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

BRIEF FOR PETITIONERS

TEAM P9

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STATEMENT OF ISSUES PRESENTED

I. Whether searches conducted pursuant L.O. 1923 are permitted under the special needs exception to the Fourth Amendment, when the purpose of the ordinance, and subsequent searches, is to protect victims of human trafficking given the prevalence and increased likelihood surrounding the 2015 All-Star Baseball Game.

II. Whether W.M. possessed apparent authority to consent to Officer Nelson's search of the apartment at 621 Sasha Lane or the cell phone found therein where W.M. expressed having joint access, control, and use of both the apartment and the cell phone, both of which she shared with the Defendant.

STATEMENT OF THE CASE

STATEMENT OF THE FACTS

I. Starwood Park's Gang Activity

The Starwood Park neighborhood of Victoria City, Victoria has long been affected by gang activity--namely, the Starwood Homeboyz and the 707 Hermanos. R. at 2. These gangs are involved in a wide range of illegal activity, the most profitable of which is human trafficking. *Id.* Upwards of 1,500 sex workers have been recruited by these gangs; many of whom are believed to be underage children. *Id.* It is often difficult to monitor and locate the person(s) responsible because these groups shield themselves by utilizing the "deep web" as a platform to further their illicit activity. *Id.*

After being chosen to host the 2015 All-Star Baseball Game, to be held on July 14, 2015 at Cadbury Park Stadium, local citizens raised concerns that the game would cause the already existing human trafficking to increase substantially. *Id.* The citizens recognized and argued that large events such as the All-Star Game are frequently accompanied by an increase in human trafficking due to the influx of visitors. Specifically, men traveling without their wives or significant others are more likely to engage in activity that they otherwise would not consider. *Id.* As a result, the Victoria City Board of Supervisors ("Board") passed Local Ordinance 1923 ("L.O. 1923") on May 5, 2015. *Id.*

II. The Enactment of Local Ordinance 1923

L.O. 1923 expressly limits searches to individuals obtaining accommodations in hotels, motels, and public lodging facilities where an authorized law enforcement officer reasonably believes that the individual is either "[a] minor engaging in a commercial sex act as defined by federal law" or "[a]n 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." R. at 2. L.O. 1923 was enacted to prevent a surge in human trafficking in the Starwood Park area during the All-Star Game. In enacting L.O. 1923, the Board limited its scope and application. Id. Specifically, the ordinance was only valid for one week, from Monday, July 11, 2015 until Sunday, July 17, 2015, and only in the Starwood Park neighborhood, which is expressly defined as "the area within a three-mile radius of Cadbury Park Stadium." *Id.*

III. Starwood Park's High Prevalence of Human Trafficking

In a statement released on May 6, 2015, the Board addressed the frequency of human trafficking occurring in the Starwood Park area by referencing recently collected statistics and personal accounts by a former victim of child sex slavery. R. at 3. Specifically, the Board told the story of a woman named Samantha who, at the age of sixteen, was forced to become a child sex worker. Samantha had been forced into sex slavery by a friend's father who she had gone to live with in an attempt to escape her home life. R. at 40. Soon after, this man beat Samantha and forced her to become a child sex slave with the threat of further physical abuse if she did not earn at least $1000. *Id*. While her friends went to prom, Samantha was forced to engage in sexual intercouse with several strange men. *Id*. As a result of this trauma, Samantha dropped out of school, and tried to get a customer to kill her. *Id.* The Board explained that Samantha's stories, while uncomfortable, were common among child sex slaves. *Id*.

To show the prevalence of human trafficking in the Starwood Park area of Victoria City, the Board relied on a study conducted by the University of Victoria City. R. at 41. This study found there are upwards of 8,000 victims of sex trafficking in Victoria City, 1,500 of whom are located in the Starwood Park area—three times the number of victims in other areas of the city. *Id*. The average age of these victims is sixteen years old. *Id.* Further, the Board discussed a study

conducted by Arizona State University that showed the direct correlation between large sporting events and the rise in human trafficking in the days leading up to these events. *Id.* This study found that online posts advertising sex services dramatically increased in the days leading up to Super Bowls. *Id.* For example, in the days leading up to the 2015 Super Bowl, online advertisements for sex services increased by more than thirty percent. *Id.* The Board also referenced a similar study, conducted by the National Center for Missing and Exploited Children, which found that approximately 10,000 individuals were brought into the Miami area prior to the 2010 Super Bowl. *Id.*

The Board concluded by addressing the necessity to prevent a phenomena of child sex trafficking in the Starwood Park area of Victoria City. *Id.* To combat this, the Board introduced L.O. 1923 as a means to protect the safety of local children while simultaneously protecting the privacy interest of individuals so that all could enjoy the All-Star Game. *Id.*

IV. The Constitutional Search

At approximately 11:22 p.m. on July 12, 2015, two days before the All-Star Game, Officer Joseph Richols and Officer Zachary Nelson used their authority pursuant to L.O. 1923 to search William Larson ("Larson") as he and a female attempted to check into the Stipes Motel. R. at 3. This motel is located in the middle of Starwood Park on I Street, between Narrow Avenue and Coconut Boulevard. *Id.*

Officer Nelson observed that the female with Larson appeared noticeably younger than Larson. The female wore a low-cut top and tight fitting shorts exposing her legs. *Id.* Significantly, the officers observed that Larson had two tattoos that identified him as a member of the Starwood Homeboyz gang. *Id.* The first tattoo, located on his left forearm, was of a wizard hat with the letters "S" and "W" on it. *Id.* The second tattoo, located on the back of his neck, was of the numbers "4-

11-5-11". *Id*. Officer Nelson knew these numbers were a reference to the phrase "dinosaur killer, everybody killer," which is a derogatory term used by the members of the Starwood Homeboyz. *Id*. Based on these observations and pursuant to L.O. 1923, the officers searched Larson. The officers found the following in Larson's large jacket: nine condoms, a butterfly knife, lube, two oxycodone pills, a list of names and corresponding allotments of time, and $600 in cash. R. at 4. The officers then proceeded to search the female with Larson. *Id*. The female produced a license, which identified her as W.M., a female at age sixteen. Based on these findings, the officers believed W.M. to be a victim and only arrested Larson. *Id*.

Afterwards, W.M. willingly spoke with Officer Nelson about her relationship with Larson and gave him express permission to search the apartment she shared with Larson. *Id*. Officer Nelson and W.M. then walked from the Stripes Motel to the apartment, located at 621 Sasha Lane. In the apartment Officer Nelson found several pertinent items. *Id*. First, Officer Nelson uncovered a black semi-automatic handgun with the serial number scratched off. *Id*. Larson subsequently admitted the handgun belonged to him. *Id*. Second, Officer Nelson found a smartphone with a custom cover decorated with an "S" and "W" wrapped around a wizard's hat, which was identical to the tattoo identified on Larson's left forearm. *Id*. W.M. told Officer Nelson that she and Larson shared the phone. *Id*. W.M. voluntarily gave Officer Nelson the password, and expressly allowed him to search the phone. *Id*. Upon searching the phone, Officer Nelson found several photos of Larson holding the handgun that was uncovered earlier, and he found a video of Larson rapping about pimping. *Id*.

PROCEDURAL HISTORY

William Larson was indicted by a federal grand jury on August 1, 2015. R. at 5. The jury returned an indictment charging Larson 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*. Larson moved to suppress virtually every piece of evidence collected in the case maintaining that L.O. 1923 was facially unconstitutional under the Fourth Amendment thus making the initial search of his person invalid. *Id*. Further, Larson asserted that the search of his apartment conducted by Officer Nelson was a violation of his Fourth Amendment rights. *Id*.

The United States District Court for the Western District of Victoria held that L.O. 1923 was not facially unconstitutional under the Fourth Amendment. R. at 5. First, the district court, found that searches conducted pursuant to L.O. 1923 were justified by the "special needs" exception to the general requirement of a warrant. *Id*. Second, the district court found that W.M. had apparent authority to consent to Officer Nelson's search of the apartment and cell phone, thus these searches were not in violation of Larson's Fourth Amendment rights. *Id.* Based on these findings the district court denied Larson's motion to suppress evidence in its entirety. R. at 13.

Larson appealed to the United States Court of Appeals for the Thirteenth Circuit, which then reversed the district court on both issues. R. at 15. The Thirteenth Circuit first found that L.O. 1923 did not serve a purpose separate from a general interest in law enforcement. Based on this finding, the Thirteenth Circuit declined to address whether a warrant would be impracticable under the asserted special need. R. at 16. Second, the Thirteenth Circuit found that W.M. did not have authority to consent to the search of the apartment or cell phone. R. at 22. Thus, the court held that evidence must be suppressed. *Id*.

The Government appealed to the Supreme Court of the United States, which granted certiorari on both issues. R. at 24.

SUMMARY OF THE ARGUMENT

I. Searches conducted pursuant to L.O. 1923 are permitted under the special needs exception to the Fourth Amendment, and it was in error for the Court of Appeals for the Thirteenth Circuit to conclude otherwise. The primary purpose of L.O. 1923 is to protect the community, especially children, from a substantially certain rise in human trafficking in the period leading up the All-Star Game. The concerns giving rise to L.O. 1923 were that of the community, which feared that All-Star Game, like other large sporting events, would cause a swell in human trafficking. The statistics relied upon by the Board substantiated these concerns and showed that a large proportion of human trafficking victims are children, and that in the Starwood Park area there are three times as many children being trafficked than in other parts of the city. If is clear then, that the primary purpose of L.O. 1923 was to protect the community, especially children from the heightened risk of human trafficking where it is most prevalent and likely to rise due to the All-Star Game. This primary purpose, especially in light of protecting children, is clearly a special need that is distinct from ordinary law enforcement. Thus, the Court of Appeals for the Thirteenth District incorrectly concluded that the special needs exception was not implicated.

Further, this special need makes it impracticable to require a warrant because the nature of human trafficking require swift and immediate action in order to protect victims. The District Court correctly held that Larson's privacy interest was significantly outweighed by governmental interest in protecting the community. While Larson does have a privacy interest in being free from unreasonable searches, the search in question is reasonable because of the explicit limitations in L.O. 1923. Namely, that its reach is limited to the Starwood Park area, which is reasonable because this area of the city is where the All-Star Game will be held and this area is where child sex-

trafficking is most prevalent. Second, L.O. 1923 requires reasonable suspicion, which Officer Richols and Officer Nelson clearly had prior to initiating their search of Larson. Specifically, the fact that Larson was checking into the hotel with a significantly younger companion who was dressed very provocatively, and without luggage. Thus, there was a reasonable suspicion that the two were engaged in or about to be engaged in sex-trafficking.

II. W.M. possessed apparent authority to consent to Officer Nelson's search of both the apartment at 621 Sasha Lane and the cell phone found therein. If a law enforcement officer reasonably believes that a third party possesses the authority to consent to a search, the search is valid even if the third party did not have actual authority to consent to the search. Here, the facts available to Officer Nelson at the time of the apartment search would warrant a reasonable officer's belief that W.M. possessed authority to consent to the search because W. M. had joint access and control of the apartment. W.M. asserted that she shared the apartment with the defendant, kept personal belongings there, received mail, performed chores, and hosted guests.

Additionally, at the time of search of the cell phone, Officer Nelson reasonably believed that W.M. possessed joint access and use of the cell phone found in the bedroom W.M. maintained she shared with the defendant. W.M. expressed that she used the cell phone regularly, without the defendant's assistance, for her personal communication and use of various applications. Further, W.M. and the defendant used the same password to access the cell phone. Moreover, Officer Nelson observed a picture of W.M. on the lock screen of the shared cell phone.

Although W.M. was a minor at the time of the search, W.M. possessed the capacity to consent to the searches. Viewing the facts known to Officer Nelson at the time of the search in

light of the totality of the circumstances, Officer Nelson's belief that W.M. possessed authority to consent to both searches was undoubtedly reasonably.

STANDARD OF REVIEW

Whether law enforcement conduct constitutes a search and whether it violates the Fourth Amendment are questions of law that this Court reviews *de novo*. *United States v. Bynum,* 604 F. 3d 161, 164 (2010).

ARGUMENT

I. SEARCHES CONDUCTED PURSUANT TO L.O. 1923 ARE CONSTITUTIONAL UNDER THE SPECIAL NEEDS EXCEPTION TO THE FOURTH AMENDMENT BECAUSE L.O. 1923 PROPERLY SERVES THE NEED TO PROTECT INDIVIDUALS FROM BECOMING VICTIMS OF HUMAN TRAFFICKING IN SITUATIONS WHERE SWIFT AND IMMEDIATE ACTION IS NECESSARY, THUS MAKING IT IMPRACTICABLE TO REQUIRE A WARRANT.

The Fourth Amendment protects the right of the individual to "to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV; see *Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602 (1989) ("The [Fourth] Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their discretion"). Accordingly, it is generally required that a search be supported by "a warrant issued upon probable cause." *National Treasury Employees Union v. Von Raab,* 489 U.S. 656, 665 (1989). However, the Supreme Court recognizes that the warrant requirement may be impracticable in particular situations, such as in circumstances of special needs. *New Jersey v. T.L.O,* 469 U.S. 325, 351 (Blackmun, J., concurring) ("Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable").

Under the special needs doctrine, the general requirement of a warrant may be disposed of *"*where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement," thereby making it "impractical to require a warrant or some level of individualized suspicion in the particular context". *Von Raab, 489 U.S. at 665*. To determine whether the search at issue comes within the purview of the special needs doctrine, the court must first determine whether there is a special need implicated, and if so, the next step requires a balancing of the individual's privacy expectations against the Government's interests to determine whether a warrant is applicable . *Id*.

A. L.O. 1923 Is Constitutional Under Special Needs Doctrine Because The Primary Purposes Of Protecting The Community And Victims From A Certain Rise In Human Trafficking Is Separate and Distinct From Ordinary Law Enforcement.

The special needs doctrine applies where the primary purpose of law enforcement is a need that is "beyond the normal need for law enforcement." *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987), see also *Illinois v. Lidster*, 540 U.S. 419, 424 (2004) (A general interest in crime control does not mean to include every law enforcement objective). To determine whether the need at issue qualifies under the doctrine, the appropriate inquiry is "whether the search serves as its immediate purpose an objective distinct from the ordinary evidence gather associated with crime investigation." *United States v. Amerson*, 483 F.3d 73, 81 (2d Cir. 2007) (internal citations omitted). Against the available backdrop of precedent, it is readily apparent L.O. 1923 has a purpose that is separate and distinct from ordinary law enforcement.

For instance, in *Griffin*, the Supreme Court upheld a regulation that permitted "any probation officer to search a probationer's home without a warrant." 483 U.S. at 868. The court held that the regulation fell under the purview of the "special needs" exception because its purpose was to "assure that the probation serves as a period of genuine rehabilitation and that the

community is not harmed by the probationer's being at large." *Id* at 875. While the public concerns may be different, both the regulation in *Griffin* and L.O. 1923 were promulgated in the wake of a growing concern to their respective communities. In *Griffin*, this was the growing number of probationers, and here it the surge of human trafficking because of the upcoming All-Star Game. Thus, under *Griffin*, it is clear that the government's purpose in enacting L.O. 1923 was distinct from ordinary law enforcement.

Similarly under *Skinner*, the Supreme Court upheld a regulation where the purpose was to "prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs," 489 U.S. at 620-21, "not to assist in the prosecution of employees." *Id*. The regulation at issue required blood and urine tests after major train accidents or incidents and allowing such tests when these employees violate regulations. *Id.* at 602. Likewise, L.O. 1923 does not seek to prosecute individuals suspected of human trafficking, rather its purpose is to protect the community and minors from likely harm. This is evidenced by the tailoring of the statute authorizing searches where there is reasonable suspicion that a *minor* is involved in commercial sex acts. See R. at 2.

Contrary to the Court of Appeals opinion, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) and *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) are not instructive, R. at 17, but rather serve as distinguishable cases against which it is further apparent that L.O. 1923 is separate and distinct from the state's interest in law enforcement. See R. at 17.

In *Ferguson*, the Supreme Court invalidated a policy because "the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment." 532 U.S. at 80. Pursuant to the policy, pregnant woman meeting certain criteria were drug tested for cocaine use and threatened with law enforcement in

three specific situations, one of which put women to the choice of either being arrested or consenting to substance abuse treatment. *Id*. at 72. In addition to its coercive nature, the court further found the policy invalid based on the explicit incorporation of police operations guidelines, namely "chain of custody, the range of possible criminal charges, and the logistics of police notification and arrests." *Id* at 82. In turn the court concluded that ordinary law enforcement was not divorced, but completely embedded in the policy. *Id* at 80-81. L.O. 1923 is noticeably distinguishable. It authorizes searches where there is reasonable suspicion of human trafficking, and thus is reactive, not coercive. R. at 2-3. Further, L.O. 1923 has been referenced to in terms of the prevalence and dangers of minors being involved in commercial sex acts, not in terms of law enforcement. R. at 40-1.

Edmond is similarly distinguishable. There the court invalidated an Indianapolis narcotics checkpoint program because the primary purpose was to "uncover evidence of ordinary criminal wrongdoing." 532 U.S. at 42. The court found that the program could not be divorced from ordinary law enforcement because the policy explicitly referred to the "checkpoints as 'drug checkpoints'" and described "them as being operated by the City of Indianapolis in an effort to interdict unlawful drugs in Indianapolis." *Id*. at 40-41. Contrary to the Court of Appeals opinion, see R. at 17-18, *Edmond* is not guiding because it is completely distinguishable from the ordinance at issue here. Unlike the program in *Edmond*, L.O. 1923 is not standardless, and does not allow unconstrained discretion. Rather, as the district court correctly concluded, L.O. 1923 was only valid during the week of the All-Star Game, was limited to the immediate area surrounding the stadium, and the ordinance explicitly restricted the scope of searches. R. at 9. Moreover, the ordinance is referred to in context of protecting victims of human trafficking.

Thus, the court should find that the special needs exception is met because L.O. 1923 purpose is to protect the community interest in protecting minors from the devastation caused by being involved in human trafficking, which is distinct from ordinary law enforcement.

B. It is Impracticable to Require a Warrant Because Immediate Action is Paramount in Achieving the Purpose of Protecting the Community and Victims From the Danger of Human Trafficking.

Once it has been determined that the regulation at issue was promulgated to serve a "special need" that is distinct from ordinary law enforcement, the government must establish that the search "meets a general test of "reasonableness." *Wilcher*, 139 F.3d 373-4 (The reasonableness of a search under the Fourth amendment is an issue of law, thus the court must exercise plenary review). "Reasonableness" is widely considered to be the "touchstone" of a Fourth Amendment analysis, and because the Fourth Amendment only protects against searches that are unreasonable, "reasonableness" must be determined by the circumstances in which the search took place and the nature of this search itself. *Skinner*, 489 U.S. at 618.

To answer the question of "reasonableness," the Supreme Court has provided a three-prong inquiry: "(1) the nature of the privacy interest upon which the search intrudes; (2) the extent to which the search intrudes on the employee's privacy; and (3) the nature and immediacy of the governmental concern at issue, and the efficacy of the means employed by the government for meeting that concern." *Wilcher*, 139 F.3d at 375, citing *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995).

i. The Nature of the Privacy Interest that is Intruded Upon

It is a settled proposition of law that "[t]he Fourth Amendment does not protect all subjective expectations of privacy." *Vernonia*, 515 U.S. at 654. Rather, the Fourth Amendment only protects those expectations of privacy that society recognizes as "legitimate." *Id.* at 654, citing

T.L.O., 469 U.S. at 338. As the district court found, Larson has a privacy interest in remaining free from unreasonable searches. However, this interest is substantially outweighed by the government's interest in protecting the community from human trafficking and rescuing victims of human trafficking.

The District Court held that L.O. 1923 implicated the privacy interest of remaining free from unreasonable searches, and that the significance of the privacy interest weighed against "reasonableness." R. at 8-9. This conclusion, however, fails to recognize that Larson's interest in being free from unreasonable searches was outweighed by reasonable suspicion that he may was engaging in commercial sex acts with a minor, W.M. Among other probative facts, it is significant that there appeared to be a large age difference between Larson and W.M, a young woman who was noticeably dressed in provocative attire, and that they were checking into Stripes Motel without luggage. R. at 3. However, even where this court agrees with the District Court that Larson had an interest that was significantly impinged upon, the court should also find that this conclusion is not determinative when taken with the following two factors.

ii. The Character Of The Intrusion Upon That Interest

The second factor requires an examination of the "character of the intrusion that is complained of." *Vernonia*, 515 U.S. at 658. While "reasonableness" of a search is a legal question, "the particular character of that search is a factual matter." *Wilcher*, 139 F.3d at 375. Thus, the factual finding may only be reversed where it is clearly erroneous. *Id*.

As the fact-finder, the District Court found that L.O. 1923 limited the intrusion, thus weighing in favor of reasonability. R. at 9. In arriving at this conclusion, the district court emphasized that L.O. 1923 was valid only during the week of the All-Star Game, was limited in scope, and required "an officer to have a modicum of particularized suspicion in order to initiate a

search." *Id*. Upon, reconsideration, this court should uphold the district court's conclusion as it was correct because L.O. 1923 is limited in scope and application, and thus does not permit unfettered discretion of standardless searches.

Furthermore, it is significant that L.O. 1923 explicitly requires particularized suspicion to initiate a search. The Supreme Court has long-recognized that "individualized suspicion is usually a prerequisite to a constitutional search." *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976); *Terry v. Ohio*, 392 U.S. 1, 21 (1968). As the district court correctly noted, the presence of reasonable suspicion makes it more likely that the search was reasonable. R. at 9, relying on *Roe v. Marcotte*, 193 F.3d 72, 78 (2d Cir. 1999). Specifically, L.O. 1923 requires that the officer observe reasonable suspicion of individual(s) checking into lodging facilities, and such reasonable suspicion must go to the reasonable belief that the individual(s) are either engaging in commercial sex acts of minors or are facilitating such acts. The searches conducted by Officer Richols and Officer Nelson were clearly in accordance with this "reasonable suspicion" requirement. First, there was a noticeably age difference between Larson and W.M. *Id*. Second, W.M. was dressed provocatively in a "low-cut top and tight fitting shorts that exposed much of her legs." *Id*. Third, neither of them had any luggage. *Id*. Lastly, Larson had two tattoos that identified him as a member of the Starwood Homeboyz, which is known to be involved in human trafficking. R. at 2-3. Based on these facts, one could reasonably infer that Larson and W.M. were about to engage or facilitate commercial sex, and because W.M. appeared to be significantly younger and was dressed provocatively, it was also reasonable to infer that she may be a victim of human trafficking. Thus, Officer Richols and Officer Nelson had the requisite reasonable suspicion to conduct the search.

iii. The Nature And Immediacy Of The Government Concern At Issue

The last factor, requires the court "to consider the nature and immediacy of the governmental concern at issue." *Vernonia*, 515 U.S. at *660.* To be reasonable, the government's concern must be "compelling." *Wilcher v. City of Wilmington*, 139 F.3d 366, 377 (1998), see *Vernonia*, 515 U.S. at 663-65. The Supreme Court has stressed "that where the risk to public safety is substantial and real, suspicionless searches calibrated to the risk may rank as 'reasonable.'" *Chandler v. Miller*, 520 U.S. 305, 323 (1997).

Recent studies, in conjunction with the confirmed prevalence of human trafficking already in the Starwood Park area, prove that human trafficking was already a prevalent risk to public safety. Further, these studies show that human trafficking dramatically increased in the time surrounding large events like the All-Star game. For instance, prior to the 2015 Super Bowl, postings for sex services increased by 30.3% in the host city. R at 41. Additionally, an estimated 10,000 people were trafficked into the Miami in the days before the 2010 Super Bowl. *Id*. The effects of being the victim of human trafficking is absolutely "devastating," as proven by statistics showing that these victims are at risk for post-traumatic stress disorder and substance abuse. *Id*. In light of these studies, the Board had a compelling need to protect the community from the certain rise in human trafficking during the period surrounding the All-Star Game. *See Vernonia*, 515 U.S. at 660 (Finding no clear error in the District Court's finding immediacy where student athletes were in a state of rebellion, which displayed an immediate crisis of great proportions).

It is clear that L.O. 1923 is reasonable because the factors weigh in favor of the government interest in protecting minors from human trafficking, which significantly outweighs Larson privacy interest.

II. W.M. POSSESSED APPARENT AUTHORITY TO CONSENT TO OFFICER NELSON'S SEARCH OF THE APARTMENT AND CELL PHONE FOUND THEREIN BECAUSE THE FACTS OBTAINED BY OFFICER NELSON AT THE TIME OF THE

SEARCH WOULD HAVE LEAD A REASONABLE OFFICER TO BELIEVE THAT W.M. HAD JOINT ACCESS, CONTROL, AND USE OF BOTH THE APARTMENT AND CELL PHONE.

Under Fourth Amendment jurisprudence, a search is reasonable when conducted based on a warrant pursuant to probable cause. *See Warden v. Hayden*, 387 U.S. 294 (1967); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914). Evidence that is seized during a reasonable search is generally deemed admissible. *Katz v. United States*, 389 U.S. 347 (1967). However, this Court has long recognized that there are certain exceptions to the warrant requirement that render a search valid under the circumstances, despite the absence of a warrant at the time of the search. *See Chimel v. California*, 395 U.S. 752 (1969); *Warden v. Hayden*, 387 U.S. 294 (1967). One exception to the warrant requirement is a search pursuant to consent. *United States v. Sumlin*, 567 F.2d 684, 867 (6th Cir. 1977) ("It is well settled that a search conducted pursuant to a voluntarily obtained consent comes within an exception to the general warrant requirement"). A warrantless search is reasonable under the Fourth Amendment if consent to search is obtained from an individual authorized to give consent. *Florida v. Bostick*, 501 U.S. 429, 438 (1991). A warrantless search by a law enforcement officer does not violate the reasonableness requirement of the Fourth Amendment if the officer has obtained the consent of a third party that possesses common authority over the premises. *United States v. Matlock*, 415 U.S. 164 (1974).

Since *Matlock*, this Court has held that if a law enforcement officer reasonably believes that a third party possesses the authority to consent to a search, the search is valid even if the third party did not have actual authority to consent to the search. *Illinois v. Rodriguez*, 497 U.S. 177 (1990). Under this objective standard, police reliance on the third-party's apparent authority need not always be correct, only reasonable.

A. Officer Nelson Reasonably Believed W.M. Possessed Authority to Consent to the Search of the Apartment Because W.M. Expressed Having Joint Access and Control of the Apartment as Defendant's Live-In Girlfriend.

W.M. had apparent authority to consent to the search of the apartment at 621 Sasha Lane because W.M. expressed having joint access and control of the apartment. If a law enforcement officer reasonably believes that a third party possesses the authority to consent to a search, the search is valid even if the third party did not have actual authority to consent to the search. *Rodriguez*, 497 U.S. at 186-88. The Government has the burden of proof to establish consent of a third party. *United States v. Reid*, 226 F.3d 1020 (9th Cir. 2000).

Whether a third party has authority to consent to a search is dependent upon whether a reasonable officer can reasonably conclude that the third party maintained joint access and control of the premises. *Rodriguez*, 497 U.S. at 181. An officer's reasonable belief must be based on the facts known by the officer while conducting the search. *Id.* at 188. The officer conducting the search has a duty to investigate before relying on consent from a third-party. *United States v. Kimoana*, 383 F.3d 1215 (10th Cir. 2004).

The leading Supreme Court case on point is *Illinois v. Rodriguez*, 497 U.S. 177 (1990). The issue in *Rodriguez* was whether a warrantless entry and search are valid when based upon the consent of a third party that officers reasonably believed possessed common authority over the premises, but who did not actually have authority to consent. *Id.* at 179. This Court applied an objective standard to determine the reasonableness of the officer's belief that a third party had authority. The appropriate inquiry is "[w]ould the facts available to the officer at the moment…warrant a man of reasonable caution in the belief that the consenting party had authority over the premises." *Id.* at 188. If the answer is no, the warrantless entry and search is unlawful without further inquiry, unless authority exists. *Id.* at 188-89. If the answer is yes, the entry and

search is valid. *Id.* The Court held that the Fourth Amendment is not violated when officers made a warrantless entry and search because the officers reasonably believed that they obtained consent to search the apartment from a party with authority to consent. *Id.* at 185-89.

When deciding whether a third party maintains joint access or control over the premises, courts have rejected authority like that of a superintendent, landlord, or hotel manager. *United States v. Turner*, 23 F.Supp.3d 290, 308 (S.D.N.Y. 2014) (a father had no apparent authority to consent to a search of his son's apartment as his authority was limited to that of a superintendent). Any third party who consents to the search of property must not use the premises infrequently, but instead must have some measure of control over the premises. *Id.*

Courts have also looked at certain factors to determine whether a third party has authority to consent to the search of a residence:

> "(1) possession of a key to the premises; (2) a person's admission that she lives at the residence in question; (3) possession of a driver's license listing the residence as the driver's legal address; (4) receiving mail and bills at that residence; (5) keeping clothing at the residence; (6) having one's children reside at that address; (7) keeping personal belongings such as a diary or a pet at that residence; (8) performing household chores at the home; (9) being on the lease for the premises and/or paying rent; and (10) being allowed into the home when the owner is not present."

United States v. Groves, 530 F.3d 506, 509-10 (7th Cir. 2008). *See United States v. McGee*, 564 F.3d 136 (2d Cir. 2009) (holding that the defendant's girlfriend possessed authority to consent to the search of the apartment where the girlfriend possessed no key to the apartment, but kept

personal belongings at the apartment); *See also United States v. McCurdy*, 480 F.Supp.2d 380 (D. Me 2007) While each factor may be considered, no one factor is controlling.

This case is analogous to *Groves* where a defendant challenged the admission of evidence recovered from his apartment during the search conducted by police officers. The defendant's girlfriend consented to a search of the apartment. The officers recovered bullets from the defendant's nightstand and the defendant was subsequently charged with possession of a firearm and possession of ammunition. The court held that the evidence supported a finding that the defendant's girlfriend possessed the authority to consent to a search of the apartment. The court relied on, *inter alia*, the fact that the defendant's girlfriend kept personal belongings, including clothing, mail, and bills, at the apartment. The defendant's girlfriend also had unlimited access to the apartment. Moreover, the defendant's girlfriend admitted to cleaning the apartment on a regular basis.

Here, Officer Nelson's search of the apartment at 621 Sasha Lane did not violate the Fourth Amendment. The evidence presented is overwhelming that Officer Nelson reasonably believed that W.M. had the proper authority to consent to a search of the apartment she shared with the defendant. First, W.M. asserted that she lived in the apartment at 621 Sasha Lane with the defendant as his live-in girlfriend. R. at 29. More significantly, W.M. stated that she had lived with the defendant at the apartment for about one year. R. at 30. Additionally, W.M. possessed personal belongings like clothing and a bag within the apartment. *Id.* Although W.M. did not store many items in the apartment, it is not inconceivable that W.M. would not possess an excessive amount of belongings, especially given the fact that she had run away from her previous home just prior to moving into the apartment with the defendant. *Id.* Further, W.M. informed Officer Nelson that she received personal mail, including medical bills, at the apartment. R. at 31. Finally, W.M.

verbalized to Officer Nelson that she performed chores within the apartment while she lived there R. at 33, and has hosted guests while living at the apartment. R. at 38. W.M.'s access to the apartment was not like that of a superintendent, as she was the defendant's live-in girlfriend who maintained a high measure of control over the apartment.

The Thirteenth Circuit opines that W.M. neither pays rent nor is listed on the apartment lease. R. at 21. The Thirteenth Circuit further notes that W.M. required the use of a spare key in order to enter the apartment. *Id.* While W.M. admits to not paying rent and not being listed on the lease, the facts are not entirely clear as to whether W.M. ever possessed her own key to the shared apartment or whether she used the spare key as a temporary solution to entering the apartment on the day in question. Even assuming that W.M. does not possess her own key to the apartment, paying rent, being on the lease, and possessing a key to the residence are not required for a court to find that a third party possesses authority to consent to a search. *See United States v. Hudson*, 405 F.3d 425 (6th Cir. 2005); *United States v. Weeks*, 666 F.Supp.2d 1354 (N.D. Ga. 2009).

The facts obtained by Officer Nelson before the search of the apartment were such that a reasonable person would believe that W.M. possessed authority to consent to a search. Therefore, the search of the apartment was valid and the motion to suppress the evidence was properly denied.

B. Officer Nelson Reasonably Believed W.M. Possessed Authority to Consent to the Search of the Cell Phone Because W.M. Expressed Having Joint Access and Use of the Cell Phone She Shared with the Defendant.

W.M. had apparent authority to consent to the search of the cell phone found at the apartment at 621 Sasha Lane because Officer Nelson reasonably believed she had joint use and access to the cell phone, based on the facts available to him at the time of the search. As with the search of the apartment, if a law enforcement officer reasonably relied on the third party's apparent authority to consent to a search of property, the search is valid. *Rodriguez*, 497 U.S. at 186-88.

When a law enforcement officer is searching an object or a container, the authority to search is based on the third party's relationship to the object. *United States v. Andrus*, 483 F.3d 711 (10th Cir. 2007). Specifically, "the principle 'does not rest on the law of property…but rests rather on mutual use of the property by persons generally having joint access or control for most purposes'…" *United States v. Clutter*, 674 F.3d 980, 984 (8th Cir. 2012) (citing *Matlock*, 415 U.S. at 172 n. 7.).

When considering a third party's relationship to an electronic device, courts have weighed factors to determine whether the third party had access to the device. *Clutter*, 674 F.3d at 984 (examining whether the third party used the device, whether the device was located in a common area, and "often most importantly—whether defendant's files were password protected"); *United States v. Morgan*, 435 F.3d 660, 663-64 (6th Cir. 2006) (holding that the third party possessed apparent authority where the computer was located in a common area, was not password protected, and contained an application installed by the third party); *United States v. Buckner*, 473 F.3d 551, 555 (4th Cir. 2007) (viewing the facts in light of the totality of the circumstances and noting that the device was located in a common area, used outside of the defendant's presence, and contained no password-protected files, even though the third party's primary use was to play games). Whether an officer reasonably believed that the third party had authority to consent to the search of an electronic device depends on the facts viewed in light of the totality of the circumstances which are known to the officer at the time of the search. *Buckner*, 473 F.3d at 555.

Here, the facts known to Officer Nelson at the time of cell phone search would have lead a reasonable officer to believe that W.M. had joint access or use of the cell phone. At the time of the search, Officer Nelson knew that W.M. shared the cell phone with the defendant. R. at 4. The cell phone was located in the bedroom that W.M. shared with the defendant. R. at 33. W.M.

indicated to Officer Nelson that she had access to the cell phone and used it regularly. R. at 32. Additionally, W.M. and the defendant used the same password to access the cell phone. R. at 34. W.M. informed Officer Nelson that she was able to use the cell phone for her personal communication and to operate her social media accounts using several applications, without the defendant's assistance. R. at 13. Moreover, the lock screen of the cell phone contained a picture of W.M. *Id.* Viewing these facts in light of the totality of the circumstances, it is unquestionable that Officer Nelson's belief that W.M. possessed authority to consent to a search of the cell phone was reasonable.

Any argument that the defendant has a greater expectation of privacy in the data contained in the cell phone fails. Cell phones may differ from other physical objects, both quantitatively and qualitatively, due to its extensive storage capacity. *See Riley v. California*, 134 S.Ct. 2473, 2489 (2014). However, in this case it was evident to Officer Nelson that W.M. shared access to the cell phone, including its contents. R. at 13. Officer Nelson pointedly questioned W.M. regarding her access and use of the cell phone and W.M. specified that she and the defendant used the cell phone for the same purpose of personal communication, in addition to W.M.'s use of the cell phone for social media purposes. R. at 32. Therefore, it was reasonable for Officer Nelson to believe that W.M. possessed apparent authority.

C. W.M.'s Age does not Preclude a Finding of Authority.

W.M.'s age does not preclude a finding that she possessed authority to consent to a search. "Minority does not, per se, bar a finding of actual authority to grant third-party consent to entry." *United States v. Gutierrez-Hermosillo*, 142 F.3d 1125 (10th Cir. 1998). "Whether, as a matter of law, a minor could consent to the entry is a factor to consider in deciding the reasonableness of the officers' belief that their entry was authorized." *Id.* at 1230.Whether a search is reasonable depends

on whether consent offered by the third party was voluntary. *United States v. Guzman*, 864 F.2d 1512 (10th Cir. 1988).

Courts have looked to the totality of the circumstances to determine whether the consent by a minority was voluntary. *Gutierrez-Hermosillo*, 142 F.3d at 1230 (citing *Guzman*, 864 F.2d at 1521) In *Gutierrez-Hermosillo*, border patrol agents and drug enforcement agents arrived at a motel room after observing suspicious behavior from the defendant over the course of two days. *Id.* at 1228. When the officers arrived at the scene, they knocked on the motel room door and a female answered. *Id.* at 1229. The officers asked whether they could enter the motel room and the female who answered the door consented. *Id.* The officers' entry into the motel room ultimately led to the discovery of marijuana. *Id.*

The court held that the search was legitimate because the female who answered the door, defendant's fourteen year old daughter, possessed the legal capacity to grant third party consent to enter the defendant's hotel room. 142 F.3d at 1233. The court further held that the officers could reasonably believe that the female child had the legal capacity to give consent to the officers' entry into the motel room, making the search valid. *Id.* at 1231. The court based its decision on the fact that the defendant's daughter appeared to be fourteen years old and the officers knew that she was traveling in her father's company. *Id.* The court deemed these facts sufficient to establish the officers' reasonable belief that the defendant's daughter possessed mutual use of the hotel room. *Id.* The "[d]efendant assumed the risk that [his daughter] would permit the officers to enter the motel room." *Id.*

Other circuits have similarly held that minors may possess the capacity to consent to the search of a family residence, so long as the minors satisfy the requirements of third party consent. *Lenz v. Winburn*, 51 F.3d 1540, 1548-49 (11th Cir. 1995) (holding that legal sophistication is not

a requirement for third party consent of a minor), *Clutter*, 914 F.2d at 778 (holding that a twelve year old and fourteen year old could grant an officer access to a family residence). In *Clutter*, the court further noted that even if the facts of the cases did not permit a holding that the minors had the capacity to consent to a search, the facts were "more than adequate to support a reasonable belief" that the minors could consent. *Clutter*, 914 F.2d at 778 n. 1.

Here, as in *Gutierrez-Hermosillo*, the facts undoubtedly support Officer Nelson's reasonable belief that W.M. possessed the authority to consent to both the search of the apartment and the search of the cell phone.

CONCLUSION

For all the foregoing reasons, this Court should reverse the decision of the Thirteenth Circuit and hold that L.O. 1923 is constitutional under the special needs doctrine. Additionally, this Court should hold that W.M. possessed apparent authority to consent to the search of the apartment at 621 Sasha Lane and the cell phone found therein.

Respectfully Submitted,

_/s/_____
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