No. 03-240

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

FALL TERM, 2016

UNITED STATES OF AMERICA,

Petitioner,

v.

WILLIAM LARSON,

Respondent.

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

BRIEF FOR PETITIONER

TEAM P4
COUNSEL FOR PETITIONER

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ISSUES PRESENTED

I. Are searches conducted pursuant to Local Ordinance 1923 permissible under the special needs exception to the Fourth Amendment, when the officer has reasonable suspicion and when the government has a compelling interest to conduct the search?

II. Does W.M. have authority to consent to a search of the apartment and the cell phone over which she has mutual use and control?

STATEMENT OF THE FACTS

Every year, more than 8,000 children are victims of sex trafficking throughout Victoria City. R. at 40. Almost 19%[1] of those victims are located in the Starwood Park neighborhood downtown. R. at 40. Further, recent studies have confirmed that there is an increase in sex trafficking during large sporting events. R. at 41. Victoria City, Victoria was selected in 2013 to host the July 2015 Professional Baseball Association All-Star Game, which brought in visitors from all over the country. R. at 2. The game was held in the Starwood Park neighborhood. R. at 2. The Starwood Park neighborhood is known for gang activity, specifically the gang called the Starwood Homeboyz. R. at 2. The gang is involved in robbery, drugs, and murder, but makes most of its money in sex trafficking. R. at 2. In order to curtail the known problem of sex trafficking, specifically of minors, at large sporting events, the Victoria City Board of Supervisors (the "Board") enacted Local Ordinance 1923 (the "Ordinance") and announced it to the press in May, 2015—months before the All-Star game. R. at 2-3. The Ordinance allows for a police officer, with a reasonable suspicion, to search an individual only to "which is reasonably necessary" to determine if the individual is engaged in the sex trafficking of minors. R. at 2. Additionally, the Board limited the Ordinance to the week of the All-Star Game and only to the Starwood Park neighborhood. R. at 2.

On July 12, 2015, William Larson ("Larson"), a member of the Starwood Homeboyz gang and convicted felon, tried to check in to the Stripes Motel, located in Starwood Park, with sixteen-year old, W.M. R. at 3-4. Although Larson was checking into the motel, neither he nor W.M. carried any suitcases. R. at 3. Officer Joseph Richols and Officer Zachary Nelson observed Larson

[1] Nineteen percent was calculated with the formula (1,500 [Starwood Park Victims] / 8,000 [Total Victims]) * 100 = 18.75%. This was rounded up to the next whole number.

enter with W.M. who was dressed in "a low-cut top and tight fitting shorts that exposed much of her legs". R. at 3. Also, W.M. looked considerably younger than Larson. R. at 3. Based on Officer Nelson's twelve-year police career (seven within the mid-city and Starwood Park area) Officer Nelson recognized Larson's visible tattoos identifying his gang affiliation. R. at 3, 26. The gang is known for human trafficking. R. at 2. Larson has two tattoos representing his ties to the Starwood Homeboyz. R. at 3. The first, are the letters "S" and "W" on a wizard hat on his left arm, and the second tattoo is "4-11-5-11." R. at 3. Officer Nelson knew that these numbers represented the letters "d," "e," and "k," and that the letters stood for "dinosaur killer, everybody killer." R. at 3. The Starwood Homeboyz referred to their rival gang as "dinosaurs." R. at 3. The Ordinance required officers to have a reasonable suspicion that an individual was trafficking minors for commercial sex. R. at 2. Larson was stopped and searched by police based on their observations of Larson in the lobby. R. at 3-4. Officer Nelson and Officer Richols believed there was a reasonable suspicion for the search based on their observations of Larson. R. at 3.

The officers found nine condoms, lube, "a list of names and corresponding allotments of time," $600 cash, a butterfly knife, and oxycodone pills when Larson's jacket was searched. R. at 4. The time allotments ranged between fifteen minutes to an hour. R. at 4. The police obtained the age of W.M. through a search of her wallet, and looking at her license. R. at 36. Based on the age of W.M. and the surrounding circumstances, Larson was arrested for engaging in the sex trafficking of a minor. R. at 4. W.M. talked with Officer Nelson and informed him that she and Larson lived together in a nearby apartment, where "they shared everything" except food R. at 4, 29, 33. Larson paid the rent, but W.M. did all of the household chores, had her bills mailed there, shared a bedroom with Larson, and kept all of her belongings there. R. at 30-31, 33, 38.

Additionally, W.M. lived there for at least one year and invited friends over the night before Larson's arrest. R. at 30, 38.

Officer Nelson and W.M. walked to the apartment where she lived, and W.M. consented to a search of the apartment. R. at 4. The keys to the apartment were found on Mr. Larson, and W.M. used the spare key to let Officer Nelson into the apartment. R. at 28, 31. Mr. Larson admitted that the "semi-automatic handgun with the serial number scratched off" found belonged to him. R. at 4. While in the bedroom, Officer Nelson found a cell phone on a night stand with condoms, a men's watch, and men's glasses. R. at 4, 35. The cell phone's lock screen was a picture of W.M. and Larson, and it had a sticker matching both Larson's tattoo and W.M.'s tattoo on her ankle. R. 34, 37. W.M. testified that she shared the phone with Larson, using it for her social media as well as personal text messages and phone calls. R. at 32. W.M. gave Officer Nelson the password to the cell phone, and gave him consent to look through it. R. at 4.

In August 2015, Larson was charged with one count of sex trafficking of a minor and one count of being a felon in possession of a firearm. R. at 5. Before trial, Larson filed a motion to suppress evidence collected on the date of his initial arrest. R. at 1. In October, 2015, the United States District Court for the Western District of Victoria denied Larson's motion to suppress the evidence. R. at 1. Larson then appealed and the United States Court of Appeals for the Thirteenth Circuit, which reversed the district court. R. at 23. The government has appealed the decision. R. at 24.

SUMMARY OF THE ARGUMENT

This case considers the constitutionality of two searches conducted by police officers. The issues presented focus on the searches and whether the exceptions, of special needs and consent, to the Fourth Amendment apply.

The first search was conducted pursuant to the special needs exception to the warrant requirement, in compliance with Local Ordinance 1923. The Ordinance allowed for searches to be conducted when an officer had a reasonable suspicion that an individual was facilitating the sex trafficking of a minor. The Ordinance falls within the special needs exception to the warrant requirement to the Fourth Amendment. To be a special need, the government must show the Ordinance was for more than general law enforcement and that obtaining a warrant was impracticable. When there is a compelling, immediate government interest outside of general law enforcement, the special needs exception applies. The Ordinance was for the specific purpose of preventing the sex trafficking of minors during the limited time period around the All-Star Game. Requiring a warrant to conduct these searches would undermine the purpose and not prevent the sex trafficking of minors.

The second search was conducted pursuant to the consent exception of the Fourth Amendment. W.M. gave consent to the search of the apartment and cell phone. To demonstrate apparent authority to consent, an officer must reasonably believe that an individual has mutual use or control of the property sought to be searched. W.M. demonstrated that she had both mutual use and control over the apartment and cell phone. It was reasonable for Officer Nelson to believe the same because of her unfettered access over the apartment and cell phone. After speaking with W.M. for an extended period of time, it was reasonable for Officer Nelson to conclude that she had mutual use or control, too. Even if this Court finds that apparent authority does not exist, W.M. had actual authority to consent to the search, still making it constitutional.

STANDARD OF REVIEW

The Fourth Amendment issue of whether a search with reasonable suspicion falls within the special needs exception to the warrant requirement is a question of law and should be reviewed

de novo. *Orneals v. United States*, 517 U.S. 690, 699 (1996). Similarly, the standard of review is *de novo* for the issue of apparent authority. *United States v. Weston*, 443 F.3d 661 (8th Cir. 2006).

ARGUMENT

I. SEARCHES CONDUCTED PURSUANT TO THE ORDINANCE FALL UNDER THE SPECIAL NEEDS EXCEPTION BECAUSE THE PRIMARY PURPOSE WAS TO PREVENT THE SEX TRAFFICKING OF MINORS AND OBTAINING A WARRANT FOR THESE SEARCHES WAS IMPRACTICABLE.

The special needs exception to the warrant requirement applied to the Ordinance because the search's primary purpose was to prevent a minor from engaging in a commercial sex act and obtaining a warrant for the search was impracticable at the time. The Fourth Amendment to the U.S. Constitution provides that people are to be safe from "unreasonable searches and seizures." U.S. Const. amend IV. This Court recognizes a special needs exception to the warrant requirement, stating that "in those exceptional circumstances in which *special needs*, beyond the normal need for law enforcement, make the warrant . . . impracticable," a search may be reasonable without a warrant or probable cause. *New Jersey v. TLO*, 469 U.S. 325, 351 (1985) (Blackmun, J. concurring) (emphasis added). The special needs exception to the warrant requirement provides that when the need for a search is substantial, the state may conduct a search that would normally be prevented under the Fourth Amendment. *Chandler v. Miller*, 520 U.S. 305, 318 (1997). In order to justify a search under the special needs exception, the government must show that the interest was more than simply general law enforcement, and the government must also show that obtaining a warrant was impracticable under the circumstances. *Nat'l Treasury Emps. Union v. Von Rabb*, 489 U.S. 656, 665-66 (1989). The Ordinance falls within the special needs exception to the warrant requirement of the Fourth Amendment because the primary purpose of the

Ordinance was to prevent the sex trafficking of minors and to require police to obtain warrants to conduct these minimally intrusive searches would be impracticable.

A. The primary purpose of the Ordinance was to prevent the sex trafficking of minors, specifically around the All-Star game, because there is a known increase of human trafficking during large sporting events.

The Ordinance's primary purpose was not for general law enforcement—but rather to prevent the increase in sex trafficking of minors at the All-Star Game which attracted thousands of visitors to the area during a short period of time. The primary purpose of a warrantless search cannot be for the state's general interest in law enforcement. *City of Indianapolis v. Edmond*, 531 U.S. 32, 38 (2000); *Von Raab*, 489 U.S. at 665. The State must have a substantial or compelling interest for conducting the search but do not have to have an individualized suspicion. *Edmond*, 531 U.S. 32, 43-44; *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 660-61 (1995) (stating that a compelling interest is one "that appears important enough to justify the particular search at hand"). Courts look at all available evidence "to determine the relevant *primary* purpose" of an ordinance. *Ferguson v. City of Charleston*, 532 U.S. 67, 81 (2001) (emphasis added). When considering the available evidence regarding the increase in sex trafficking that takes place at large sporting events, the primary purpose of the Ordinance was to prevent minors from being forced into commercial sex activities—the primary purpose was not for general law enforcement.

In *Ferguson v. City of Charleston*, this Court held that a hospital's drug testing policy was not a special need because the hospital was reporting the results to the police to force the expectant mothers into rehabilitation services. 532 U.S. 67, 85 (2001). When drafting the hospital's drug testing procedures, the police were involved in the process from beginning to end. *Id.* at 82. Additionally, the hospital's method to identify a woman for drug testing did not amount to reasonable suspicion. *Id.* at 76. The hospital did not publish this policy to the public, and it only

indicated the procedure to patients in the forms they signed before treatment. *See generally id.* at 72-73 (discussing the hospital's nine-page protocol). This Court found that the primary purpose of the policy was not "special" enough to satisfy the exception to the warrant requirement of the Fourth Amendment. *Id.* at 84.

Again, in *City of Indianapolis v. Edmond*, this Court held that a traffic check point to uncover people transporting drugs was not a specialized need justifying an exception to the warrant requirement of the Fourth Amendment because there was no individualized suspicion. 531 U.S. at 47-48. The City of Indianapolis conducted traffic stops for the purpose of preventing drug smuggling into the city with only a nine percent success rate and no showing of emergency or exigent circumstances. *Id.* at 35, 44. This Court found that there was not a strong enough correlation between the checkpoint and the intent to protect people from drugs as there was between a checkpoint and the intent to prevent drunk drivers from being on the road. *Id.* at 39. Based on the particularity of the stop for a DUI checkpoint, drunk driving checkpoints were for more than the detection of criminal wrongdoing. *Id.* (discussing the "magnitude of the State's interest" in *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990)). The Court distinguished this case from other traffic checkpoints because the primary purpose was not specific enough to lessen the requirement of individualized suspicion. *Id.* at 42.

The case at hand is distinct from *Ferguson* because the Ordinance here was not created the same way as the policy in *Ferguson*. The Ordinance was published well in advance of going into effect, which differs from *Ferguson* where the police and hospital staff did not announce the plan or inform the patients of the testing procedures prior to the consent forms given to the women upon testing. The Board, however, issued a press release regarding the Ordinance and its purpose before it was implemented, meaning that there was an opportunity for the public to object to the ordinance,

yet the record does not indicate that there was any objection. The police were involved from the policy's inception in *Ferguson*, unlike this case. The Board drafted the Ordinance on its own and based it on its own research and understanding of the potential increase of sex trafficking during the All-Star Game without the assistance of police, unlike in *Ferguson*.

The Ordinance required that there be reasonable suspicion for the search, unlike searches in *Edmond*, and that the search be limited both in time and in location. The lack of limitations on searches in *Edmond*, yielded a ninety-one percent arrest rate for crimes other than drugs, but here, the searches were limited to what was reasonably necessary to accomplish the purpose of preventing sex trafficking. While in *Edmond*, this Court noted the lack of correlation between the traffic stops and their purpose the evidence in this case, however, indicated local gangs engaged in human trafficking, "pimping," and there was an expected increase in those activities during the days around the All-Star Game, which directly related to the primary purpose of the Ordinance. Further, there was a lack of emergency or exigency in *Edmond* to need the drug checkpoint, unlike here. With the All-Star Game and festivities only for a limited period of time, there was an emergency situation needing immediate attention. Officer Nelson testified that he was on a "specialty detail" the night of the search and that he did not routinely engage in this type of assignment on his patrol, showing that this was an extraordinary circumstance and limited in scope to the time surrounding the All-Star Game. The *primary* purpose of the Ordinance was to prevent the sex trafficking of minors, specifically during the All-Star Game and was not for general law enforcement.

B. Obtaining a warrant was impracticable because the state's compelling interest in preventing the sex trafficking of minors outweighed the slight intrusion into Larson's privacy interest.

The government's interest in protecting minors from sex trafficking outweighed the minimal interest of Larson's privacy interest because there was a short window of time to prevent the commercial sex acts. Where an intrusion of privacy is more than a general interest in law enforcement, the court should balance the individual's privacy interests against the government's interest to determine if obtaining a warrant or requiring individualized suspicion is impracticable. *Von Raab*, 489 U.S. at 665-66; *Skinner v. Ry Labor Execs.' Ass'n*, 489 U.S. 602, 619 (1989); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). When an ordinance is not for general law enforcement, this Court should closely examine the "competing private and public interests advanced by the parties." *Chandler*, 520 U.S. at 305. A search is reasonable when the privacy intrusion is limited, and the government's interest would be jeopardized by the requirement of individualized suspicion. *Id.* "A significant government interest, such as . . . public safety . . . must prevail over a minimal intrusion on an individuals' privacy rights . . . ." *Roe v. Marcotte*, 193 F.3d 72, 78 (2nd Cir. 2004). This Court considers three factors: (1) "the nature of the privacy interest intruded upon," (2) "the character of the intrusion" on the interest, and (3) "the nature and immediacy of the governmental concern at issue." *Vernonia*, 515 U.S. at 654, 658, 660. The specific, primary purpose of the Ordinance was to prevent minors from being forced to engage in commercial sex activities and was a more significant interest when balanced against obtaining a warrant for a minimally intrusive search.

1. The nature of the privacy interest intruded upon was not significant because Larson subjected himself to the public by entering the motel lobby where there is a lower level of privacy.

While there may be a privacy interest regarding Larson's jacket, there is a not a privacy interest preventing the observation of Larson and W.M. in the Stripes Motel lobby. Courts look to the legitimate expectations of privacy and what that privacy interest is when analyzing the nature of the alleged intrusion. *Vernonia*, 515 U.S. 646, 654 (1995). Further, a visual observation of an individual "does not constitute a search." *United States v. Jones*, 132 S. Ct. 945, 953 (2012). "[T]he Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). Additionally, the protections afforded to people claiming the Fourth Amendment's protection may depend on the location of the people because "commercial property is treated differently . . . from residential property." *Minnesota v. Carter*, 525 U.S. 83, 88, 90 (1998). A person must have a legitimate privacy expectation "in the invaded place" to claim Fourth Amendment protection, *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (citing *Katz*, 398 U.S. at 353), but a person has no "reasonable expectation of privacy" when traveling in public, *United States v. Knotts*, 460 U.S. 276, 281 (1983). An individual cannot claim Fourth Amendment protections to what he or she "knowingly exposes to the public." *Cardwell v. Lewis*, 417 U.S. 583, 591 (1974) (internal citation omitted).

In *Knotts*, this Court held the search did not violate the Fourth Amendment when the police tracked a barrel of chloroform in a car driving on public highways. 460 U.S. at 285. Police officers placed a beeper in a five-gallon barrel of chloroform and tracked the movement of the barrel inside of a car while driving on public roads. *Id.* at 278-79. This Court stated that when an individual enters the pubic, there is not a reasonable privacy expectation because he or she voluntarily conveyed their movements to anyone watching. *Id.* at 281. Once an individual enters the public,

there is no expectation of privacy to prevent the general public from observing that individual's movements. *Id.*

Under the Ordinance, the police cannot search a home or car but may search a "hotel, motel, or public lodging facility" in the Starwood Park neighborhood which qualifies as the public. Larson did have a privacy interest in the contents of his jacket as part of his person protected by the Fourth Amendment. However, when he entered the Stripes Motel, he exposed himself to the public, meaning the police officers were free to observe him in the lobby similar to the officer's observations in *Knotts*. As this Court in *Knotts* held, there is no reasonable expectation of privacy in public, so the officers were reasonable to question why a man, with visible gang-affiliated tattoos, accompanied by a younger, provocatively dressed woman, was checking into a motel with no luggage. The nature of the privacy interest in this case was diminished based on the location of the search. This Court should find there was no privacy interest after Larson voluntarily entered the public motel. Since there was no privacy interest, the police could validly conduct a limited search because they had a reasonable suspicion a minor was forced into commercial sex activities. Even if this Court were to find a privacy interest in the motel lobby, it was minimal.

2. The character of the intrusion upon the privacy interest was minimal because the officers had reasonable suspicion for the search and it did not significantly intrude on Larson's rights.

The search conducted by the officers was not a substantial intrusion into Larson's privacy interest because it did not involve a deeply personal intrusion of Larson's person nor did the search jeopardize his safety. The degree of the intrusion depends on the manner in which the search occurred. *Vernonia*, 515 U.S. at 646, 658. It is "of central relevance" to the court when an intrusion into an individual's privacy is negligible. *Maryland v. King*, 133 S. Ct. 1958, 1969 (2013). When a search fails to involve significant privacy interests, a warrant may not be required. *See Birchfield*

v. *North Dakota*, 136 S. Ct. 2160, 2176 (2016). Additionally, even if a severe intrusion into one's privacy occurs, it may still be permitted if there is a reasonable suspicion to support the imposition. *Terry v*. *Ohio*, 392 U.S. 1, 30 (1968). In determining the character of the intrusion, this Court considers how the search will "threaten the safety or health of the individual" as a "crucial factor." *Winston v*. *Lee*, 470 U.S. 753, 761 (1985). Warrantless intrusions into an individual's body are permitted in limited circumstances. *Schmerber v*. *California*, 384 U.S. 757, 772 (1966).

In *Birchfield v*. *North Dakota*, this Court held that warrants were not required for breathalyzer tests because the tests do not "implicat[e] significant privacy concerns." 136 S. Ct. 2160, 2176 (2016) (quoting *Skinner*, 489 U.S. at 626). In *Birchfield*, the petitioners challenged the consent laws in various states regarding warrantless breathalyzer tests to determine a driver's blood alcohol concentration. *Id*. at 2172-73. The Court relied on the slight intrusive nature of breathalyzer tests to the body and the minimum inconvenience and determined that warrants were not required for breathalyzer tests. *Id*. at 2176. Similarly, this Court allows limited intrusions into one's body in certain emergency circumstances where the search is conducted reasonably. *Schmerber*, 384 U.S. at 772. This Court allowed police officers to force a person, who previously denied consent, to submit to having blood withdrawn when he was suspected of driving under the influence. *Id*. at 761. When an intrusion on a privacy interest is insignificant, warrantless searches may be permitted. *Birchfield*, at 2186.

In *Terry v*. *Ohio*, this Court held that police officers may briefly "stop and frisk" suspects without a warrant when the officers had reasonable suspicion for the stop. 392 U.S. 1, 30 (1968). The Court emphasized the use of a totality of the circumstances approach when determining an officer's reasonable suspicion for a stop. *Id*. at 22-23. After the officer observed the defendant "casing" a store, the officer stopped the defendant and patted down the outside of his clothing

before reaching into his pocket to remove a weapon. *Id.* at 6. Though the search of the respondent's clothing "constitute[d] a severe" intrusion, the Court indicated it was brief and reasonable even with a lack of probable cause. *Id.* at 24-25. When there is reasonable suspicion of a crime, police officers are permitted to stop individuals and conduct a limited search. *Id.* at 30.

The investigation in this case did not occur in an unreasonable manner indicating the character of the intrusion was not significant because it did not implicate significant privacy concerns as required by *Birchfield*. This Court has found that the collection of breath, in drunk driving cases, and blood, for arrested individuals not yet convicted of a crime, are minimal intrusions to a person's privacy. This search was similar to that in *Terry*, but the Court has since recognized far more invasive intrusions as minimal, like this Court in *Birchfield*. The officers only searched Larson's jacket but did not pierce his skin, remove his clothing, or significantly invade his privacy, which would be required to constitute a significant intrusion. When comparing the jacket pocket of an individual to the collection of an individual's blood, the collection of blood is much more personal and private. Yet, this Court still classifies the collection of blood as a minor intrusion to a person's privacy interest when emergency circumstances are present like in *Schmerber* and like in the case at bar. This Court should find that the search of Larson's jacket was not a substantial intrusion into his privacy interest, especially when balanced against the state's interest in protecting minors from sex trafficking. Even if this Court finds the intrusion was more than minimal, the need to protect young victims should outweigh that intrusion.

3. There was an immediate governmental concern at issue when the officers conducted the search because there was a short window of opportunity to prevent Larson from forcing W.M. into commercial sex activities.

The potential increase in minors being forced into commercial sex activities was an immediate, compelling government interest which outweighed Larson's minimal privacy right in

his jacket. This Court should balance the "nature and immediacy of the government's needs" with the privacy interest of the individual. *United States v. Amerson*, 483 F.3d 73, 87 (2d Cir. 2007) (internal quotations and citation omitted); *see also United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976). When there is an immediate need that would delay an officer's ability to prevent harm, a warrant may not be required. *See Griffin v. Wisconsin*, 483 U.S. 868, 876, 879 (1987). The nature of the government's interest must be substantial and "important enough to override" an individual's privacy interest. *Chandler*, 520 U.S. at 318. In considering the government's compelling interest, it is *not* relevant to the reasonableness analysis if there is "a less intrusive method" of accomplishing the government's interest. *Wilcher v. City of Wilmington*, 139 F.3d 366, 377 (3d Cir. 1998) (citing *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983)).

In *Vernonia Sch. Dist. 47J v. Acton*, this Court held that a school district's student drug test policy was constitutional when there was "a decreased expectation of privacy," the search was not overly intrusive, and there was a severe need for the search. 515 U.S. at 664. The policy of student-athlete drug testing was implemented after a notable, sharp increase in drugs among the students. *Id.* at 648. This Court upheld the policy based on the importance of protecting children in schools and as a special needs exception to the Fourth Amendment. *Id.* at 661. The compelling government interest of protecting minors outweighed the slight intrusion into the privacy interest of the students. *Id.* at 665.

In *Griffin v. Wisconsin*, this Court held that a search conducted with reasonable suspicion was not unreasonable when obtaining a warrant delayed officers from responding quickly "to evidence of misconduct." 483 U.S. 868, 876 (1987). A probation officer searched a probationer's home without a warrant based on reasonable suspicion and found a gun. *Id.* at 871. The search was

reasonable because the probation officer needed to act quickly and prevent the probationer from harming society. *Id.* at 879.

Based on the recorded increase of trafficking minors, the Board implemented a policy to protect minors who may be in danger, like the policy created in *Vernonia*. Similar to the immediate need in *Vernonia*, there was an immediate need for the policy in this situation. The All-Star Game and festivities were for one week, and the police needed to be able to protect the children in the immediate time frame of the All-Star Game. If this Court protected children from drugs in prior cases, certainly the protection of minors from sex trafficking is a compelling interest that should be recognized in this case.

The time to obtain a warrant would also pose a difficult hurdle, similar to *Griffin*, for police when conducting searches to protect children. When the officers investigated Larson, they found a log book containing records for different blocks of time—some as short as fifteen minutes—meaning that requiring a warrant would have prevented the officers from stopping misconduct, like in *Griffin*. In order to prevent minors from being forced to engage in commercial sex activities, the police needed to be able to stop the suspects before the act. It is unlikely the police would have been able to obtain a search warrant in that short amount of time, further indicating the immediacy of the government's concern in this case, like in *Griffin*. This Court should find that requiring a warrant would significantly impede the purpose of the Ordinance and could place more children in harm's way by preventing the officers from taking the necessary actions before the commercial sex acts occur. The Ordinance was for the protection of minor children, a compelling interest recognized by this Court and was immediate based on the increase in sex trafficking of minors surrounding large sporting events, like the All-Star Game. When balancing the privacy interests of Larson against the compelling interest to protect minor children, the government's interest

outweighed the minimal intrusion to the privacy interest. The Ordinance was constitutional under the special needs exception to the warrant requirement of the Fourth Amendment.

II. W.M. POSSESSED AUTHORITY TO CONSENT TO OFFICER NELSON'S SEARCH OF THE APARTMENT AND THE CELL PHONE BECAUSE W.M. HAD APPARENT AUTHORITY. EVEN IF THIS COURT FINDS THAT W.M. DID NOT HAVE APPARENT AUTHORITY, W.M. STILL HAD ACTUAL AUTHORITY TO CONSENT.

W.M. possessed authority to consent to the warrantless search, because apparent authority existed. While the Fourth Amendment generally requires a warrant, exceptions to this warrant requirement do exist—one of which is consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). So long as the consent is freely and voluntarily given by somebody with authority to give it, a warrant is not required. *Florida v. Bostick*, 501 U.S. 429, 438 (1991); *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). An individual can have the authority to consent to the warrantless search of another. *United States v. Matlock*, 415 U.S. 164, 169–72 (1974). The search will be upheld when individual has apparent authority to give consent. *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990). Apparent authority exists when a police officer reasonably believes that an individual has common authority over a premises. *Id*. Common authority is defined as having: (1) mutual use of the property, or (2) control of the property for most purposes. *Matlock*, 415 U.S. at 170. An individual must have *either* mutual use or control in order for common authority to exist. *United States v. Rith*, 164 F.3d 1323, 1329-30 (10th Cir. 1999). Here, apparent authority existed because Officer Nelson reasonably believed that W.M. had common authority.

A. W.M. had apparent authority to consent because Officer Nelson reasonably believed that W.M. had mutual use or control over the premises.

Officer Nelson's reasonable belief regarding W.M.'s mutual use and control indicated W.M. had apparent authority to consent. Authority to consent turns on whether an individual has

mutual use or control over property to be searched. *Matlock*, 415 U.S. at 170. But having authority to consent to a house does not automatically give that person the right to consent to objects found therein, such as: cell phones, shoeboxes, drawers, etc. *Georgia v. Randolph*, 547 U.S. 103, 132 (2006). In order for a person to give consent to search such objects, that person must have mutual use or control of the object as well. *Matlock*, 415 U.S. at 170. Thus, a cohabitant may have authority not only to consent to a house, but also to objects found inside the house, provided that mutual use or control is established over both. *Randolph*, 547 U.S. at 106. Additionally, a cohabitant can have authority to consent, despite not having a legal interest in the property. *Matlock*, 415 U.S. at 171 n.7. In other words, a cohabitant is not prohibited from consenting to a search despite not owning an apartment or being named on a lease. *Katz*, 389 U.S. at 352. Hence, consent is not dependent on ownership, but rather on mutual use or control of the property or items found therein. *Id*. A court will find that an individual has authority to consent when the officer reasonably believes that the consenter has either mutual use *or* control of the property to be searched. *Rodriguez*, 497 U.S. at 188. Here, Officer Nelson reasonably believed that W.M. had both mutual use and control of the property, thus giving her apparent authority to consent.

1. W.M. had authority to consent because W.M. had mutual use of the apartment and of the cell phone.

W.M. had mutual use of the apartment and cell phone because she had joint access to both pieces of property. This Court finds mutual use when a person has joint access for most purposes. *Matlock*, 415 U.S. at 170; *Rodriguez*, 497 U.S. at 180. Joint access is a fact-intensive inquiry. *Rith*, 164 F.3d at 1329-30. Courts use various factors in determining joint access. Factors commonly used are: (1) possessing a key to the premises; (2) admitting living at the residence in question; (3) receiving mail and bills at the residence; (4) keeping clothing at the residence; (5) keeping personal

belongings at the residence; (6) performing household chores at the residence; (7) being named on the lease or paying rent at the residence; and (8) entering the residence when the owner is not present. S*ee United States v. Nichols*, 574 F.3d 633, 636 (8th Cir. 2009); *United States v. McGee*, 564 F.3d 136, 141 (2d Cir. 2009); *United States v. Groves*, 530 F.3d 506, 509-10 (7th Cir. 2008); *United States v. McCurdy*, 480 F. Supp. 2d 380, 387 (D. Me. 2007); *McAlpine*, 919 F.2d at 1465. In looking at a totality of the circumstances, if joint access is present, then that individual has mutual use of the residence. *United States v. Tompkins*, 130 F.3d 117, 121 (5th Cir. 1997).

Courts have found mutual use in a variety of different circumstances, by using a combination of factors. *See Groves*, 530 F.3d at 509. In *Matlock*, this Court found that joint access existed when a woman slept in the same bed with the defendant and lived at the house full time, despite not having her name on the lease. 415 U.S. at 166. Additionally, the Tenth Circuit held that a woman who did not have a key, was not on the lease, and had only lived at the property for two months, had joint access, giving her authority to consent. *McAlpine*, 919 F.2d at 1465. Similarly, the Eighth Circuit held that a girlfriend had joint access of her boyfriend's apartment when she had unrestricted access to the entire apartment and lived there for three months. *Nichols*, 574 F.3d at 636. Contrastingly, in *Rodriguez* this Court held that the consenting party there did not have joint access because she was not allowed to invite others to the apartment on her own, nor did she have access to the apartment when the defendant was away. *Rodriguez*, 497 U.S. at 180.

In *Rodriguez*, this Court held that the consenting party did not have mutual use because the consenter was not allowed to invite people over, nor was the consenter able to access the apartment without the defendant's consent, unlike this case. In the current case, W.M. invited friends over the night before her conversation with Officer Nelson and was able to enter the apartment without her boyfriend's consent. Further, W.M. was able to use the cell phone without permission from

Larson and used it for personal calls. The factors presented in *McAlpine* are analogous to the present case because both women were not listed on the lease, both slept at the property, and both had personal belongings at the property. Thus, this Court should reach the same legal conclusion as did the court in *McAlpine*, and hold that mutual use did exist. Similar to *Matlock*, W.M. lived at the premises full time and slept with the defendant even though her name was not on the lease. When considering the factors this Court uses, W.M. had mutual use of the property based on her joint access.

2. W.M. had authority to consent because W.M. had control of the apartment and of the cell phone.

W.M. had control for most purposes, because W.M. had an established connection to the property searched. An individual has control over property, when that individual has a strong relationship to the property being searched. *McAlpine,* 919 F.2d at 1464. Control is a normative inquiry, meaning courts look at to what the 'norm' is when analyzing control. *Rith*, 164 F.3d at 1330. The relationship between the consenter and the property owner is not relevant because consent inquiries focus on the consenter and the property being searched. *McAlpine*, 919 F.2d at 1464.

There is a presumption that the legal owner of property has control. *Rith*, 164 F.3d at 1330. This presumption can be rebutted by showing: (1) that the consenter paid rent to the legal owner; (2) there was an intent to prohibit entry; or (3) whether there is an agreement that the consenter never enter a particular area. *See id*. at 1331 (citing *Stoner v. California,* 376 U.S. 483, 489-90 (1964)). Sharing access to common areas also implicates a lack of control by one party. *United States v. Block*, 590 F.2d 535, 539-40 (4th Cir. 1978). *See United States v. Ladell*, 127 F.3d at 623, 624 (7th Cir. 1997) (noting that, when an apartment is shared, one co-tenant ordinarily assumes

the risk that another co-tenant might consent to a search "at least to all common areas"); *United States v. Whitfield*, 939 F.2d 1071, 1074 (D.C. Cir. 1991). The longer that an individual lives at a property, the stronger the relationship to the property becomes—but time by itself is not dispositive. *See United States v. Jones*, 580 F.2d 785, 786-87 (5th Cir. 1978) (holding that a man who slept in the defendant's apartment for a week could give effective consent). Likewise, the age of the consenter implicates a presumption of control. *United States v. Sanchez*, 608 F.3d 685, 690 (10th Cir. 2010). There is no minimum age requirement to give consent; age is a relevant factor within the totality of the circumstances when looking to establish control. *Id.*; *Lenz v. Winburn*, 51 F.3d 1540 (11th Cir.1995); *United States v. Clutter*, 914 F.2d 775 (6th Cir. 1990).

In *United States v. Rith*, there were no locks on the door, rent was not paid to the co-tenant, and there was no agreement prohibiting the co-tenant from entering any room. 164 F.3d at 1331. The court there held that the consenter had control of the property, and thus could consent. *Id.* Unlike *Rith*, the court in *United States v. Whitfield* held that the consenter did not have control since the co-tenant paid rent and did chores in the co-tenant's own bedroom. *Whitfield*, 939 F.2d at 1074. Contrastingly, in *Block*, the court held that a mother had control of her twenty-three-year-old son's bedroom since she could enter it at will and clean it without permission. *Block*, 590 F.2d at 541. In *United States v. Buckner*, the court held that a woman could not give consent of her husband's electronic device because she did not know the password, despite having permission to use it every day. 473 F.3d 551, 556 (4th Cir. 2007). In *Sanchez*, the court held that a fourteen-year-old minor had sufficient control of a motel room she shared with her father. The other circuits have adopted similar results, and found consent from younger minors. *See, e.g., Lenz*, 51 F.3d at 1552 (age 9); *Clutter*, 914 F.2d at 780 (ages 12 and 14).

In *Whitfield*, the co-tenant paid rent, did chores, and prohibited others from entering, and the court concluded that the consenter did not have control which is different from this case. Larson did not require W.M. to pay rent, but she did all of the household chores nor did he prohibit W.M. from entering the premises at will. In *Buckner*, the court held that a because a woman did not know the password to her husband's electronic device, she did not have control despite using the electronic device every day for playing games and doing work. Unlike in *Buckner*, W.M. did have control because W.M. knew the password to the cell phone and used the device often for texting and using social media. While W.M. was a minor, her age does not prohibit her from giving consent like in *Sanchez*, where a minor consented to shared property. W.M. had control of the apartment and cell phone, because she did chores, was not prohibited from entering any room or using the cell phone, and she knew the password to the cell phone. These factors indicate that W.M. had control for most purposes.

3. Officer Nelson reasonably believed that W.M. had both mutual use and control of the apartment and cell phone, thus apparent authority for W.M. to consent existed.

W.M. had authority to consent because Officer Nelson reasonably believed that W.M. had both mutual use and control of the apartment and cell phone. An individual has authority to consent if an officer reasonably believes that the consenter has mutual use or control. *Rodriguez*, 497 U.S. at 188. An officer's belief is judged against an objective standard, not a subjective one. *Terry*, 392 U.S. at 21–22. The court should look at the facts available to the officer at the moment of consent and determine if the facts would "warrant a man of reasonable caution" to believe that the consenting party had authority. *Id.* If the answer is 'no' then warrantless entry *without further questioning by the officer* is unlawful. *Rodriguez*, 497 U.S. at 188-89. Where the officer is not sure, the officer has a duty to investigate further before relying on the consent. *United States v.*

Kimoana, 383 F.3d 1219, 1222 (10th Cir. 2004). But if the answer is yes—meaning the officer did reasonably believe the consenter had authority—then the search is valid. *Rodriguez*, 497 U.S. at 189.

In *United States v. Kimoana*, an individual gave an officer a key to his hotel room and told the officer that he was staying there. 383 F.3d at 1219. The court found apparent authority existed based on a totality of the circumstances because the officer had a sufficient reasonable belief that the consenter had authority to consent. *Id.* at 1223. In *United States v. Salinas-Cano*, the defendant's girlfriend told an officer that she lived in the apartment but did not use the suitcase that was searched. 959 F.2d 861, 863 (10th Cir. 1992). The court found that apparent authority did not exist since the girlfriend specifically told the officer she did not use the suitcase, so the officer could not reasonably believe that she had mutual use or control of it. *Id.* at 866. In *United States v. Cos*, the police questioned the defendant's girlfriend for a couple seconds regarding her relationship to the apartment, and the girlfriend told the police that she had just come to visit the defendant. 489 F.3d 1115, 1118 (10th Cir. 2007). The court found that apparent authority did not exist because the officer could not reasonably believe that the girlfriend had mutual use or control of the apartment based on those few seconds of questioning. *Id.* at 1131.

Unlike *Cos* where the police only questioned the girlfriend for a few seconds, Officer Nelson spent ten minutes in the motel lobby asking W.M. questions pertaining to her mutual use and control. After thorough questioning, W.M. told Officer Nelson that she lives at the property (and has been for over a year), she can travel freely in and out of the property without permission, she can invite others over, she has access to a key, and she has her personal property at the house. The court in *Cos* held apparent authority did not exist, so this court should find the opposite and hold that apparent authority did exist because W.M.'s responses would warrant a man of

reasonable caution that W.M. had mutual use and control of the property. The court in *Kimoana* held apparent authority existed where the consenter gave the officer access to the property by giving the officer a key after saying that he lived there. In the case at bar, this Court should find that apparent authority existed as well because W.M. gave Officer Nelson access to the property by using a key, after telling him that she lived there. Here, W.M. told the officer that she lived in the apartment and used the cell phone, which makes this case distinct from *Salinas-Cano*. W.M. told Officer Nelson that she and her boyfriend shared the cell phone. This was evidenced by the lock screen photo, the case cover that matched her tattoo, her admission of mutual use, and her knowledge of the passcode. In *Salinas-Cano* the officer knew that the girlfriend did not use the suitcase, while in the case at bar Officer Nelson knew that W.M. did use the cell phone. Based on a totality of the circumstances, since Officer Nelson reasonably believed that W.M. had mutual use and control, apparent authority does exist.

B. **Even if this court finds that W.M. did not have apparent authority to consent, W.M. still had actual authority to consent.**

Should this Court decline to find that apparent authority existed, W.M. was still permitted to consent because she had actual authority. Consent may be obtained from either the owner or from a third party who exercises common authority over the property to be searched. *Matlock*, 415 U.S. at 170–71. A third-party consenter does not need to own the property, or have his or her name on the lease, in order to have authority, but rather the third-party must instead have "mutual use of the property by persons generally having joint access or control for most purposes." *Id*. at 171. This rule follows the logic that a defendant who allows another to use his property also allows that person to access the property in his absence. *Id*.; *see also United States v*. *Jackson*, 598 F.3d 340, 347 (7th Cir. 2010).

There are two considerations a court looks at to determine common authority: (1) if the third-party has mutual use of the property, or (2) if the third-party has control of the premises for most purposes. *Matlock*, 415 U.S. at 170. A third-party has mutual use when the third-party has joint access of the property for most purposes. *Id*. Additionally, a third-party has control when the third-party has a strong relationship to the property or effects being searched. *McAlpine*, 919 F.2d at 1464. This means that *either* mutual use or control must be present, in order for the third-party to have authority to consent. *Rith*, 164 F.3d 1323 at 1330. The key to consent is actual authority over the area to be searched. *United States v. Basinski*, 226 F.3d 829, 834 (7th Cir. 2000). This inquiry focuses on mutual use and control. *Matlock*, 415 U.S. at 170.

A Fourth Circuit court found that a third-party consenter had actual authority over the property since she lived in the defendant's house full time. *Buckner*, 473 F.3d at 555. While the third-party consenter had actual authority over the house, she did not have actual authority over the electronic device found therein, because despite her having unlimited access to the electronic device, she did not know the password. *Id*. As a result, she could not consent to its search. *Id*. Actual authority over an electronic device, for example, turns on whether the third-party consenter enjoyed mutual use or control over the electronic itself. *United States v. Wright*, No. 15–3109, 2016 WL 5338528, at *3 (7th Cir., Sept. 23, 2016). The Seventh Circuit held that a third-party consenter had actual authority to consent to the defendant's computer, since she could freely use it to watch movies, play games, and store work-related documents. *Id*. at 4.

Like *Buckner*, W.M. had actual authority over the apartment because she lived in the apartment full time. Thus this Court should hold the same and find W.M. had authority to consent to the search of the apartment because W.M. lived there full time. But unlike *Buckner*, where the consenter did not know the password to the electronic device, in this case W.M. did know the

password to the cell phone. Similarly, in *Wright*, the court held that the third-party consenter had actual authority to consent to the defendant's computer, because she could freely use it. This is analogous to W.M. being permitted to freely use the cell phone. Thus, like *Wright*, this Court should determine that W.M. had actual authority as well.

The facts from the record show that W.M. had joint access of the apartment and cell phone, thus indicating she had actual authority to consent to those items. Similarly, W.M. had a strong relationship to these items, indicating that the defendant did not have exclusive control of them. As a result, even if this court finds that W.M. did not have apparent authority to consent, W.M. has more than satisfied a showing of actual authority and thus, as a result, had authority to consent to the search.

CONCLUSION

This Court should reverse the Thirteenth Circuit's judgment. The Ordinance falls within the special needs exception to the warrant requirement of the Fourth Amendment. Additionally, W.M. had apparent authority to consent the search of the apartment and the cell phone.

Respectfully submitted,
Team P4
Counsel for Petitioner

APPENDIX – 1

Local Ordinance 1923

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.