson's tattoos which the officer knew identified Mr. Larson as a member of the Starwood Homeboyz gang. *Id*. at 2:10-11; 28:8-17.

Based on these indicators of child sex trafficking, the officers searched Mr. Larson and WM under the ordinance based on reasonable suspicion. *Id*. at 27:24-27. Officer Nelson's search of Mr. Larson's jacket pockets revealed items including nine condoms, lube, a butterfly knife, six hundred dollars in cash, and "a list of names and how long they paid for." *Id*. at 28:19-25. Officer Richols arrested Mr. Larson and Officer Nelson searched WM. *Id*. at 28:27-28. Officer Nelson found a valid state driver's license showing that WM was only sixteen years old; from this Officer Nelson concluded that "she was probably the victim" of child sex trafficking and did not arrest her as his goal was to help potential victims. *Id*. at 27:9-11; 29:2-5.

Officer Nelson talked to WM about her relationship with Mr. Larson and learned that WM was Mr. Larson's girlfriend. *Id.* at 29:6-10. He then asked if she had a safe place to stay that night and WM said she lived with Mr. Larson about three blocks away at 621 Sasha Lane. *Id*. at 29:14-

20. She mentioned they shared it, to which Officer Nelson asked for clarification and she said they share everything. *Id.* at 29:21-2. Again, Officer Nelson asked for clarification, telling her he was having trouble understanding. *Id.* at 29:25. WM told the officer they lived together and they shared all the money from the business they had together, which Mr. Larson held. *Id.* at 29:26-27.

WM and Officer Nelson continued to talk. She told Officer Nelson she met Mr. Larson while she was homeless and he offered to let her live with him. *Id.* at 30:2-3. For the third time, Officer Nelson investigated further asking whether she lived at the apartment all the time or just stayed there. *Id.* at 30:9-10. She said that she lived at the apartment with Mr. Larson for about a year. *Id.* at 30:10-1. WM continued to share intimate details about her relationship with Mr. Larson, telling the officer that once he got mad at her for texting a male friend and slapped her. *Id.* at 30:15-7. From that point on she only used the phone Mr. Larson had given her. *Id.* at 30:18-9.

Officer Nelson then felt WM probably had mutual use of the apartment but he was not entirely sure. *Id.* at 30:22-3. For the fourth time, Officer Nelson investigated further and asked her whether she kept any of her belongings in the apartment. *Id.* at 30:23-4. WM told him she kept her backpack, spare clothes, and a duffle-bag worth of stuff there because she really did not have any other belongings. *Id.* at 30:25-8. She also said that she received medical bills and other personal mail at the apartment. *Id.* at 31:1-2. Then Officer Nelson's concluded they probably shared the apartment and asked for permission to search it. *Id.* at 31:4-6. She consented and used a spare key located underneath a fake rock to open the door. *Id.* at 31:6-9.

Inside the apartment, Officer Nelson found two things: a loaded black semi-automatic handgun with the serial number scratched off underneath the bed and a cellular phone on a nightstand with other male items on it. *Id.* at 31:14-21; 35:1-2. The first thing Officer Nelson did when he found the phone was to investigate further. He asked WM if the phone belonged to her,

to which she responded it was the phone they shared. *Id.* at 31:25-6. Again, he inquired further and asked whether she chose the sticker on the phone and learned the sticker was Mr. Larson's. *Id.* at 32:2. He also asked what she used the phone for and learned she used it for Instagram, Facebook, and Snapchat without having to ask Mr. Larson for permission, and for sending personal text messages and making calls. *Id.* at 32:3-11. Officer Nelson then asked WM for permission to search the phone and she consented, providing him with the password. *Id.* at 32:13-4; 34:14.

Mr. Larson contends that (a) the initial search of his person at the Stripes Motel was invalid because L.O. 1923 is facially unconstitutional, and (b) his Fourth Amendment rights were violated when Officer Nelson searched the apartment identified by W.M. as belonging to them, and then again when he proceeded to search the cell phone discovered in the apartment. In fact, the arguments below will show that Mr. Larson is wrong on both counts since L.O. 1923 searches are permissible under the special needs doctrine and Officer Nelson reasonably relied upon W.M.'s authority to allow him search the apartment where she lived with Mr. Larson.

SUMMARY OF THE ARGUMENT

I. Permissibility of L.O. 1923 Searches Under the Fourth Amendment

"Child sex trafficking" could fittingly be substituted for "drugs" in the Court's statement that "[i]t is hard to think of a more compelling government interest than the need to fight drugs on our streets and in our neighborhoods." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 673 (1995). Faced with the special-need non-law-enforcement objective to protect children during the extraordinary one-week surge in anticipated child sex trafficking in the area, L.O. 1923 provides city law enforcement with a vital tool to act on the basis of reasonable suspicion. R. at 41. The fact that law enforcement is directly involved in addressing the special need does not of itself make the authorized searches facially unconstitutional. *New York v. Burger*, 482 U.S. 691, 717 (1987).

Similar Fourth Amendment principles underpin the searches authorized under L.O. 1923 and other special-need searches conducted on the basis of reasonable suspicion. Paralleling the state schools' interests in enforcing their no-drugs policy in *New Jersey v. T.L.O.*, the City's interests in protecting children from sex trafficking at a time of greatly-increased risk outweighs the search's limited intrusion on the privacy interest of those who provide grounds for reasonable suspicion concerning unlawful and heinous activity. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

In addition, the ordinance specifically limits the officers' discretion in the time, place, and scope of the searches. R. at 2. In the interest of removing children from dangerous situations, officers merely look for signs of child sex trafficking and briefly search those who give rise to reasonable suspicion. *Id.* at 41. This intrusion is less than that upheld by the Court in *Vernonia* which imposed random urine drug testing on student athletes without requiring any level of individualized suspicion. *Vernonia*, 515 U.S. at 650, 664-65.

Therefore, searches pursuant to L.O. 1923 satisfy the requirements of the special needs exception to the Fourth Amendment and L.O. 1923 is not facially unconstitutional.

II. WM Possessed Actual and Apparent Authority to Consent to Both Searches

A warrantless search is considered unreasonable. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). However, there are exceptions. *Id.* A warrantless search is constitutional provided there is (1) voluntary consent (2) given by a person with authority to consent. *U.S. v. Digiovanni*, 650 F.3d 498 (4th Cir. 2011).

As to the first element, consent is not at issue in this case. However, the government points out that WM's consent was given freely and voluntarily. Here, there were no coercive police measures. Officer Nelson actually displayed concern for WM's safety, asking her whether she had a safe place to stay that night in a calm demeanor. R. at 29. Furthermore, WM was extremely

cooperative with the officer, as she shared personal details about her relationship with Mr. Larson. R. at 30. Lastly, the facts are unclear as to whether she knew about the right to refuse, but the court in *United States v. Weeks*, 666 F.Supp.2d 1354, 1376 (2009) states that the lack of knowledge to refuse does not render consent involuntary.

As to the second element, WM had the authority to consent to the searches because she possessed both actual and apparent authority. She had actual authority to consent because she meets most of the factors set out in *United States v. Groves*, 530 F.3d 506 (7th Cir. 2008). WM lived at the apartment for about a year, received highly personal mail there, stored her personal belongings there including her clothes, and did most of the house chores. R. at 30:11; 30:25-6; 31;1-2. These facts indicate that she had joint access and control of the entire apartment.

WM also had actual authority to consent to the search of the cell phone. The relevant inquiry in determining whether a person had authority over an object relates to the consenting party's relationship to the object. *United States v. Andrus*, 483 F.3d 711 (10th Cir. 2007). If the consenting party had joint access to or control over the object, the party had authority to consent. *United States v. Ruiz*, 428 F. 3d 877 (9th Cir. 2005). WM meets these requirements because the cell phone was in a room she and Mr. Larson shared. R. at 31. She also used the phone for all her social media accounts and was able to access it without Mr. Larson. R. at 32.

Lastly, even if this Court finds that WM did not possess actual authority, WM possessed apparent authority, thus justifying the searches. Apparent authority is present when the available facts would "warrant a man of reasonable" caution to reasonably believe the consenting party had authority over the premises. *Terry v. Ohio*, 392 U.S. 1 (1968). The facts available to officer Nelson would lead a reasonable person to believe that WM had authority to consent. Further, the officer questioned WM a total of eight times when presented with ambiguous facts.

Thus, WM possessed both actual and apparent authority to consent to both searches and therefore the searches were justified.

STANDARD OF REVIEW

This Court granted certiorari to review two issues: (1) whether searches conducted pursuant to L.O. 1923 are permissible under the special needs exception to the Fourth Amendment, and (2) whether WM possessed the authority to consent to Officer Nelson's search of the apartment at 621 Sasha Lane or the cell phone found therein. The first issue is a constitutional question of law subject to de novo review. *United States v. Maybee*, 687 F.3d 1026, 1030 (8th Cir. 2012). As to the second issue, when reviewing a court's denial of motion to suppress, the reviewing court considers the totality of the circumstances in light most favorable to the government. *United States v. Kimoana*, 383 F.3d 1215 (10th Cir. 2004) (quoting *United States v. Long*, 176 F.3d 1304, 1307 (10th Cir. 1999)). The decision of reasonableness under the Fourth Amendment is a question of law and this Court should apply the de novo standard of review. *Kimoana* at 1215.

ARGUMENT

I. L.O. 1923 SEARCHES SUCH AS OFFICER NELSON'S SEARCH OF MR. LARSON ARE PERMITTED UNDER THE FOURTH AMENDMENT'S SPECIAL NEEDS EXCEPTION BECAUSE (A) THE PRIMARY PURPOSE OF THE ORDINANCE AND SEARCH WAS TO MEET A SPECIAL NEED WHERE THE GOVERNMENTAL INTEREST OUTWEIGHS THE PRIVACY INTEREST AND (B) THE SEARCHES SATISFY THE REASONABLENESS STANDARD

The City of Victoria's government can satisfy its burden of showing that L.O. 1923 searches fall within the "special needs" exception established by the Court as one of the "specifically established and well-delineated exceptions" to the Fourth Amendment's warrant requirement. *Katz v. United States*, 389 U.S. 347, 356-57 (1967). The Fourth Amendment provides that the federal government shall not violate "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. CONST. amend.

IV. The Court has held that the Fourteenth Amendment extends this constitutional guarantee to searches and seizures by state officers. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 644, 652 (1995). The ultimate measure of the constitutionality of a governmental search is reasonableness. *Vernonia*, 515 U.S. at 652. The Court has not hesitated to adopt a reasonableness standard that stops short of probable cause where a careful balancing of governmental and private interests suggests that this best serves the public interest. *New Jersey v. T.L.O.*, 469 U.S. 327, 341. The Court commonly applies these considerations of public interest and the balance of governmental and private interests where "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Vernonia*, 515 U.S. at 653.

The two-fold inquiry for determining the reasonableness of any search is (1) whether the search was justified at its inception, and (2) whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place. *T.L.O.*, 469 U.S. at 341 (1985). Where special needs make the warrant and probable cause requirements impracticable, a court is "entitled to substitute its balancing of interests for that of the Framers." *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring). Based on applying the traditional special needs doctrine and principle-based comparisons drawn from precedent, the Court should hold that L.O. 1923 searches—and specifically Officer Nelson's search of Mr. Larson—are permitted under the special needs doctrine.

A. L.O. 1923 Searches Satisfy the Special Needs Exception Requirements of (1) a Primary Purpose Outside the Scope of Ordinary Law Enforcement, (2) Circumstances Making Obtaining a Warrant Impracticable, and (3) the Government Interest Outweighing the Individual's Privacy Interest

Under the special needs exception, searches conducted pursuant to L.O. 1923 satisfy the exception requirements based upon the City government's primary purpose to protect vulnerable children at a time of almost-certain heightened sex trafficking in the City. R. at 41 ¶ 1. Also, this

special need faced by the City makes the probable cause and warrant requirements impracticable given the urgent need to act where child sex trafficking activities are suspected or underway in order to prevent those involved from being put on alert. Thus, the City enacted L.O. 1923 as a special measure limited to the one week of heightened sex trafficking activities. R. at 2:16-28. While not requiring probable cause, L.O. 1923 does require police officers to have individualized reasonable suspicion of involvement in child sex trafficking before initiating an encounter with and possibly searching suspect individuals. *Id*. at 2:22-24. The City government's interest in preventing children from becoming caught up in the higher demand for child sex that exists around the time and place of a major sports event far outweighs the relatively minor intrusions on individual privacy interests that may occur under the limited scope of the search policy of the ordinance. *Id*. at 2:26-27. In sum, searches conducted pursuant to L.O. 1923 satisfy the requirements of the special needs doctrine and do not violate Fourth Amendment rights.

(1) The Requirement for a Special Need Outside of Normal Law Enforcement is Met Because the City Government's Primary Purpose of L.O. 1923 is to Protect Children in the City from Sex Trafficking at a Time of Significantly Heightened Risk

For purposes of the special needs doctrine, the primary purpose of a law may serve non-law-enforcement ends even where law enforcement officers are involved in carrying out the law. *Griffin v. Wisconsin*, 483 U.S. 868, 873-75 (1987). In *Griffin*, the Court upheld the warrantless search of a probationer's home by probation officials after police informed the probation authorities that "there were or might be" guns in Griffin's apartment. *Id*. at 871. Plainclothes policemen accompanied probation officers to the probationer's home where the probation officers conducted the search and found a handgun. *Id*. The Court held that the state's operation of a probation system presented special needs beyond those of normal law enforcement. *Id*. at 873-74. In balancing the state's special need against the individual's privacy interest in his own home, the

Court found that probationers are only entitled to conditional liberty, not the absolute liberty of the public at large. *Id*. at 874. Therefore, the degree of impingement upon privacy here is permitted although the Court stated that it would not be constitutional if applied to the public at large. *Id*. at 875. Finally, having found firstly that the state did have a special need and secondly that the need outweighed the individual's privacy interest, the Court proceeded to find that the special needs of Wisconsin's probation system made the warrant requirement impracticable and justified the reasonable grounds standard for the search. *Id*. at 875-86.

In contrast, a special need does not exist where law enforcement is involved in developing the search policy from its inception and where implementation of the policy relies on the threat of law enforcement intervention to provide the necessary leverage to make the search policy effective. *Ferguson v. City of Charleston*, 532 U.S. 67, 71-73 (2001). In *Ferguson,* the State set up a task force including police and members of the Medical University of South Carolina ("MUSC") to develop a policy to combat cocaine use among maternity patients. *Id*. at 70-71. Under the policy, any MUSC maternity patient whose urine tested positive for cocaine would be identified to the police and arrested unless she agreed to enter substance abuse treatment. *Id*. at 72. The *Ferguson* majority distinguished the "immediate" objective from the "ultimate" goal of the policy, finding that the immediate objective was to obtain inculpatory evidence such that the threat of prosecution would promote compliance with substance abuse treatment. *Id.* at 82-84. The Court held that the facts did not fit within the special needs exception. *Id*. at 84. Thus, the immediate purpose of a special-needs search should be "distinct from the ordinary evidence gathering associated with crime investigation." *United States v. Amerson*, 483 F.3d 73, 81 (2d Cir. 2007). Of note, however, the Court found that, while "normal" law-enforcement objectives cannot qualify as

special needs, "some 'special law enforcement concerns'" will justify suspicionless searches under the special-needs doctrine. *Id*. (quoting *Illinois v. Lidster*, 540 U.S. 419, 424 (2004)).

Here, in passing L.O. 1923, the City's immediate objective of authorizing police searches based on reasonable suspicion was to protect children from becoming embroiled in heightened child sex trafficking activities due to the anticipated spike in demand for child sex around the time of the All-Star Game. R. at 41. This government objective was shared by Officer Nelson who testified that observing guests as they checked into the Stripes Motel on July 12, 2015, was not a normal assignment for him but that he was doing it "to see if we could help additional potential victims." *Id*. at 26:26-27; 27:4-5, 10-11. While a normal law-enforcement objective is to catch and prosecute sex traffickers and free the victims, the special need arises because the City police are not normally faced with needing to protect so many at-risk children. *Id*. at 41.

(2) The Requirement of Impracticability for Obtaining a Search Warrant is Met Because Officers Need to Act Quickly When They Observe Suspect Child Sex Trafficking Activity to Avoid At-Risk Children from Being Whisked Away into Further Harm

Where government agents do not act arbitrarily and the nature of the special need makes obtaining a warrant impracticable, a warrant is not required under the special needs doctrine since the fundamental purpose of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). In *New York v. Burger* where a state statute permitted police officers to conduct administrative searches of automobile junkyards, the Court determined that requiring a warrant would interfere with the statute's purpose of deterring automobile theft and shutting down the market in stolen cars and parts. *New York v. Burger*, 482 U.S. 691, 710 (1987). Recognizing that stolen cars and parts often pass quickly through an automobile junkyard, the Court found that frequent and unannounced police inspections were necessary for the detection of such stolen

goods. Thus the Court held that, where the junkyard owner was not keeping records as required by the statute, the police officers' warrantless search of the yard was permissible and the stolen goods found were admissible evidence. *Id*. at 715-16. Indeed, surprise was crucial in addressing the special need of remedying the major social problem of trade in stolen cars and parts. *Id*. at 710.

While administrative searches such as the statutory inspections in *Burger* do not require any individualized suspicion, other special needs situations require reasonable suspicion but not probable cause. For example, the warrant requirement "is unsuited to the school environment" because teachers are not trained in the "niceties" of probable cause and they need to be able to search a child suspected of an infraction promptly in order to "swiftly" maintain discipline. *New Jersey v. T.L.O.*, 469 U.S. 325, 340, 343 (1985). Thus, in assessing whether public interest demands an exception to the warrant requirement, the question "turns in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 533 (1967).

Here, the necessity of officers to intervene quickly is critical when faced with a situation suggestive of child sex trafficking and makes obtaining a warrant impracticable. Indeed, faced with a one-week surge in child sex trafficking activity, the City purposefully designed the L.O. 1923 search policy to allow police to act when they spot signs of child sex trafficking to save the child from harm. R. at 41 ¶ 2:6-9. The Court has stated that "what is reasonable depends on the context within which a search takes place" and during the context of this extraordinary one-week period of heightened risk to children, police do not have the luxury of time in which to develop probable cause before intervening. *T.L.O.*, 469 U.S. at 654. Furthermore, the fact that police officers conduct the searches under the ordinance is not constitutionally significant. *New York v. Burger*, 482 U.S. 691, 717 (1987) (finding police officers, rather than administrative agents,

permitted to conduct statutory inspections of automobile junkyards). Therefore, because a time delay could allow a sex trafficker to whisk children away to different locations and out of law enforcement's reach, the requirement of impracticability for obtaining a search warrant is met.

(3) The Requirement for the Government Interest Outweighing the Individual's Privacy Interest is Met Because Child Protection from Sex Trafficking Greatly Outweighs the Intrusion on a Suspect's Privacy Interest from a Limited Search

The government interest underpinning L.O. 1923 could hardly be greater given the risk to children from heightened demand for sex trafficking connected with the All-Star Game, and this interest greatly outweighs the relatively minor intrusion on a suspect's privacy interest where police have reasonable suspicion to conduct a brief search of an individual. Unlike the special needs exception involving administrative searches under a regulatory scheme that permits suspicionless searches, L.O. 1923 does require reasonable suspicion, thereby fulfilling the usual Fourth Amendment requirement of having "some quantum of individualized suspicion" for conducting a constitutional search. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 624 (1989) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976)); *see also City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) ("A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing"); *Chandler v. Miller*, 520 U.S. 305, 308 (1997) ("Searches conducted without grounds for suspicion of particular individuals have been upheld . . . in 'certain limited circumstances'").

Under L.O. 1923, the degree of intrusion on the individual's privacy interest is further limited by restricting the scope of the search to that which is "reasonably necessary" to ascertain whether or not the suspect individual is engaging in or attempting to facilitate involving a child in commercial sex acts as statutorily defined. 18 U.S.C. § 1591(e)(3). Further, L.O. 1923 operates for only one week and officers are limited to observing individuals obtaining a room in a public

lodging facility. R. at 2:21-22, 25-26. Those checking into a lodging such as a motel have a much reduced expectation of privacy than they would in their own home since the check-in area is a public place where those checking in are well aware that others are likely to observe them. Finally, L.O. 1923 was passed in response to the expressed concerns of the community as well as of the Board. *Id*. at 16-21. Indeed, the Court has found previously that members of the public cooperate with police during encounters because they know that such encounters enhance their own safety and the safety of those around them. *United States v. Drayton*, 536 U.S. 194, 205 (2002). Thus, just as bus passengers in *Drayton* may feel their safety enhanced by encounters with police officers coming on the bus at a scheduled stop, guests checking into motels which have a broad reputation for criminal activity might be reassured rather than upset by the mildly intrusive actions of law enforcement under the ordinance.

In sum, the governmental interest in child welfare greatly outweighs the limited intrusion on an individual's privacy interest that may occur from searches conducted under L.O. 1923.

B. L.O. 1923 SEARCHES SATISFY THE FOURTH AMENDMENT STANDARD OF REASONABLENESS BECAUSE (1) THE SEARCHES ARE JUSTIFIED AT THEIR INCEPTION IN SEEKING TO PROTECT CHILDREN FROM SEX TRAFFICKING, AND (2) THE SEARCHES ARE REASONABLY RELATED IN SCOPE TO ESTABLISHED INDICATORS OF CHILD SEX TRAFFICKING

The legality of a search depends simply on the reasonableness of the search under all the circumstances. *T.L.O.*, 469 U.S. at 341. In *T.L.O.*, the Court found that the search of a 14-year-old freshman's purse was justified at its inception because there were reasonable grounds for suspecting that the search would turn up evidence of the student ("T.L.O.") violating the school's no-smoking policy. *T.L.O.*, 469 U.S. at 341-42, 345. Reasonable grounds rested on the fact that a teacher reported discovering T.L.O. smoking in a lavatory and that the purse T.L.O. was carrying was the obvious place in which to find cigarettes. *Id*. at 345-46. Finding evidence implicating

T.L.O. in drug dealing, administrator Mr. Choplick notified the police. *Id*. at 328. The Court noted that Mr. Choplick's original suspicion that there were cigarettes in the purse was the sort of "common-sense" conclusion about human behavior upon which practical people—including government officials—are entitled to rely. *Id*. at 346.

Applying the *T.L.O.* principles to the context of Officer Nelson's search of Mr. Larson in the motel lobby provides support for the search being justified at its inception. This is because the officer had reasonable grounds for suspecting that the search would turn up evidence of Mr. Larson violating the federal statute prohibiting child sex trafficking and that WM needed the officer's protection. 18 U.S.C. 1591(a)(1). Common-sense reasonable grounds rested on the fact that Officer Nelson recognized several suspicious features about the appearances of WM and Mr. Larson on entering the motel. R. at 28:1-6. WM looked much younger than Mr. Larson, WM's clothes "barely covered anything at all," and the pair did not have any suitcases. *Id*. These features are indicators of child sex trafficking.[1] "What scared [Officer Nelson] the most" was the fact that Mr. Larson bore tattoos which the officer knew meant that Mr. Larson is a Starwood Homeboyz gang member. *Id*. at 28:8-17. A reasonable inference is that this scared Officer Nelson on WM's behalf because the Starwood gang is a violent local gang that participates in sex trafficking. *Id*. at 28:11-17.

Just as Mr. Choplick's search of T.L.O.'s purse was based on reasonable suspicion that it would contain incriminating evidence of smoking and drugs, Officer Nelson's search of Mr. Larson's big jacket was based on reasonable suspicion that the jacket pockets would contain incriminating evidence of sex trafficking, which they did, leading Officer Nichols to arrest Mr. Larson. *Id*. at 28:19-25. Confirming the officers fears, Officer Nelson found a valid state driver's

[1] *Human Trafficking in Hotels and Motels: Victim and Location Indicators*, POLARIS PROJECT, http://www.twolittlegirls.org/ufiles/Hotel%20and%20Motel%20Indicators%20AAG.pdf.

license on WM which showed that WM was sixteen years old; from this Officer Nelson concluded that "she was probably the victim here" and he did not arrest her. *Id*. at 29:2-5.

In sum, the search at issue here—that of Mr. Larson's jacket pockets—was justified at its inception in seeking to protect WM from possible child sex trafficking and the search was reasonably related in scope in response to the indicators of child sex trafficking observed by the officers. Since at least this search under L.O. 1923 satisfies the reasonableness standard, L.O. 1923 cannot be held to be facially unconstitutional under the Fourth Amendment as Mr. Larson contends because facial unconstitutionality of a regulation requires that any and all searches carried out in any set of circumstances under the regulation are unconstitutional. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Thus, the Court should overturn the Appellate Court's holding that L.O. 1923 searches violate the Fourth Amendment and their fruits must be suppressed, and reinstate the holding of the Trial Court to the contrary.

II. RESPONDENT'S FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED BECAUSE WM POSSESSED ACTUAL AND APPARENT AUTHORITY TO CONSENT TO BOTH SEARCHES OF THE APARTMENT AND CELL PHONE

The Fourth Amendment exists to protect the people from unreasonable searches and seizures. U.S. CONST. amend. IV. A warrantless search is presumptively unreasonable, but there are exceptions of which consent is one. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). For consent to be valid it must be (1) voluntarily obtained and (2) given by a person with authority to consent. *United States v. Digiovanni*, 650 F.3d 498 (4th Cir. 2011). The government briefly points out that the first element is not at issue in this case. As to the second element, WM possessed actual authority to consent to the searches because she had joint access and control over the apartment and cell phone. WM also possessed apparent authority because the facts available to the officers

at the time of the search would "warrant a man of reasonable caution" to believe WM had authority to consent. *United States v. Kimoana*, 383 F.3d 1215, 1222 (2004).

A. Mr. Larson's Fourth Amendment Rights Were Not Violated When The Police Officers Searched The Apartment and Cell Phone Because WM Voluntarily Consented To Both Searches.

Whether WM's consent was voluntary is not at issue in this case. WM voluntarily consented to both searches. In *United States v. Weeks*, 666 F.Supp.2d 1354, 1374 (2009) the court states that voluntariness of consent is determined on the totality of the circumstances. The court establishes factors that are relevant in a voluntary consent analysis: (1) presence of coercive police procedures; (2) extent of person's cooperation with police officer; and (3) person's awareness of right to refuse consent. *Id*. There were no coercive police procedures in obtaining WM's consent. Officer Nelson was calm when conversing with WM. In fact, he was concerned about WM—he asked WM whether she had a safe place to stay that night. R. at 29. Furthermore, WM extensively cooperated with officer Nelson. She freely agreed to talk to him about her relationship with Mr. Larson. She even went as far as telling the officer intimate details about their relationship, such as mentioning that Mr. Larson once got mad and slapped her for texting a male friend. *Id*. at 30. She felt so comfortable with Officer Nelson that she shared personal stories, demonstrating that she did not feel intimidated or coerced. The facts do not indicate that WM was aware of her right to refuse but the court in *Weeks* found that failure to inform consenting party of right of refusal does not render a verbal consent invalid. *Id.* at 1376. WM's consent was voluntary and the evidence should not be suppressed on the basis that it was not.

B. WM Possessed Actual and Apparent Authority To Consent To The Apartment Search Because She Lived With Respondent For Over a Year, Received Extremely Personal Mail There, Stored Her Personal Belongings At The Apartment, and Did Most of the Chores.

For consent searches to be valid, consent must be obtained from either the subject of the

search or a third party who possesses authority over the premises or the object to be searched. *Fernandez v. California,* 134 U.S. 1126 (2014). A third party possesses authority when it has common authority over the premises or effects. *United States v. Mattlock,* 415 U.S. 164, 170 (1974). Common authority rests on the "mutual use of the property by persons generally having joint access or control [of the premises] for most purposes." *Id.*; see also *Illinois v. Rodriguez,* 497 U.S. 177 (1990). The burden lies on the government to prove that the consenting party had common authority over the premises. *Rodriguez,* 497 U.S. at 181. The burden can be met either through actual or apparent authority. *Id*. Actual authority exists when the consenting third party had joint access or control over the premises. *United States v. Andrus,* 483 F.3d 711 (10th Cir. 2007). Apparent authority exists when the officer reasonably believed, even if erroneously, that the consenting third party possessed authority to consent. *Andrus,* 483 F.3d at 715.

1. WM possessed actual authority to consent because she and Mr. Larson had joint access and control to the entire apartment

The Seventh Circuit has applied a set of factors in determining whether a significant other has actual or apparent authority to consent to a search. *United States v. Groves*, 530 F.3d 506 (7th Cir. 2008). Some of the factors are (1) possession of a key to the premises; (2) a person's admission that she lives at the residence in question; (3) receiving mail and bills at that residence; (4) keeping personal belongings at the residence, including clothing; (5) performing household chores at the home; (6) being on the lease for the premises or paying rent; and (7) being allowed into the home when the owner is not present. *Groves,* 530 F.3d at 509-10.

In *Groves,* police officers responded to a call from Defendant's neighbors reporting gunshots. *Id*. Upon arrival Defendant denied having a gun. *Id*. Later that month, at a time when police officers knew Defendant would not be home, they obtained Defendant's girlfriend's consent to search. *Id*. Officers discovered that girlfriend kept her personal belongings at the apartment,

such as her clothing, mail, and bills. *Id*. She also had her own key and performed housework. *Id*. During their search, police officers found bullets *inside* of a nightstand drawer. *Id*. The court found that Defendant's girlfriend had actual and apparent authority to consent to the search of the apartment and that the consent extended to the drawer inside Defendant's nightstand. *Id*.

The court in *Groves* reasoned that the officers were justified on relying on girlfriend's consent because they reasonably believe she had authority over the apartment. The girlfriend kept her personal belongings and received mail there, which showed that she used the apartment like a co-occupant. Furthermore, the fact that she owned a key showed that girlfriend had access to enter and exit the apartment at any time, without asking for Defendant's permission. The girlfriend also performed chores around the entire house, which is generally indicative of joint access or control of the entire apartment.

Similar to the girlfriend in *Groves* who kept her personal belongings at the apartment, WM kept her clothing, backpack and a duffle bag's worth of stuff in the apartment. R. at 30. This shows that she and Mr. Larson jointly shared the entire apartment. Although opposing counsel may argue that this is insignificant because WM had only a few belongings at the apartment, those few belongings compromised the entirety of her property. WM was homeless before living with Mr. Larson and it is not uncommon for a homeless person to own few belongings. However, whether she had few belongings in the apartment becomes irrelevant when considering that she exercised dominion and control of her own section of a closet conclusively demonstrating that she had unfettered joint access of the apartment. R. at 33.

Similar to the girlfriend in *Groves* who received mail at the apartment, WM likewise received medical bills and personal mail at the apartment. R. at 31. Medical bills and personal mail are extremely private and personal documents that one would only receive at a location one intends

to reside permanently, which further demonstrates joint access and control over the apartment. Similar to the consenting party in *Groves,* WM complained about doing almost *all* the chores around the apartment. R. at 33. A person who contributes to the upkeep of a home by doing chores has clear joint access and control to the premises.

Additionally, the girlfriend in *Groves* owned a key. While it is unclear here whether WM owned a key, we can reasonably infer that she did. WM told Officer Nelson that she and Mr. Larson shared all the money from their business but that he held all of it. R. at 29. This demonstrates that he held WM's important belongings, which could include apartment keys. Thus, when the officers searched Mr. Larson and found a *pair* of house keys on him, one of the keys likely belonged to WM. Even if WM did not own a key, that simple factor is not enough to defeat actual or apparent authority. See *Weeks, 666 F. Supp. 2d* at 1378 (finding that a girlfriend who did not have her own set of keys had apparent authority to consent).

In *Rodriguez,* the defendant was arrested for possession of illegal drugs. *Rodriguez,* 497 U.S. at 177. The female cotenant told the officers the apartment was "ours" and allowed officers to enter. *Id*. The cotenant had actually moved out about a month ago, taking her clothing with her and only leaving behind furniture. *Id*. She only spent the night at the apartment when defendant was home, and she never had friends over. *Id*. The court held that former cotenant did not have common authority over the premises and therefore could not consent to the search. *Id*.

A determining factor in the court's decision was that the consenting party no longer lived at the apartment. The court reasoned that joint access requires more than simply being on the premises when defendant is there. It viewed the nights she spent at the apartment as transitory visits. Of particular importance in the court's reasoning was also that the belongings left behind were not of the kind that prove joint access. For example, furniture is not of the essential personal

effects that people use on a daily basis. Whereas clothing is a daily essential and one can link the place where it is stored to the place of use. Because the consenting party had taken her clothing, the court reasoned she and defendant no longer mutually used the premises. The fact that she never had friends over showed that she did not use the apartment as one with authority normally would.

Unlike the consenting party in *Rodriguez* where the female co-tenant moved out a month prior to the search, WM lived with Mr. Larson for about a year prior to the date of search. R. at 30. Thus, WM was not a visitor but a person with joint authority over the premises. This case is further distinguishable from *Rodriguez* because WM had hosted friends at the apartment the night before the search. R. at 38. WM made free use of the apartment by inviting guests, demonstrating that she had joint access to the place.

Unlike the consenting party in *Rodriguez,* WM was often present at the apartment without Mr. Larson. This can be reasonably inferred because when officer Nelson asked whether she had a safe place to stay that night she told him she could stay at the apartment. R. at 29. This happened after Mr. Larson's arrest indicating she could be at the apartment without him. This is further strengthened because she knew the spare key was underneath a fake rock. This implies Mr. Larson intended to provide WM joint access and control to the apartment. R. at 31. Only a person who exercises joint access to a home knows the precise location of a hidden key.

2. WM also had apparent authority to consent to the apartment search because it reasonably appeared to officer Nelson that WM had the authority to consent

Determining apparent authority to consent to a search is an objective inquiry. *Rodriguez* at 188. It focuses on whether the facts available to the officer at the time of the search would "warrant a man of reasonable caution" to believe that consenting party had authority over the premises. *Id* (quoting *Terry v. Ohio,* 392 U.S. 1 (1968).) The officer has a duty to investigate further when presented with ambiguous facts before relying on the consent. *Kimoana,* 383 F.3d at 1222.

In light of the aforementioned factors set out in *Groves*, Officer Nelson reasonably believed that WM had authority to consent to the search. The facts available to the officer at the time of the search satisfy most of the factors delineated in *Groves*. Officer Nelson asked for clarification *four times* when WM presented him with ambiguous facts. R. 29-30. One of those times officer Nelson asked what WM meant when she said they shared the apartment. *Id*. at 29. The officer wanted to be sure that the type of "sharing" WM referred to was of the type that gave her authority to consent. At one point he believed she *probably* had mutual use of the apartment. R. at 30. However, to be sure, he asked whether she kept her belongings there. *Id*. at 30. It was only until the officer "felt like they were sharing the apartment" that he asked for WM's permission to search the premises. *Id*. at 31. He fully performed his duty of investigating and seeking clarity before relying on consent.

C. WM Possessed Actual and Apparent Authority To Consent To The Cell Phone Search Because It Was Located In A Room WM and Mr. Larson Jointly Shared, WM Used The Phone For All Her Social Media Accounts, She Knew The Password And Was Able To Access It Without Mr. Larson.

A person's authority to consent to a search of the premises does not automatically extend to the search of objects found therein. *Georgia v. Randolph*, 547 U.S. 103. Rather, the proper inquiry of authority to consent to the search of an object lies in the third party's relationship to the object. *Andrus*, 483 F.3d at 717. The proper analysis focuses on whether the consenting party had joint access or control over the object. *United States v. Ruiz*, 428 F.3d 877, 880 (9th Cir. 2005). A relevant factor in determining whether a third party had access to a device is (1) whether the device was located in a common area and consenting party had installed applications on the device. *United States v. Morgan*, 435 F. 3d 660 (6th Cir. 2006). Courts may also consider (2) whether defendant's files were password protected. *Id*.

1. WM and Mr. Larson shared joint access and control to the cell phone as it was located in a common area

WM had access to the cell phone because it was located in the room that WM shared with Mr. Larson. As WM told officer Nelson, she always slept in that room with Mr. Larson. R. at 33. Mr. Larson had allocated a section of the closet to WM inside that bedroom. *Id.* Also, the phone was located on a nightstand—a piece of furniture that was found in a common area and jointly accessible by both WM and Mr. Larson. If the search inside the drawer was justified in *Groves*, the mere search of an item found lying in plain sight on a nightstand should also be justified.

Further, the girlfriend in *Groves* did not tell the officers that she had access to the inside of the nightstand. *Groves*, 530 F.3d at 510. She also never explicitly consented to a search of the drawer where the incriminating evidence was found. *Id*. Yet the court still found that her consent extended to the search of the drawer. *Id*. Here, WM had access to the cell phone. She told Officer Nelson they shared the phone. R. at 31. She also explicitly gave officer Nelson permission to search the phone. *Id*. at 32. The facts in this case warrant a finding that WM had access to the device and thus could consent to the search.

In *Frazier v. Cupp*, 394 U.S. 731 (1969) the defendant was convicted of murder. However, he contends that the consent to search was improper. *Id*. In *Frazier*, the defendant shared a duffle bag with his cousin. *Id*. The cousin consented to a search of the duffle bag, in which police found defendant's incriminating clothing inside. *Id*. Defendant argued that his cousin did not have the authority to consent to a search of the entire duffle bag because his cousin only had permission to use one compartment in the duffle bag. *Id*. The court stated it would not "engage in metaphysical subtleties in judging the efficacy of the consent." *Id*. The court reasoned that defendant assumed the risk that the cousin would consent to a search. *Id.*

Officer Nelson found the cell phone on a nightstand that contained male items on it. R. at 35. The phone also had a sticker that matched the design on Mr. Larson's tattoo. *Id*. at 34. Opposing

counsel may argue that these facts should have made officer Nelson skeptical as to WM's authority over the phone. However, like the court in *Frazier*, this Court should decline to engage in "metaphysical subtleties." Mr. Larson assumed the risk that WM would give consent to search the phone because she used the phone extensively.

In fact, authority to consent in *Frazier* was weaker than in this case. The cousin in *Frazier* only used a compartment of the duffle bag whereas WM was allowed to use the entire phone. WM installed applications on the phone including Instagram, Facebook, and Snapchat without asking Mr. Larson for permission. R. at 32. She also used the phone to make phone calls and send texts messages, which implicitly were private in nature. *Id*. Even though the phone was password protected, WM knew the password and was able to access the phone herself. *Id*. at 34. There is no indication that the files on the phone were password protected to prevent WM from accessing them. Rather, Mr. Larson shared the phone with WM, waiving any interest in maintaining privacy of its contents. Therefore, WM exercised both joint access and control over the phone that is the subject of the search.

2. Even if WM lacked actual authority, she possessed apparent authority because it reasonably appeared to officer Nelson that she had the authority to consent

In light of the aforementioned facts, officer Nelson reasonably believed that WM had the authority to consent to the cell phone search. A reasonable officer in his position would reach the same conclusion because WM explicitly told the officer she shared the phone with Mr. Larson. R. at 31. There was strong evidence to support WM's statement, such as the fact that she used the phone for personal purposes. She installed all her social media applications on the cell phone, as well as made phone calls and sent text messages. *Id*. at 32.

Officer Nelson also met his duty to investigate further when presented with ambiguous facts regarding WM's authority over the cell phone. He asked for clarification four times when

discussing the cell phone, starting immediately upon finding the phone by asking WM if the phone belonged to her. R. at 31-32. He also asked what she used the phone for. *Id.* at 32. At this point he realized she used it extensively and reasonably concluded she had authority to consent.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that this Court find that (1) L.O. 1923 searches are permissible under the special needs exception to the Fourth Amendment and (2) WM possessed actual and apparent authority to consent to the search of the apartment and the cell phone. Therefore, the Court should reverse the decision of the Thirteenth Circuit Court of Appeals, affirm the decision of the District Court of the Western District of Victoria to deny defendant's motion to suppress evidence, and remand the case to the District Court for trial.