No. 03-240

IN THE

Supreme Court of the United States

_____

UNITED STATES OF AMERICA,

Petitioner,

v.

WILLIAM LARSON

Respondent.

_____

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

_____

October Term 2016

The University of San Diego School of Law
28th Annual Criminal Procedure Tournament
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STATEMENT OF THE CASE

A. FACTS

Victoria City, Victoria has become the hot spot for child sex trafficking. R. at 2. In March 2013, the city was selected to host the Professional Baseball Association's All-Star Game. *Id*. The game was to be held on July 14, 2015 in the Starwood Park neighborhood of Victoria. *Id*. This All-Star Game was expected to draw *tens of thousands* of visitors to the area. *Id*. (emphasis added). The Starwood Park area has been a prime area for gang activity for a long time. *Id*. The gang members engage in a variety of illegal activity but their most profitable venture is human trafficking. *Id*. The Starwood Park area is primarily controlled by the gang Starwood Homeboyz but is also home to the 707 Hermanos. Gangs in the Starwood Park area control upwards of 1,500 sex workers. *Id*. Many of these workers are believed to be child victims. *Id*. Due to the lucrativeness of the crime and utilization of the websites that are hard to monitor, law enforcement often has a difficult time locating the criminals who run the trafficking. *Id*.

Based on the concerns of several Victoria City citizens that the All-Star Game would create a swell of human trafficking in the area, especially since large sporting events attract this type of crime, the Victoria City Board of Supervisors ("Board") recognized the concerns and thus passed Local Ordinance 1923 ("L.O. 1923") on May 5, 2015. *Id*. L.O. 1923 reads:

> 1. Any individual obtaining a room in a hotel, motel, or other public lodging facility shall be subject to search by an authorized law enforcement officer if that officer has reasonable suspicion to believe that the individual is:
>   a. A minor engaging in a commercial sex act as defined by federal law
>   b. An adult or a minor who is facilitating or attempting to facilitate the use of a minor for a commercial sex act as defined by federal law.
> 2. This ordinance shall be valid only from Monday July 11, 2015, through Sunday July 17, 2015.
> 3. A search conducted under the authority of this provision shall be limited in scope and duration to that which is reasonably necessary to ascertain whether the individual searched in engaging in the conduct described in subsection (1).
> 4. This ordinance shall be valid only in the Starwood Park neighborhood.
>   a. Starwood Park is defined to encompass the area within a three-mile radius of Cadbury Park Stadium. R. at 2, 3.

When the Board released a statement to the press on May 6, 2015 announcing L.O. 1923 they emphasized the prevalence of child sex trafficking in Starwood Park. R. at 3. This was done through recent statistics and personal stories of victims. *Id*. The arguments in the statement focused on the outrageous damaging effects that this crime has on its victims. *Id*. The statement also listed statistics about the rise in sex trafficking that typically accompanies major sporting events. *Id*. The statement concluded by telling the public that the Board intended to make the week of the All-Star Game fun for all. *Id*.

On July 12, 2015, Officers Richols and Nelson were inspecting patrons as they checked into the Stripes Motel. *Id*. The Stripes Motel is located in the middle of Starwood Park. *Id*. At approximately 11:22 p.m., the defendant, William Larson, and a much younger looking female entered the Stripes Motel. *Id*. The young female was wearing a revealing outfit for someone her age. *Id*. Neither the defendant nor the young female were carrying any luggage into the motel. *Id*. The officers identified the defendant as a member of the Starwood Homeboyz gang with two identifying tattoos. *Id*. First, the defendant has the letters "S" and "W" on a wizard's hat tattooed on his left forearm. *Id*. Second, on the back of the defendant's neck was a tattoo that read "4-11-5-11." *Id*. From experience and training Officer Nelson knew these letter referenced "d," "k," and "e" which then stood for the phrase "dinosaur killer, everybody killer." *Id*. The term dinosaur is a derogatory term used by members of the Starwood Homeboyz to describe the rival gang the 707 Hermanos.

Based on these telling observations, the officers believe they were authorized to search the defendant and the young female pursuant to L.O. 1923. *Id*. During the search of the defendant, the officers recovered the following items from a jacket he was wearing: nine condoms, a butterfly knife, lube, two oxycodone pills, a list of names and corresponding

allotments of time (i.e. “1 hour”, “45 min”, and “15 min”), and $600 in cash. R. at 4. When the young female was searched, she had a valid State of Victoria driver’s license identifying her as W.M., a 16-year-old. *Id*. Officer Richols immediately handcuffed the defendant and arrested him for sex trafficking of a minor in violation of 18 U.S.C. §1591(a)(1). *Id*.

Believing W.M. to be a victim rather than a perpetrator, Officer Nelson did not put her under arrest. *Id*. Instead, Officer Nelson asked if she had a safe place to stay the night and W.M. explained that she lived in an apartment a few blocks away with the defendant. *Id*. Officer Nelson asked W.M. if she was willing to speak more about her relationship with the defendant and she agreed to do so. *Id*. After that exchange, Officer Nelson asked whether she would give consent to allow him to search the apartment she shared with the defendant and she agreed. *Id*.

At the apartment, Officer Nelson put on gloves and walked around the apartment. *Id*. Under the bed, Officer Nelson found a black semi-automatic handgun with the serial number scratched off. *Id*. The handgun was impounded. *Id*. In the bedroom, Officer Nelson found a smart phone on the nightstand. *Id*. The phone’s cover was detailed with an “S” and a “W” on a wizard’s hat. *Id.* This design on the cover was identical to the design of the tattoo identified on the defendant’s forearm. *Id*. Officer Nelson then asked W.M. whom the phone belonged to and she declared that she shared the phone with the defendant. *Id.* Officer Nelson then asked if a password was needed to access the device and W.M. told him the password was 4-11-5-11. *Id*. He asked if he could search the phone and W.M. gave him permission to do so. *Id.* Using the password W.M. provided, Officer Nelson found several photos on the phone of the defendant holding the gun found underneath the bed, suggestive photographs of W.M., and a video of the defendant rapping about pimping. *Id.*

B. PROCEDURAL HISTORY

On August 1, 2015, a federal grand jury indicted the defendant charging him with one count of sex trafficking of children in violation of 18 U.S.C. §1591(a)(1) and one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). *Id.* at 5. The defendant is seeking to suppress nearly every piece of evidence gathered in this case. *Id*. The government has conceded the fact that there was not probable cause to initiate a search, however the officers believed they were authorized to search pursuant to L.O. 1923. *Id*. at 3. The defendant later admitted to owning the black semi-automatic handgun found at the apartment. *Id*. at 4. Prior to this incident, the defendant was convicted for state level drug trafficking offenses. *Id*. at 4. The district court found that the special need at issue in this case made the ordinary requirement of a warrant impracticable and that searches pursuant to L.O. 1923 did not violate the Fourth Amendment. R. at 10. The district court also ruled in favor of the state holding that based on the facts, Officer Nelson reasonably believed that W.M. had authority to consent to a search of the phone and thus the court declined to suppress the evidence. R. at 13. The defendant then appealed to the Court of Appeals. R. at 14. The Court of Appeals held that because L.O. 1923 had no other purpose than general enforcement it was not necessary to evaluate the balancing test in the second prong of the special needs analysis concluding that the searches conducted under L.O. 1923 were in violation of the Fourth Amendment. *Id*. at 19. Additionally, the Court of Appeals held that in light of the evidence presented, a reasonable officer would not have believed that W.M. had joint access and use of the cell phone and thus suppressed the evidence found on it. R. at 23. The decision of the District Court was therefore, reversed. Id.

SUMMARY OF THE ARGUMENT

Applying the special needs doctrine of the Fourth Amendment requires the Government to show its compelling interest is separate from ordinary law enforcement and that its purpose outweighs any individual privacy intrusion, concluding that the necessity of a warrant would be impracticable in the situation. Courts must balance the two interests and look to the primary purpose of the proposed special need. This Court has ruled in favor of applying the special needs doctrine in much more invasive searches, such as stopping every single vehicle to look for signs of intoxication. Additionally, circuits have ruled in favor of applying the doctrine where one of the purposes of the search happens to be crime control so long as it was not the primary purpose. A statute that is only valid for one week, limited in time and scope, permits searches only to happen where a room could be obtained for the crime intended, and is enforced for the main purpose of preventing child sex trafficking easily falls under the special needs exception.

The Fourth Amendment protects against unreasonable searches and seizures. The defendant's rights were not violated here because he chose to give his girlfriend, W.M., joint access to his apartment and to his cell phone. By having that joint access and mutual control, W.M. had actual authority. However, if this Court does not believe W.M. had actual authority, it should still determine W.M. had apparent authority. Apparent authority does not require the consenter have actual authority, it only requires an officer to reasonably believe that W.M. had authority to consent. Even if the authority is ambiguous, the risk of ambiguity is borne by the property owner and not the officers. Finding consent should be determined on a case-by-case basis, and in this case, W.M. did have the requisite authority to consent to a search of the apartment and the cell phone, and the officers reasonably believed so after further inquiry. This Court should find that W.M. did hold authority, either actual or apparent, and reverse the Appellate Court's decision and uphold the defendant's convictions.

STANDARD OF REVIEW

I. Applying the special needs doctrine of the Fourth Amendment is generally a question of law reviewed de *novo*. *United States v. Ward*, 131 F.3d 335, 338 (3d Cir. 1997). Additionally, any balancing of interests in a constitutional context is a question of law reviewed de *novo*. *Hall v. Marion School Dist. No. 2*, 31 F.3d 183 (4th Cir. 1994).

II. The question of whether a third party had authority to consent is a question of law and is reviewed *de novo. United States v. Hudson*, 405 F.3d 425, 432 (6th Cir. Tenn. 2005). *See also; Ornelas v. United States,* 517 U.S. 690 (1996). Additionally, determining whether police violated Fourth Amendment rights is always subject to a *de novo* review. *United States v. Harris,* 192 F.3d 580, 584 (6th Cir. 1999).

ARGUMENT

I. WARRANTLESS SEARCHES CONDUCTED UNDER L.O. 1923 ARE PERMITTED PURSUANT TO THE SPECIAL NEEDS EXCEPTION OF THE FOURTH AMENDMENT.

By virtue of the Fourth Amendment, the United States Constitution prohibits unreasonable searches. U.S. Const. amend. IV. Courts have used the Fourth Amendment's second clause when determining reasonableness and hold that "no warrants shall issue but upon probable cause." *Id*. Accordingly, as a general rule, a person cannot be searched without some probable suspicion of wrongdoing. *Terry v. Ohio*, 392 U.S. 1, 30 (1968); *Dunaway v. New York*, 442 U.S. 200, 214 (1979). The notion of individualized suspicion lies at the heart of the Fourth Amendment and thus, suspicionless searches are almost never allowed. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989). That is, unless an exception applies. "A warrantless search is not unconstitutional when probable cause to search exists and the government satisfies its burden of demonstrating that the circumstances of the situation made a warrantless search imperative." *State v. Allison*, 298 N.C. 135, 141 (1979). A balancing test has been used to determine when the special needs exception applies. Even when a search serves a "special government need beyond the normal need for law enforcement, it is still necessary to balance the individual's privacy expectations against the government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665–66 (1989)(citing *Skinner* 489 U.S. at 616–18). If the primary purpose of the search is carrying out ordinary law enforcement, the special needs doctrine will not apply and the search will be deemed unconstitutional. *United States v. Sczubelek*, 255 F. Supp. 2d 315, 320 (D. Del. 2003). To justify a warrantless search using the special needs exception, the government must show that the search serves a purpose related to a special need separate from ordinary law enforcement and that the

government's interest outweighs the individual's privacy interest, thus making the ordinary requirement of a warrant impracticable under the circumstances. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985)(BLACKMUN, J., concurring in judgment); *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987); *Von Raab,* 489 U.S. at 665–66; *Skinner*, 489 U.S. at 619.

A. The Compelling Government Interest of L.O. 1923 Outweighs the Defendant's Privacy Interests Because the Warrantless Search Was Based on Reasonable Suspicion and the Nature and Immediacy of the Search Only Minimally Affected the Persons Searched.

The "special needs" balancing test requires this Court to consider not only the Government's interest in enforcing the statute but also the privacy interest at stake with respect to both the expectation of privacy and the extent of the intrusion imposed on the individual. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664-65 (1995). Special needs are generally only recognized where the ordinary requirements of the Fourth Amendment become impracticable. *Griffin,* 483 U.S. at 873. This Court has defined a compelling governmental interest as one "important enough to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy." *Vernonia*, 515 U.S. at 661. Weighing the intrusion of privacy of an individual, the analysis begins with consideration of the nature of the privacy interest invaded and the degree to which the intrusion affects this interest. *Id*. at 654.

In limited circumstances, when the privacy interest implicated by the search is minimal and the important governmental interest is furthered by a simple intrusion of individualized suspicion, a search may be reasonable even without the absence of such suspicion. *Skinner*, 489 U.S at 624. It is also impractical and extremely inappropriate for the government to wait until a warrant is received to prevent the crime that may be occurring right before them. V*ernonia*, 515

U.S. at 653. This Court has explicitly recognized that "in certain limited circumstances, the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion." *Von Raab*, 489 U.S. at 668.

When balancing these interests previously, this Court has held that interests, such as protecting our Nation's borders, outweigh the minimal privacy infringements of individuals. *United States v. Martinez-Fuerte*, 428 U.S. 543, 561–64 (1976). It was determined that effectively preventing illegal immigration at our Nation's borders is difficult and it is impractical to obtain a warrant, thus the modest degree of intrusion weighed into the Courts decision. *Id*. at 556–564. Further, this Court has upheld checkpoints designed to remove drunk drivers from the roads. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 455 (1990). Deterring dangerous behavior has routinely been held as a special need. This Court must consider the nature and immediacy of the concern that is trying to be prevented. When the burden of obtaining a warrant would slow down the governmental purpose behind the search, this Court has routinely held that a warrant is not required by the Fourth Amendment. *Griffin* 483 U.S. at 876. In fact, "the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route." *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000).

The need to prevent child sex trafficking is of great importance and is at the very least as substantial as previously recognized special needs by this Court. Compare, e.g., *Skinner*, 489 U.S. at 620 (recognizing the great interest in regulating conduct of employees to ensure safety); *Von Raab*, 489 U.S. at 666 (identifying interest in deterring drug use by Customs officials in sensitive positions); *Sitz*, 496 U.S. at 449-451 (1990) (spotting interest in eradicating drunk

driving); *Vernonia*, 515 U.S. at 653 (recognizing interest in deterring drug use in public school context). This Court has denied applying the special needs exception to scenarios involving urine testing and drug checkpoints. See *Ferguson v. Charleston*, 532 U.S. 67, 90 (2001); *Edmund*, 531 U.S. at 56. Those types of searches are much more intrusive than a limited, defined search of a person suspected of child sex trafficking.

The compelling interest here is self-evident. Protecting the youth from this heinous crime is clearly of great importance. Initially, a person's privacy interest outweighs that of a warrantless search. However, the government in this instance has a substantial interest in enforcing L.O. 1923 to deter child sex trafficking. There are more than 8,000 victims in the Victoria City alone with the average age being 16. R. at 40. Starwood Park, the area of focus in L.O. 1923 and the area where the defendant was searched, accounts for almost 1,500 victims of child sex trafficking. *Id*. The special need at issue requires intervening government prevention.

The government has a compelling interest in ensuring the safety for sex trafficking victims, especially children, in a situation where the likelihood of this crime is to be increased. The link between human trafficking and major sporting events is increasingly strong. R. at 41. Due to the nature of this hidden crime, accurate numbers are a difficulty but in the days leading up to the 2015 Super Bowl, advertised sex services increased by 30.3%. *Id*. Conclusively, studies have shown there is a correlative increase surrounding large sporting events. When the Super Bowl was hosted in Miami in 2010, nearly 10,000 individuals were trafficked into the area. *Id*.

As the district court found, the searches conducted pursuant to L.O. 1923 are minimally intrusive and are limited in scope and duration thus making the Government's interest in deterring child sex trafficking strong enough to make the warrantless searches authorized by L.O. 1923 reasonable. L.O. 1923 recognizes the typical behavior of using a hotel room and

incorporating the language about hotels in the statute helps deter this type of activity there. The officers in this case were not abusing L.O. 1923. Rather, they were looking for any signs to prevent another victim from falling into sex trafficking and only conducted one search that night. R. at 27. The defendant was primarily stopped and searched because he was entering a motel room with a very young looking female and neither of them were carrying any luggage. *Id*. at 28. L.O. 1923 should easily satisfy the standard under the Fourth Amendment as laid out in *T.L.O.* If the privacy interest implicated by the searches are in fact minimal and the individual's expectation of privacy is not subject to the officer's discretion, the governmental interest in ensuring the safety of the general public is compelling. *T.L.O.*, 469 U.S. at 352. With L.O. 1923's narrow and defined search that is limited in time, place, and scope, the government has a compelling interest in ensuring the safety of the general public and more specifically the vulnerable youth from the dangerous crime of sex trafficking. Here there is a real risk to public safety and the searches calibrated to L.O. 1923 are reasonable. The government's compelling interest in deterring child sex trafficking justifies any minimal infringement of an individual's privacy. Serious threats demand serious and effective responses and because the Fourth Amendment bars only unreasonable searches, L.O. 1923 falls into the special needs exception.

B. The Purpose of L.O. 1923 Requiring The Warrantless Searches at Issue is to Deter Child Sex Trafficking, Not The General Enforcement of Law, Thus Making a Requirement of a Warrant Impracticable.

The special needs doctrine applies only where "certain exceptional circumstances justify a search policy designated to serve non-law-enforcement ends." *Ferguson*, 532 U.S. at 67. In these situations, the requirement of a warrant may be impracticable. *T.L.O.,* 469 U.S. at 351. To determine whether the search serves a purpose outside the general enforcement of law, the Court should evaluate whether the search's immediate purpose has an objective distinct from ordinary

evidence gathering. *United States v. Amerson,* 483 F.3d 73, 80–81 (2d Cir. 2007). This inquiry should focus on what the primary purpose of the search is. *Miller v. U.S. Parole Commission*, 259 F. Supp. 2d 1166, 1176 (D. Kan. 2003).

Courts have held that the mere fact crime control is one purpose of the search but not the primary purpose will not bar the application of the special needs doctrine. *Lynch v. City of New York*, 589 F.3d 94, 102-03 (2d Cir. 2009). "There are circumstances that may justify a law enforcement checkpoint where the primary purpose would otherwise, but for some emergency, relate to ordinary crime control." *Edmond*, 531 U.S. at 44. Courts across the country have faced various scenarios facing this issue. In *Lynch*, a checkpoint was able to serve as a tool in combating illegal activity without barring an application of the special needs doctrine. *Lynch*, 589 F.3d at 101(noting that while one purpose was crime control, the primary purpose was for the policy to act as a deterrent).

Courts have been faced with whether or not the collection of DNA goes beyond the ordinary need for law enforcement. The court in *Miller* ruled that the statute had the primary purpose of solving past and future crimes which clearly demonstrates its purpose is one of law enforcement. *Miller*, 259 F. Supp. 2d at 1176. However, "it is not every law enforcement purpose that would render the statute unconstitutional." *Id*. The statute would fall into the special needs exception if the law enforcement purpose that is targeted goes beyond the ordinary law enforcement needs. *Id*. The statute in Miller was decided to not be targeted at investigating a specific crime but rather creating a database for solving crimes that had not yet occurred. *Id*.

There are scenarios where this Court has denied applying the special needs doctrine to a much more invasive and broad search. For example, in *Ferguson*, this Court struck down a policy set in hospitals to drug test prenatal patients without consent because there recently had

been a spike in children who had tested positive for drugs at birth. *Ferguson*, 532 U.S. at 70. The hospital staff would then forward those test results to the police. *Id*. at 71. This Court could not justify a nonconsensual search if not authorized by a valid warrant. *Id*. at 68. *Ferguson* is an example of a need that goes too far and invades the privacy of the individual. This type of search is not limited in scope and is done in a hospital where the patient should feel safe.

To be legally impracticable means to be "excessively difficult to perform especially by reason of an unforeseen contingency." *Impracticable, Merriam-Websters Legal Dictionary (2016*). When "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search, the Court has routinely held that a warrant is not required by the Fourth Amendment." *Camara v. Municipal Court of San Francisco,* 387 U.S., 523, 533 (1967); *T.L.O.,* 469 U.S. at 351 (holding the state generally must show that obtaining a warrant would be impracticable when it conducts warrantless searches under the special needs exception). Further, it can be difficult to obtain a warrant in situations when time is of the essence. When the courts have deemed a situation where the special needs exception applies, the warrant requirement becomes impracticable for that need.

Preventing or deterring a behavior against present problems is distinct from standard law enforcement needs and goes well beyond them. *Cassidy v. Chertoff*, 471 F.3d 67, 70 (2d Cir. 2006). The court in *Cassidy* found a necessary nexus between "protecting a ferry and guarding against the threat of terrorism through minimally intrusive searches of vehicles and carry-on baggage." *Cassidy*, 471 F.3d at 82. The Second Circuit correctly highlighted the fact that the government has a need to *prevent* potential disasters. *Id*. Courts have acknowledged "the special governmental need in protecting citizens in the mass transportation context." *Id*., See *United States v. Hartwell,* 436 F.3d 174, 179 (3d Cir. 2006) (holding the pre-boarding search of

passengers' carry-on baggage a special need). To provide an illustrative example of a permissible search, *Sitz* established a sobriety checkpoint where every car was stopped to look for signs of intoxication. *Sitz*, 496 U.S. at 447. The court there found this system permissible because "the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the State program." *Id*. at 455. Drunk driving is a serious problem and the State had a major interest in deterring it. *Id*. at 449. This checkpoint stop was effective because some amount of evidence showed that it furthered the purpose for which it was created. *Id*. at 451. To balance the interests, the Court weighed the brevity of the stop, the short amount of time the stop occurred and the minimal nature of the investigation, finding that the measure of the driver's intrusion was slight. *Id*. at 449.

The government here has a need that goes beyond the normal need of law enforcement making a warrant impracticable. L.O. 1923 can easily be compared to the special needs exceptions in *Cassidy* and *Sitz* because child sex trafficking is absolutely something that should be deterred if possible, especially in Starwood Park where this outrageous crime is already happening. L.O. 1923 cannot be seen as analogous to *Ferguson* because the purposes of the search in that case were for general crime control and in contrast, L.O. 1923 was enacted for the *prevention* of child sex trafficking. The search in *Ferguso*n was not limited in scope or reasonableness suspicion. *Ferguson*, 532 U.S. at 71. To go ahead with the unconsented drug search, the patient only had to meet one of the nine criteria. *Id*. The manual was also explicit in the procedure for the police when the patient was arrested and what offenses could be charged. *Id*. L.O. 1923 is extremely limited in time as it's only applicable for the week of the All-Star Game. R. at 2. L.O. 1923 does not mention any type of instruction of a crime to be charged or

the sentencing involved. *Id*. Further, courts have upheld much more intrusive searches of carry-on luggage. *United States v. Edwards*, 498 F.2d 496, 499 (2d Cir. 1974) (describing a search that involved unwrapping slacks wrapped around a package and investigating pockets of bags). Here, the search must be conducted only at an area where a room can be obtained and the search is still limited in scope and duration for the officer to ascertain whether or not the individual is engaged in child sex trafficking. R. at 2. L.O. 1923 is intended to deter future acts of child sex trafficking. While punishing it may be a second purpose, the primary purpose is to prevent it from happening altogether. The primary purpose is evident by the narrowness of the search and the tailored, reasonable suspicion and the limited duration that L.O. 1923 presents. It is apparent that the detection and apprehension of criminals is present but the prevention and deterrence of child sex trafficking radiates as the primary purpose of L.O. 1923, constituting a special need here that does not violate the Fourth Amendment.

II. THE APPELLATE COURT ERRED IN REVERSING DEFENDANT'S GUILTY CONVICTIONS BECAUSE THE DEFENDANT'S FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED WHEN THERE WAS A VALID THIRD PARTY CONSENT TO SEARCH BASED UPON OFFICERS REASONABLE BELIEF THAT W.M. HAD APPARENT AUTHORITY TO SEARCH.

This Court should reverse the Appellate Court's decision and deny the defendant's motion to suppress evidence. The Fourth Amendment guarantees a citizen a reasonable expectation of privacy in their persons and effects. U.S. Const. amend. IV. This includes a reasonable expectation of privacy against warrantless searches. *Florida v. Jimeno,* 500 U.S. 248, 250 (1991)(citing *Katz v. United States,* 389 U.S. 347, 360 (1967). These searches are unreasonable unless there is an exception to the Fourth Amendment. U.S. Const. amend. IV. One of the most persuasive exceptions is a consent search. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). A person may consent to the search of themselves or their property. *Id.* Consent to search is valid if

it is (1) knowing and voluntary and (2) given by one with authority to consent. *United States v. Digiovanni,* 650 F.3d 498, 689 (4th Cir. 2011). This issue does not lie within the first prong, but rather within the authority to consent. The law on this issue is widely accepted that these searches are valid and instead require a fact intensive approach to determine whether a third party has authority to consent. Finding consent is not a bright line rule and uses a case-by-case approach. In this case, W.M. did have the requisite authority to consent to a search of the apartment and the cell phone, so this Court should apply a standard that allows a reasonable expectation of privacy and a person's Fourth Amendment rights to be preserved, while still allowing police to conduct an effective search without undue burden. This Court should apply a standard that a reasonable police officer may search an area that they believe the person has authority to consent over, after conducting reasonable inquiry into that authority. This Court has ruled that actual authority is not necessary as long as there is apparent authority, and W.M.'s consent satisfies both of those standards. *Illinois v. Rodriguez,* 497 U.S. 177, 185 (1990).

There are different ways that are commonly used amongst courts to establish authority. These various standards look to whether there was a reasonable expectation of privacy, common authority and actual or apparent authority. Reasonable expectation of privacy applies when determining if someone has a privacy interest in the item searched. This considers the evidence to determine whether the defendant had a reasonable expectation of privacy in so that he could expect a third party to not have authority to consent. 18 Am. Jur. 2d 681 (1979). The standards for common and actual authority are more widely accepted standards. They are sometimes used interchangeably within courts because the standards are similar and both provide a third party the ability to consent with authority. Common authority considers the consenter's relationship to the property searched. A person with equal rights of possession and control over the premises may

consent to a search. *United States v. Matlock,* 415 U.S. 164, 171 (1974). This is a fact intensive determination. Actual authority is not required as long as there is apparent authority. *Rodriguez,* 497 U.S. at 185. Apparent authority offers more of an objective inquiry asking whether the consenter had apparent authority and could a reasonable officer believe that the consenter had that authority. *Id.*

This case can be decided by looking at the facts. These facts lead to a conclusion that W.M. did have both actual and apparent authority to consent to the search. The defendant does hold a property interest and therefore a Fourth Amendment right to his apartment and cell phone but – and this is an important but—because W.M. had joint possession and control of these items, it can be reasonably believed that the defendant bears the risk of W.M. consenting. The officers complied with their duty to investigate further when interviewing W.M.

By an objective look at the facts, it is reasonably clear that W.M. had valid authority to consent to the search, whether that authority is considered actual or apparent. This fact intensive, case-by-case approach is the correct approach to consent search determinations. This Court should look at these facts and determine that W.M. did have consent to search, and therefore reverse the Appellate Court's decision and deny the defendant's motion to suppress evidence.

A. The Search of the Apartment Did Not Offend the Defendant's Fourth Amendment Rights Because W.M. Had Actual and Apparent Authority to Consent to the Search and Officer Nelson Reasonably Relied On That Authority.

W.M. had actual authority based upon her mutual use and joint control of the property and the cell phone. However, actual authority is not needed when there is apparent authority. Apparent authority is based upon reasonable belief. Objectively looking at the facts, W.M. satisfies the standards set forth in both common and apparent authority. A warrantless search is

valid when law enforcement personnel rely on a person's apparent authority to consent to the search, if the reliance is in good faith and is reasonably based on all facts known by police at the time of the search. These standards apply to the apartment search and should also apply to the cell phone search. A cell phone does have a reasonable expectation of privacy, but W.M. had the same level of use and control with the cell phone as she did with the apartment, and thus the cell phone search should be held to the same standard.

i. W.M. Had Actual Authority to Consent to the Search of the Apartment.

The hallmark case regarding third party consent searches is one that was decided by this Court. *Matlock,* 415 U.S. at 164. In *Matlock,* officers searched respondent's house in relation to a bank robbery. *Id* at 166. Respondent lived in a home with Mrs. Graff and her daughters. *Id.* Officers received consent to enter and search the home by Mrs. Graff. *Id.* She consented to a search of the home and the bedroom in which she said was jointly occupied by the respondent and herself. *Id.* Upon searching, officers found evidence of the bank robbery. *Id.* The lower court ruled that Mrs. Graff did not have sufficient authority to consent to the search because of her own relationship to the premise. *Id.* at 167. This Court reversed. *Id.* at 169. Mrs. Graff and the respondent lived together in this house for about four months and were seen going up and down the stairs together. *Id.* at 168. There was also evidence that both a man and a woman occupied that bedroom. These facts were enough to show that Mrs. Graff had "common authority over or other sufficient relationship" to the bedroom, making the search valid. *Id.* at 171. *See also United States v. Groves,* 530 F.3d 506 (7th Cir. 2008)(where a totality of circumstances test was established and the court looked at factors such as; the telephone was registered to the address and to her, she had registered her daughter for school using that address, she kept personal

belongings there, had mail sent there, had a key, and could use the premises without the defendant being present, to determine actual authority).

Matlock is an important case and this Court should uphold its own decision and apply it here. Like Mrs. Graff, W.M. had authority to consent to the search of the apartment. W.M. had been living in the apartment for over a year, a much longer time frame than Mrs. Graff. R. at 30. This was W.M.'s only place of residence and the bedroom was her only bedroom. *Id.* There is evidence in the bedroom that both a man and woman share this bedroom. All of her belongings, although not much, it is all she has, were kept in the apartment. *Id.* She had her personal mail, including her private mail and medical bills, sent to that address. *Id.* She didn't have a key of her own but she had access to the spare key and was able to use it to come and go as she pleases and use the space as she pleases. *Id.* The defendant and her shared a bedroom and closet space. *Id.* W.M. did not pay rent, however, she did do all of the household chores. *Id.* W.M. even told the officers "they shared everything." *Id.* at 29. W.M. have sufficient authority to consent to the search because of her own relationship to the premises. She used this premises like anyone uses their own apartment and bedroom, and holds a relationship to it, enough to make her have the authority to consent. *See also United States v. McGee,* 564 F.3d 136 (2nd Cir. 2009) (where the defendant's girlfriend had actual authority to consent because she lived there, had all her belongings there, but did not have a key).

When considering all of these facts together, it is self-evident that W.M. had authority over this apartment and it is reasonable for an objective officer to believe that too.

ii. It Does Not Matter If W.M. Had Actual Authority to Consent, the Officers Reasonably Believed She Had Authority, Which Means She Had Apparent Authority.

In order for apparent authority to be met, there does not have to be actual authority, it just needs to be reasonably believed that the person has authority to consent. *Rodriguez* 497 U.S. at 185. This authority is enough to make a search valid. In *Rodriguez,* Ms. Fischer called the police from her mother's house because the defendant, Rodriguez, beat her. *Id.* at 179. Ms. Fischer said that Rodriguez was sleeping in their apartment and she had a key and could take officers there. *Id.* During the initial conversation with the police, Ms. Fischer called the apartment "our" apartment and said she had belongings there but it was unclear whether she currently or previously lived there. *Id.* Ms. Fischer consented to a search of the apartment. *Id.* After further examinations, this Court concluded that Ms. Fischer did not have actual authority because she did not currently live in the apartment and was just an "infrequent visitor." *Id.* at 180. Her name was not on the lease, she did not contribute to the rent, not all of her possessions were in the apartment, and she did not have access to it without the defendant. *Id.* The court determined that although she did not have actual authority, she still had apparent authority because the officers reasonably believed that she lived there. *Id.* The court adopted an objective standard: would the facts available at the time lead a reasonable man to believe that the consenting party had authority? *Id.* at 188. If so, there is no unreasonable search and Fourth Amendment rights have not been violated.

Like the officers in *Rodriguez,* these officers reasonably believed W.M. had authority to consent, making actual authority not necessary. The officers testified that they did not believe authority was satisfied just by finding out W.M. lived there. R. at 30. They further questioned her until they found out more details about the living situation and the circumstances of her

authority. *Id.* After further investigation, officers reasonably believed that she had joint control and access to the premises and was able to consent. *Id.* at 31. This further inquiry satisfies the officers need to investigate further where there is ambiguity. Looking at the totality of the circumstances objectively, it is reasonable to think that W.M., even though she was 16, had the ability to consent.

There are a number of factors set forth in precedent that are used to determine apparent authority. In *Goins,* the defendant's girlfriend called the police because the defendant had assaulted her and she wanted an escort into their apartment so she could gather her things. *United States v. Goins,* 437 F.3d 644 (7th Cir. 2006). She also claimed that the defendant had crack cocaine and a gun in the apartment and consented to a search of the apartment. *Id.* at 646. The Seventh Circuit correctly decided that the girlfriend did have apparent authority because officers were entitled to accept the girlfriend's statements as true. The girlfriend had a key to the apartment, had belongings there, stated that she lived there on-and-off, and frequently did chores. These statements were enough to satisfy apparent authority. *Id.* at 649.

The girlfriend in *Goins* was similarly situated as W.M., but with even less authority as W.M. Although the girlfriend in *Goins* had her own key while W.M. does not, it is important to note that she stated she lived there "on-and-off," which can reasonable be inferred that it was not her full time residence. *Id.* W.M. had nowhere else to go. She lived with this defendant full time for a year—not "on-and-off."

B. The Defendant Does Hold a Reasonable Expectation of Privacy With His Cell Phone, However When Another Party Had Joint Access and Control to That Cell Phone, the Privacy Expectations are Diminished, Giving W.M. Proper Authority to Consent to a Search of It.

There may be a greater expectation of privacy with a cell phone, but the same standards applied for the apartment should still apply to a cell phone. Although a third party consent search of a cell phone would be an issue of first impression to this Court, the apparent authority standard applied to the apartment should not change in this particular case. Courts have touched on this issue when it comes to computers, which hold similar privacy expectations as a cell phone, especially with modern technology and "the cloud" connections. The majority of circuits have ruled that third party consent searches of computers may be allowed.

The Fourth Circuit has ruled in *Buckner* that the defendant's wife did not have actual authority to consent to the search of her husband's computer, but she did have apparent authority. *United States v. Buckner,* 473 F.3d 551 (4th Cir. 2007). The wife and third party consenter in *Buckner,* did not have any control over her husband's password protected computer and did not share mutual use of it. *Id.* at 553. When officers arrived to their home, the computer was located in the living room and it was on and leased in the wife's name. *Id.* Although she did not use the computer, except to play solitaire occasionally, and did not use any of the password protected files, the court still determined that the officers reasonably believed she had authority and therefore she possessed apparent authority and the search was valid. *Id.* The court did discuss the reasonable expectation of privacy of the computer and stated that the defendant did have an expectation of privacy because he had a password for his computer. *Id.* at 555. He had this expectation of privacy and did not intend to give authority to a third person, but the standard for apparent authority still holds true and actual authority is not

needed. (*See also; United States v. Clutter,* 674 F.3d 980, (8th Cir. 2012), where it was ok for the defendant's dad to consent to a search of a computer; *see also United States v. Morgan,* 435 F.3d 660 (6th Cir. 2006)(holding a wife's consent for a computer search was valid).

In this case, although the cell phone is not a computer, it holds similar expectations of privacy. The wife in *Buckner* was found to have apparent authority even though she did not have mutual use or joint control over the computer and its password-protected files. *Id.* Although the wife in *Buckner* had her name on the lease for the computer, she did not share in any mutual use or control of the item. Oppositely, W.M. did not have her name on the cell phone bill but had full mutual use and joint control of the cell phone. R. at 31-2. She knew the password and opened the phone for the officers. *Id.* at 34. She also stated that it is her only cell phone and her social media apps were on that phone and she used the phone and the apps. *Id.* at 32. She also used the cell phone to send personal texts and make personal calls. *Id.* She also stated that the defendant used it for his personal use as well. *Id.* Like the computer in *Buckner* was sitting in the living room, a place of joint occupancy, the cell phone here was sitting on a nightstand in the bedroom that both W.M. and the defendant shared. *Id.* at 31. By seeing that W.M. had the password to the cell phone combined with her statements about using and sharing the cell phone and having her personal social media apps on it, it is reasonable for an objective officer to believe that W.M. had authority to consent.

Anyone that gives their password away or allows joint control of their property is bearing the risk of that person using the item as they want to, or having the ability to consent. Citizens to have a right against unreasonable searches and seizures, and they also have a reasonable expectation of privacy in their belongings, however, when another person has joint control or mutual access, that person has property rights as well and a reasonable person would expect the

other party to use their rights. Had the defendant not wanted his girlfriend to have authority of his property, he should not have given her authority of his property. The individual should bear the burden to protect his or her own Fourth Amendment rights and should not be borne by the officers. This does not allow for officers to intrude on these rights, but enforce them while also protecting the public. Not allowing third party consents would devalue law enforcement and add an undue burden on officers and ultimately unnecessarily and potentially harmfully delay a search or an investigation.

CONCLUSION

For the reasons stated above, this Court should reverse the Thirteenth Circuit's denial of concluding that the searches conducted under L.O. 1923 fell under the special needs doctrine and suppression of evidence obtained from the authorized search of the defendant's apartment and cell phone. This Court should therefore uphold the District Court's correct application of law.

Respectfully submitted,

Counsel for the United States

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