Docket NO. 03-240

IN THE

Supreme Court of the United States

Fall Term 2016

UNITED STATES OF AMERICA,

Petitioner,

— against —

WILLIAM LARSON,

Respondent.

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

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE ISSUES

I. Does the special needs exception apply to Local Ordinance 1923 when warrantless searches are conducted pursuant to the ordinance by law enforcement officers specifically to search for evidence of human trafficking by invading the privacy of individuals obtaining a room at a hotel or motel?

II. Does the apparent authority exception to the Fourth Amendment warrant requirement apply to the search of Mr. Larson's apartment when the consenter was a minor, suspected sex trafficking victim whose relationship to the apartment was ambiguous? Furthermore, does the exception apply to a search of the cell phone baring Mr. Larson's moniker in light of the heightened privacy interest inherent in cell phones?

STATEMENT OF THE FACTS

I. FACTUAL OVERVIEW

The Parties. The parties to this case are Petitioner United States of America and Respondent William Larson. Mr. Larson is a resident of Victoria City, Victoria.

Ordinance. Local Ordinance 1923 (L.O. 1923) was passed on May 5, 2015. The ordinance allows for searches of any individual obtaining a room in a hotel, motel, or other public lodging facility if an officer has reasonable suspicion to believe that the individual is: 1) a minor engaging in a commercial sex act as defined by federal law; or 2) an adult or a minor who is facilitating or attempting to facilitate the use of the minor for a commercial sex act as defined by federal law. The ordinance was only valid from Monday July 11, 2015 through Sunday July 17, 2015. The searches were limited in scope and duration, and the ordinance was only valid within Starwood Park, the three-mile radius of Cadbury Park Stadium. The ordinance was intended to curtail the spike in human trafficking that results from large sporting events, specifically the 2015 All-Star Game for the Professional Baseball Association.

Warrantless Search of Mr. Larson. On July 12, 2015, Officers Joseph Richols and Zachary Nelson were inspecting patrons as they checked in to the Stripes Hotel in the middle of Starwood Park. At about 11:22 P.M., William Larson and sixteen-year-old W.M. entered the hotel to rent a room. Officers noticed tattoos on Mr. Larson that indicated he was a member of the Starwood Homeboys street gang. Offices believed they were authorized to search Mr. Larson under L.O. 1923. The government concedes they did not have probable cause to initiate the search. Officers searched Mr. Larson and found nine condoms, a butterfly knife, lube, two oxycodone pills, a list of names and corresponding allotments of time, and $600 in cash. Mr. Larson was immediately arrested for sex trafficking of a minor in violation of 18 U.S.C. §1591(a)(1).

Warrantless Search of Mr. Larson's apartment. Officer Nelson determined W.M. to be a victim of human trafficking, as opposed to a perpetrator. W.M. told the officer she lived in an apartment with Mr. Larson a few blocks away. Officer Nelson asked W.M. about her relationship with Mr. Larson and learned that W.M. believed them to be in both a business and romantic relationship. She also told the officer she kept some belongings and received mail at his apartment. He asked W.M. for her consent to search Mr. Larson's apartment. She agreed and led him to the residence. Officer Nelson observed W.M. use a spare key hidden underneath a fake rock to open the door. Upon searching the premises, Officer Nelson located a black semi-automatic handgun with a scratched off serial number under the bed.

Warrantless Search of Mr. Larson's cell phone. Officer Nelson located a smart phone on a nightstand, along with a men's watch and men's reading glasses. The cell phone had a custom cover depicting the letters "S" and "W" wrapped around a wizard's hat. The officer recognized the design to be identical to one of Mr. Larson's tattoos. W.M. claimed that she and Mr. Larson shared the cellphone. Though Mr. Larson purchased the device, she stated she was allowed to use social media applications and make some personal communications. Officer Nelson asked if there was a password, and W.M. replied that the password was 4-11-5-11. The officer knew the code to be the same numbers tattooed on the back of Mr. Larson's neck. Office Nelson asked W.M. if he could search Mr. Larson's phone and she consented. Upon searching Mr. Larson's phone, the officer discovered several photos that depicted Mr. Larson with the gun found underneath the bed, as well as suggestive photos of W.M. and a video of Mr. Larson rapping.

Charges. On August 1, 2015, a federal grand jury returned an indictment against Mr. Larson for 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).

II. PROCEDURAL HISTORY

Mr. Larson Moves to Suppress Evidence. The District Court denied Mr. Larson's Motion to Suppress, finding that the Government's warrantless search was justified under the special needs exception to the warrant requirement of the Fourth Amendment. The District Court also held that W.M. possessed apparent authority to consent to the searches of Mr. Larson's apartment and cell phone, and the search was conducted in accordance with the Fourth Amendment.

Mr. Larson Appeals Motion to Suppress. The Court of Appeals reversed the District Court's denial of the Motion to Suppress. The court held that the warrantless search conducted pursuant to L.O. 1923 was unconstitutional and did not satisfy the special needs exception. There was no purpose distinct from general law enforcement that could justify the warrantless search. In addition, the court held that W.M. was unable to consent to the searches of Mr. Larson's apartment and phone because the facts available to the officer at the time of consent would not lead an officer of reasonable caution to believe that the consenting party had authority over the property to be searched.

Petition for Certiorari Granted. Certiorari was granted by the Court to determine whether the warrantless searches conducted pursuant to L.O. 1923 can be justified under the special needs exception and if W.M. possessed the apparent authority to consent to Officer Nelson's search of Mr. Larson's apartment and phone.

SUMMARY OF THE ARGUMENT

I. SPECIAL NEEDS EXCEPTION

In order for the government to justify warrantless searches under the special needs exception, the government must first establish that a special need exists apart from normal law enforcement. Here, the asserted purpose is to mitigate the spike in human trafficking that accompanies large sporting events, a clear law enforcement purpose. The government asserts that the ultimate purpose is to help victims of human trafficking before the crime actually occurs, however, this purpose is indistinguishable from general law enforcement. The focus of the inquiry must be on the immediate, primary purpose of the ordinance, or in other words, preventing crime. The extensive involvement of law enforcement in these particular searches further demonstrates that there is no special need. The Court need not look to the second prong of the special needs analysis because the government fails to establish a special need.

If the Court does find that the ordinance serves a special need, then the Court must next determine whether a warrant requirement is impracticable. Under the second prong of the special needs analysis, the court must balance the privacy interest, the nature of the intrusion, and the nature and immediacy of the government's interest to determine whether a warrant or a higher level of suspicion is required. Here, the government fails to justify the lack of warrant because the nature of the government's interest does not outweigh the other factors. Therefore, the special needs exception must not apply to L.O. 1923.

II. APPARENT AUTHORITY EXCEPTION

To justify a warrantless search under the third-party consent exception to the Fourth Amendment, the government must prove the third-party possessed either "actual common authority" or "apparent authority" to consent. Common authority can be deduced from the

mutual use of property by persons having joint access or control for most purposes. A consent search is valid under the apparent authority doctrine as long as an officer reasonably believes that the consenting party possesses the requisite "common authority" to consent to a search. Here, the State declined to argue that W.M. possessed actual common authority over Mr. Larson's apartment or cell phone. Instead, the State maintains W.M. possessed apparent authority because the officer reasonably believed she maintained authority over the property. Under both common authority and apparent authority doctrines, however, the State fails to meet its burden.

The apparent authority exception did not apply in the present case because no police officer of reasonable caution would have believed that W.M. possessed common authority over the property, considering the totality of the circumstances known at the time the search commenced. Crucially, W.M. was a minor, suspected sex trafficking victim, and did not possess a key to the apartment she called "home." The ambiguity surrounding her connection to the apartment cried out for further inquiry. Furthermore, the facts known to Officer Nelson indicated the cell phone belonged to Mr. Larson. It was found on his nightstand, bared his moniker, and Mr. Larson alone paid for the device. Therefore, the warrantless search was unreasonable. This is especially true in light of the Court's recent decision in *Riley*, which recognized a heightened privacy interest implicated in a person's cell phone. The State fails its burden to prove apparent authority existed, and thus the exception to the warrant requirement does not apply.

STANDARD OF REVIEW

Courts review questions of law de novo. *See Ornelas v. United States*, 517 U.S. 690, 692 (1996). Each Fourth Amendment issue is a question of law. The District Court's denial of a motion to suppress is reviewed de novo. *United States v. Lopez*, 474 F.3d 1208, 1212 (9th Cir. 2007). Thus, each issue is subject to de novo review.

ARGUMENT

The Court of Appeals for the Thirteenth Circuit properly reversed the lower court's denial of the motion to suppress because the warrantless searches conducted in reliance on the special needs and apparent authority exceptions were unconstitutional. Under the Fourth Amendment of the United States Constitution, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" is fundamental. U.S. Const. amend. IV. There is a strong presumption for warrants, and "searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment." *Katz v. United States*, 389 U.S. 347, 357 (1967). The warrant requirement and need for probable cause can only be circumvented by "few specifically established and well-delineated exceptions." *Id.*

I. THE SPECIAL NEEDS EXCEPTION IS WHOLLY INAPPLICABLE TO THE WARRANTLESS SEARCHES CONDUCTED PURSUANT TO L.O. 1923.

One such exception arose from Justice Blackmun's concurrence in *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985). Justice Blackmun stated, "only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers." *Id*. The Court of Appeals decision with regard to the special needs exception should be affirmed for two reasons. First, the government cannot demonstrate a special need apart from the normal needs of law enforcement to justify the searches under L.O. 1923. Second, the government cannot demonstrate that the government's interests overcome the serious nature of the intrusion, the individual's privacy rights that are violated, and the lack of immediacy of the problem the ordinance seeks to prevent.

A. The Special Needs Exception Does Not Apply Because the Ordinance's Primary and Immediate Purpose is General Law Enforcement.

The reversal of the lower court's decision was proper because L.O. 1923 is used solely to prevent crime, a "quintessential general law enforcement purpose." *United States v. Scott*, 450 F.3d 863, 870 (9th Cir. 2006). If the purpose of a policy, program, or ordinance is indistinguishable from a general interest in crime control, then the special needs exception does not apply. *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000). In addition, when the "central and indispensable feature of the policy from its inception [is] the use of law enforcement," the exception is inapplicable. *Ferguson v. City of Charleston*, 532 U.S. 67, 80 (2001). The focus of the inquiry should be on the immediate purpose rather than on the ultimate goal of the policy, and the purpose must be more than merely "symbolic." *Id*. at 84; *Chandler v. Miller*, 520 U.S. 305, 322 (1997). The Court must conduct a close review of all the evidence presented in order to determine the primary purpose of the proposed scheme. *Ferguson*, 532 U.S. at 81.

Courts have failed to recognize a special need when the primary purpose is to detect evidence of ordinary criminal wrongdoing, or when law enforcement is heavily involved in the search. *Ferguson*, 532 U.S. at 86; *Edmond*, 531 U.S. at 48; *Gates v. Tex. Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 424 (5th Cir. 2008). In *Edmond*, the Court held that checkpoint stops used by the City of Indianapolis to discover and intercept illegal narcotics did not serve a special need. 531 U.S. at 48. The purpose of the checkpoint was indistinguishable from the general interest in crime control, regardless of the gravity of the threat. *Id*. There, the officers looked for signs of impairment from the drivers, and a narcotics dog sniffed the outside of the car for evidence of drugs. *Id*. at 35. In *Ferguson*, the Court struck down a Charleston public hospital's policy of sending drug test results to the police. 532 U.S. at 86. While the hospital argued their ultimate purpose was to ensure the health of both the mother and child, the Court

held that law enforcement's extensive involvement at every step established that the overriding, immediate purpose of the policy was to serve the needs of law enforcement. *Id*. at 84–85. In *Gates*, the Fifth Circuit held that home visits to investigate possible child abuse were not separate from general law enforcement. 537 F.3d at 424. Law enforcement was too intertwined to constitute a special need since Texas law required reporting of all child abuse cases to law enforcement. *Id.*

Courts will only find that there is a special need when a program is not intended to assist in prosecution of a crime, but rather to serve another identifiable, immediate purpose. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 621 (1989); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989); *Lynch v. City of New York*, 737 F.3d 150, 162 (2d Cir. 2013). *MacWade v. Kelly*, 460 F.3d 260, 271 (2d Cir. 2006); *Nicholas v. Goord*, 430 F.3d 652, 669 (2d Cir. 2005). In *Skinner*, the Court held that drug testing railroad employees engaged in safety-sensitive tasks in order to ensure the safety of the traveling public, constituted a special need. 489 U.S. at 621. The exception only applied when there were serious safety concerns and the testing would not assist in the prosecution of employees. *Id*. In *Von Raab*, the Court held that drug testing of Customs employees for a promotion to positions directly involved in the interdiction of illegal drugs and requiring employees to carry firearms, also amounted to a special need. 489 U.S. at 666. Notably, the results of the tests were not intended to be used in a criminal prosecution against the employee. *Id*. In *Lynch*, the special needs exception prevailed when police officers were required to take a breathalyzer test after an officer involved shooting. 737 F.3d at 162. A sobriety determination served a purpose distinct from law enforcement by determining whether the officer was fit for duty at the time he or she discharged a weapon. *Id*. In *MacWade*, the suspicionless searches of subway passengers' bags constituted a special need

because the purpose of the search was to prevent terrorist attacks as opposed to a typical criminal investigation. 460 F.3d at 271. There, the searches were conducted specifically to locate explosives. *Id.* Lastly in *Nicholas*, New York's DNA-database statute was upheld, because the DNA was not intended to be used to investigate whether a particular individual committed a crime, but rather to create a database to solve crimes yet to be committed. 430 F.3d at 669.

Here, L.O. 1923's primary purpose is to detect, search, and arrest perpetrators of human trafficking, and it does not constitute a special need. The ordinance was enacted in order to curtail a spike in crime, specifically human trafficking, a goal that is indistinguishable from general crime control. *See Edmond*, 531 U.S. at 35; R. at 2. The gravity of the threat cannot immunize warrantless searches under L.O. 1923. *See Edmond*, 531 U.S. at 48. The extent of law enforcement involvement requires a conclusion that the searches are meant to serve the needs of law enforcement. *See Ferguson*, 532 U.S. at 84–85; *Gates*, 537 F.3d at 424; R. at 2. The immediate purpose of the ordinance, to find evidence of human trafficking and apprehend perpetrators, is what controls here. *See Ferguson*, 532 U.S. at 84–85; R. at 2. Accordingly, L.O. 1923 does not serve a special need apart from law enforcement.

L.O. 1923 is distinguishable from policies that serve a special need because there is no purpose for the ordinance aside from general law enforcement. The ordinance specifically subjects individuals to searches that may lead to an arrest and prosecution for human trafficking. *See Von Raab*, 489 U.S. at 666; R. at 2. Rather than attempting to ensure overall public safety, the ordinance is intended to seek out those who might be gang members committing crimes. *See Skinner*, 489 U.S. at 621; R. at 2. The primary and immediate purpose of the warrantless searches under L.O. 1923 is to search for evidence of human trafficking on an individual. *See Lynch*, 737 F.3d at 162; R. at 2. The officers look for general evidence of human trafficking, as

opposed to protecting the public from acts of terrorism by specifically searching for explosives. *See MacWade*, 460 F.3d at 271; R. at 2. Most significantly, the purpose of the warrantless searches in the present case is to investigate a particular person for a crime at that particular moment, disqualifying the searches under the special needs analysis. *See Nicholas*, 430 F.3d at 669; R. at 2.

Since the government failed to demonstrate a special need distinct from general law enforcement, the Court need not look to the second prong of the analysis to conduct the balancing test. The warrantless search of Mr. Larson, as well as any search conducted pursuant to L.O. 1923, cannot be justified under the special needs exception to the warrant requirement.

B. Expansion of the Special Needs Exception to L.O. 1923 Would Set a Dangerous Precedent and Further Erode Fourth Amendment Protections.

Given the limited number of contexts in which the special needs exception has been successfully applied, application of the exception to L.O. 1923 would set a dangerous precedent. The special needs exception has long been criticized for "making it remarkably easy for the state to bypass the rigorous requirements of a warrant and probable cause in a large and growing numbers of contexts." Jennifer Y. Buffaloe, *"Special Needs" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule*, 32 Harv. C.R.-C.L. L. Rev. 529, 531 (1997). The common link between cases in which the special needs exception has been applied is that a government actor is not specifically searching for evidence of a crime. *Id*. Here, the government asserts the purpose behind the ordinance is to protect victims of human trafficking, and this is somehow distinct from normal law enforcement. R. at 3. Similar to the road blocks in *Edmond*, resting the case on such a high level of generality would leave little check on the abilities of the government to conduct warrantless searches for almost any conceivable law enforcement purpose. *See Edmond*, 531 U.S. at 42. In *Ferguson*, the Court held that "because

law enforcement involvement always serves some broader social purpose or objective, under [the government's] view, virtually any nonconsensual, suspicionless search could be immunized by defining the search solely in terms of its ultimate purpose." 532 U.S. at 84. Evidence found as a result of these warrantless searches will likely support a subsequent prosecution of an individual. *See id*. at 84–85. Thus, the ordinance must not be allowed to circumvent the warrant requirement through the special needs exception.

The balancing test conducted in the special needs analysis is far too malleable to properly permit warrantless searches under L.O. 1923. Buffaloe, *supra* at 557. The balancing test too often allows judges to minimize the privacy interests of the individual by focusing solely on the government's interest. *See id*. Consequently, "without a consistent methodology, [the special needs exception] will inevitably depend on how particular judges weigh the claims of the disputing parties." Kenneth Nuger, *Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis*, 32 Santa Clara L. Rev. 89, 120 (1992). Applying the exception to L.O. 1923 ignores the "historical justification of the Fourth Amendment" and will result in numerous immunized, warrantless searches. *Id*. at 130. Judges, as the "Guardians of the Constitution," must strike down any instances of governmental overreach. *Id*. at 135. If the special needs exception is permitted to grow in this context, the government will be free to justify all warrantless searches so long as they can articulate a "special need."

C. The Special Needs Exception Does Not Apply Because the Government Has Failed to Establish That an Ordinary Warrant Requirement is Impracticable.

Even if the Court finds a special need to exist, the special needs exception does not apply because the government has not proven that the balancing of interests involved justifies the lack of warrant. In some instances, the government is required to first establish that the warrant or probable cause requirement is impracticable before undergoing the balancing test. *Henderson v.*

City of Semi Valley, 305 F.3d 1052, 1057 (9th Cir. 2002). The three factors typically weighed under this prong include the nature of the privacy interest, the character of the intrusion, and the nature and immediacy of the governmental concern. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664 (1995). The necessary inquiry is whether the government's interest is important enough to justify the intrusion given the other factors. *Id*. at 661. The balancing test decides whether "complete abrogation of the probable cause requirement or merely the application of a lesser standard of reasonableness" should apply. *Portillo v. United States Dist. Court*, 15 F.3d 819, 823 (9th Cir. 1994).

Courts have found that a lack of warrant or a heightened level of suspicion was unconstitutional when the serious intrusion on an individual's expectation of privacy was not overcome by the government's advanced interest. *Scott*, 450 F.3d at 872; *Doe v. Little Rock Sch. Dist.*, 380 F.3d 349, 356 (8th Cir. 2004); *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 407 (5th Cir. 2002). In *Scott*, the Ninth Circuit held that random drug testing of individuals on pre-trial release and warrantless searches of their homes to ensure their appearance at court was unconstitutional. 450 F.3d at 872. The government's interest did not overcome the serious privacy interest surrounding the individual's home, the presumption of innocence surrounding all citizens, and the nature of the intrusion of the drug tests. *Id*. In *Doe*, the suspicionless search of a student's belongings was found to be unreasonable. 380 F.3d at 356. The fact that the nature of the intrusion effectively reduced her expectation of privacy to nothing could not be justified by the school's general desire to curtail weapons and drugs at school without any immediate threat. *Id*. In addition, the search constituted an even more significant privacy intrusion because the individual was subsequently prosecuted based on the contents of her purse. *Id*. at 355. Lastly, in *Roe* the court held that without exigent circumstances, social

workers had enough time to obtain a warrant or court order to search the children for signs of sexual abuse. 299 F.3d at 407. Despite the serious nature of the allegations and the fact that children were the ones to be searched, the lack of an immediate threat allowed for ample time to acquire a warrant or court order. *Id*.

The Supreme Court has excused the warrant or probable cause requirement in few contexts, typically when the individual has a diminished expectation of privacy. *Vernonia*, 515 U.S. at 666; *Skinner*, 489 U.S. at 624; *Von Raab*, 489 U.S. at 679. One such context is in the drug testing of high school student athletes, in which a warrant requirement would be impracticable. *Vernonia*, 515 U.S. at 666. In *Vernonia*, the Court held that the intrusion on the privacy rights of students was overcome by the government's concern with deterring drug use amongst students, and the immediacy of the negative effects of such use on student athletes. *Id*. at 664. The Court, however, stressed that the holding centered around the fact that the subjects of the policy were children and they were committed to the temporary custody of the state. *Id*. at 654. In *Skinner*, a warrant was not required to drug test railroad employees because it would significantly hinder or frustrate the objectives of the testing program, and the regulations authorizing the testing adequately addressed the same concerns as a warrant. 489 U.S. at 624. Additionally, the reduced expectation of privacy of the employees, the nature of the public safety concerns, and the limited nature of the intrusion satisfied the balancing test. *Id*. at 634. Similarly, in *Von Raab*, the drug testing of United States Customs Service employees was found to be justified because a warrant "would provide little or no additional protection of personal privacy" due to the general awareness of the testing requirement amongst employees. 489 U.S. at 667. Further, the Court found that the Customs program's interest in deterring drug use amongst

employees outweighed the diminished privacy interests of the employees directly involved in drug interdiction. *Id*. at 679.

Another limited context in which the special needs exception has been applied to circumvent the Warrant Clause is in the search of probationers. *Griffin v. Wis.*, 483 U.S. 868, 876 (1987). In *Griffin*, the Court held that a warrant or probable cause requirement would "interfere to an appreciable degree with the probation system" and allow the magistrate rather than the probation officer to determine how closely a probationer should be monitored. *Id*. The Court stressed that status as a probationer means that probationers do not enjoy "the absolute liberty to which every citizen is entitled," and any privacy concerns were overcome by the government's interest in supervising probationers. *Id*. at 874 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)).

One last, major category in which the Supreme Court has permitted warrantless searches is in the collection of DNA. *Maryland v. King*, 133 S. Ct. 1958, 1980 (2013); *United States v. Amerson*, 483 F.3d 73, 89 (2d Cir. 2007). In *Maryland*, the Court held that the strong interest in identifying arrestees outweighed the privacy interests of individuals who have been arrested. *Id*. In *Amerson*, warrantless DNA collection of convicted felons was reasonable in order to create a national database of felons. 483 F.3d at 89. The focus was on the reduced expectation of privacy of felons and the limited nature of the intrusion of the DNA collection. *Id*.

In the present case, the balancing of the privacy interest, nature of the intrusion, and the nature and immediacy of the government concern at issue does not render a warrant requirement impracticable. The nature of the privacy interest here is significant considering that the individuals to be searched are free citizens. *See Scott*, 450 F.3d at 872; R. at 2. While the searches are not of one's home, obtaining a hotel room for the night should not result in a

diminished expectation of privacy. *See id*. Even the level of individualized suspicion that is required to conduct a search pursuant to the ordinance cannot justify the warrantless searches given the presumption of innocence. *See id*.; R. at 2. While the nature of the government's interest is great, the lack of immediacy bars application of the special needs exception because there is still adequate time to acquire a warrant. *See Roe*, 299 F.3d at 407. Most significantly, the nature of the intrusion is overwhelming, considering that the evidence found as a result of the searches will likely result in prosecution for a crime. *Doe*, 380 F.3d at 356; R. at 2. In sum, the government fails the balancing test of interests involved.

L.O. 1923 is distinguishable from cases that have found a warrant requirement or a higher level of suspicion to be impracticable. Here, the individuals obtaining a hotel room have not subjected themselves to any sort of control by an authority figure. *See Vernonia*, 515 U.S. at. 654; R. at 2. Petitioner may argue that the searches are conducted in the interest of public safety, however, such a broad policy cannot justify the intrusion without a diminished expectation of privacy. *See Von Raab*, 489 U.S. at 679; *Skinner*, 489 U.S. at 634; R. at 2. Though an argument can always be made that a warrant requirement would frustrate the purpose of the ordinance, the same evidence of human trafficking would still likely be on the suspect's person even after establishing probable cause or acquiring a warrant. *See Skinner*, 489 U.S. at 623. Additionally, a warrant or requirement for probable cause would absolutely provide additional, crucial privacy protections. *See Von Raab*, 489 U.S. at 667. As opposed to probationers, individuals obtaining a hotel room should retain their absolute liberty, which every citizen is entitled to under the Constitution. *See Griffin*, 483 U.S. at 874. The searches under L.O. 1923 go significantly beyond obtaining information for identification purposes and in fact specifically search for evidence of criminal wrongdoing on a person, which is a much more serious privacy intrusion than can be

justified by the special needs exception. *See Maryland*, 133 S. Ct. at 1980; R. at 2. Lastly, the amount of discretion officers have to conduct searches under L.O. 1923 must be checked by a warrant requirement. *See Amerson*, 483 F.3d at 82; R. at 2. For these reasons, the Court should affirm the Court of Appeals' decision and suppress all evidence acquired from the illegal, warrantless searches under L.O.1923.

II. THE WARRANTLESS SEARCHES OF MR. LARSON'S APARTMENT AND CELL PHONE WERE UNCONSTITUTIONAL BECAUSE THE APPARENT AUTHORITY EXCPETION DID NOT APPLY.

The Thirteenth Circuit correctly reversed the lower court's denial of the motion to suppress because W.M. did not possess apparent authority to consent to the apartment and cell phone searches, and therefore the warrantless intrusions were unconstitutional. The Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects. *See* U.S. Const. amend. IV. The ultimate touchstone of the Fourth Amendment, however, is reasonableness. *See Riley v. California*, 134 S. Ct. 2473, 2482 (2014).

Yet another exception to the general warrant requirement permits warrantless searches when voluntary consent has been obtained, either from the individual whose property is searched, or from a third-party who possesses common authority over the premises. *See United States v. Matlock*, 415 U.S. 164, 170 (1974). Common authority must be proven by the government, and can be deduced from the "mutual use of the property by persons having joint access or control for most purposes." *See Ill. v. Rodriguez*, 497 U.S. 177, 181 (1990). The Supreme Court made clear that the consent doctrine is intended to function as a "jealously and carefully drawn exception" to the warrant requirement. *See Ga. v. Randolph*, 547 U.S. 103, 109 (2006). Nevertheless, the Court expanded the third-party consent exception in *Rodriguez*,

holding that a third-party can give effective consent even though the third-party has no actual authority to give consent. *See* 497 U.S. at 182.

A search performed with consent is valid under the "apparent authority" doctrine as long as a police officer reasonably believes that the consenting party has authority to give consent to search. *See id.* at 186. The burden to prove the effectiveness of third-party consent rests with the State. *See id.* at 181. Determining whether apparent authority exists is an objective, totality of the circumstances inquiry into whether the facts available to an officer prior to a search would lead a reasonable officer to believe the third-party had authority to consent. *See United States v. Andrus*, 483 F.3d 711, 716-17 (10th Cir. 2007) (citing *Rodriguez*, 497 U.S. at 188). This objective reasonableness standard is required, because even when the invitation is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could be such that a reasonable person would doubt its truth. *See Rodriguez*, 497 U.S. at 188.

Therefore, the question before the Court is whether Officer Nelson acted reasonably when he accepted the third-party consent of a sixteen-year-old runaway he suspected to be a victim of sex trafficking. No reasonable officer would believe that W.M. possessed the requisite authority to consent to the warrantless searches, and consequently, the Court should uphold the ruling of the Thirteenth Circuit and grant Respondent's motion to suppress.

A. The Search of the Apartment Was Unconstitutional Because No Reasonable Person Would Have Believed W.M. Possessed the Authority to Consent.

The reversal of the lower court's decision was proper because Officer Larson's belief that W.M. maintained authority over Mr. Larson's apartment was not objectively reasonable. Considering the totality of the circumstances known to Officer Larson at the commencement of the search, no officer of "reasonable caution" would have believed W.M. could give such consent. *See Rodriguez*, 497 U.S. at 188.

Courts have found that the State's burden to prove the effectiveness of consent cannot be met when an officer, faced with an ambiguous situation, nevertheless proceeds without making further inquiry. *See United States v. Peyton*, 745 F.3d 546, 554 (D.C. Cir. 2014); *United States v. Kimoana,* 383 F.3d 1215, 1222 (10th Cir. 2004). The Tenth Circuit found such an ambiguous situation to constitute an unlawful third-party search when a friend who was merely present at a defendant's apartment with her children consented to a search. *See United States v. Cos*, 498 F.3d 1115, 1119 (10th Cir. 2007) (granting the motion to suppress). The Ninth Circuit similarly found it was unreasonable for police to believe an individual who answered the door to an apartment and appeared to be alone had authority to consent to a search when police knew a different person lived at the residence, and the individual's name did not appear on the lease. *See United States v. Reid*, 226 F.3d 1020, 1023 (9th Cir. 2000). Sometimes the facts known by the police cry out for further inquiry, and when this is the case, it is not reasonable for the police to proceed on the theory that "ignorance is bliss." *See* 4 Wayne R. LaFave, Search and Seizure § 8.3(g), at 180 (4th ed. 2004).

The State posits two conflicting theories: first, that W.M. was a minor, sex trafficking victim who was coerced into prostitution by Mr. Larson; and second, that W.M. is Mr. Larson's live-in girlfriend with the authority to consent to a search of an apartment she shares. R. at 4, 29-31. Officer Nelson's contradictory beliefs created ambiguity surrounding W.M.'s relationship to the apartment and authority to consent, and thus, he should have made "further inquiry." *See Kimoana,* 383 F.3d at 1222.

Though the Court has yet to fully articulate the relevant factors in the totality of the circumstances analysis, the Seventh Circuit Court of Appeals compiled a non-exhaustive list of ten factors to help determine whether apparent authority existed in a given situation. *See United*

States v. Groves, 470 F.3d 311, 319 (7th Cir. 2006). That court stated that acts that support a finding of actual or apparent authority *include* but are not limited to: (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. *See id.*

Courts have found the possession of a key to be particularly demonstrative of authority to consent. *See United States v. McGee*, 564 F.3d 136, 141 (2d Cir. 2009); *United States v. Goins*, 437 F.3d 644, 648 (7th Cir. 2006). The Second Circuit held that the presence or absence of locks and keys can provide important clues as to whether an owner has authorized access by the third-person who consents to entry by the police. *See McGee*, 564 F.3d at 141. Additionally, the Seventh Circuit found that officers reasonably believed a girlfriend had actual authority to consent to an apartment search when the girlfriend had a key to the apartment, possessions within the apartment, and represented that she lived there on-and-off and frequently cleaned and did household chores. *See Goins*, 437 F.3d at 648.

Another critical circumstance to consider is the age of the consenter. *United States v. Sanchez*, 608 F.3d 685, 686 (10th Cir. 2010). While several Circuit Courts have recognized that minors *may* have the requisite authority to consent to a search of their residences, it is also crucial to distinguish that the minors discussed in those cases were the children of adults that also occupied the premises to be searched. *See United States v. Gutierrez-Hermosillo*, 142 F.3d 1225, 1231 (10th Cir. 1998); *see also Lenz v. Winburn*, 51 F.3d 1540, 1549 (11th Cir. 1995).

Examining the totality of the circumstances known to Officer Nelson at the time he sought consent from W.M., no reasonable officer under the circumstances could have concluded that she maintained authority over Mr. Larson's apartment. *See Andrus*, 483 F.3d at 716-17. W.M. displayed only a few of the factors enunciated in *Groves*, and the factors must be viewed in their totality, including Officer Nelson's suspicion that she was a sex trafficking victim. *See Groves*, 470 F.3d at 319; R. at 29. While W.M. claimed to live at the apartment, her name did not appear on the lease and she did not pay any rent. R. at 29, 33. Though she kept belongings at the premises, as a runaway, all of her personal items fit within the confines of a duffle-bag. R. at 30.

Furthermore, W.M. was a minor, and unlike the minors in *Sanchez, Gutierrez-Hermosillo* and *Lenz*, she was not the child of an adult living at the residence, but instead either Mr. Larson's "victim" or his "girlfriend," depending on the State's theory. *See* 608 F.3d at 686; 142 F.3d at 1231; 51 F.3d at 1549; R. at 29. All of these facts were known to Office Nelson prior to the warrantless search. R. at 29-31. At the very least, these inconsistent factors give rise to ambiguity, and yet Officer Nelson proceeded without further inquiry. *See Kimoana,* 383 F.3d at 1222.

The sole fact that W.M. did not possess her own key to the apartment should have indicated to Officer Nelson her lack of authority to consent to its search. *See McGee*, 564 F.3d at 141; R. at 33. As the Second Circuit held, the absence of a key indicates that an owner has not authorized access to the third-person who consents to entry. *See id.* at 141. Though W.M.'s situation is similar to the girlfriend in *Goins*, in that she left possessions at the apartment and completed household chores, W.M. did not possess a key to the apartment, a crucial factor to the Seventh Circuit's decision. *See Goins*, 437 F.3d at 648; R. at 30, 33.

In light of these facts, it is unquestionable that no apparent authority existed, because no officer of "reasonable caution" would have believed W.M. possessed the actual authority to consent. *See Garcia*, 497 U.S. at 188. Thus, no exception to the warrant requirement applies, and the motion to suppress all evidence gathered at the apartment should be granted.

B. The Warrantless Search of the Cell Phone Was Unconstitutional Given the Heightened Privacy Interest Inherent in Cell Phones.

Given the circumstances known to Officer Nelson prior to the cell phone search, it was patently unreasonable to believe W.M. possessed authority to consent. This is especially true in light of the Court's unanimous decision in *Riley*, recognizing a heightened privacy interest implicated in a person's cell phone. *See* 134 S. Ct. at 2491. The Court held that officers "must *generally* secure a warrant before conducting a data search on cell phones." *Id.* at 2485. Moreover, "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house." *Id.* at 2491. While the exception for "exigent circumstances" survived, the Court in *Riley* held that the "search incident to arrest" exception to the warrant requirement cannot apply to the search of a cellphone. *See id.* at 2494. Cell phones are not just another technological convenience, but as the Court aptly recognized, they hold for many Americans "the privacies of life." *See id.* at 2495. While the Court acknowledged that its decision in *Riley* would impact law enforcement's ability to combat crime, the Court emphasized that "privacy comes at a cost." *See id.* at 2493. Furthermore, the same recent technological advances make the process of obtaining a warrant itself more efficient. *See id.*

In the wake of *Riley*, it is logical suggest that other exceptions to the warrant requirement may fall by the wayside when it comes to cell phones searches. *See id*. In fact, many legal scholars contend that *Riley* created a bright-line rule requiring a warrant to search a cell phone in all but exigent circumstances. *See* Katharine Saphner, You Should Be Free To Talk the Talk and

Walk the Walk: Applying Riley v. California to Smart Activity Trackers, 100 Minn. L. Rev. 1689, 1718-1719 (2016); Leslie A. Shoebotham, The Strife of Riley: The Search-Incident Consequences of Making an Easy Case Simple, 75 La. L. Rev. 29, 33 (2014). The Court should further safeguard privacy interests and, in keeping with the bright-line rule, refuse to apply the apparent authority exception to cell phones.

Few courts have yet to address the issue of apparent authority exceptions as applied to the warrantless searches of cell phones, perhaps because it is uncommon for two people to have joint access and control over the same cell phone. *See* European Association of Methodology, Improving Survey Method: Lessons from Recent Research 57 (Uwe Engel et al. eds., 2015) (finding that only 8% of mobile-only users shared a cell phone in 2007). However, the Court made clear in *Riley* that cell phones are not containers, or even computers, but instead implicate an even more significant privacy interest. *See Riley*, 134 S. Ct. at 2491; *see also* Elizabeth S. Myers, Containing Cell Phones? Restoring the Balance Between Privacy and Government Interests in Fourth Amendment Cell Phone Searches and Seizures, 48 Suffolk U. L. Rev. 203, 221 (2015).

If the Court decides to apply the apparent authority exception to cell phone searches, there is very little precedent concerning cell phones to guide the analysis. However, several Circuit Courts have addressed cases regarding the apparent authority exception as applied to computers. *See Andrus*, 483 F.3d at 717; *United States v. Morgan*, 435 F.3d 660, 663-64 (6th Cir. 2006). The Tenth Circuit Court of Appeals found that an elderly father possessed apparent authority to consent to a search of his son's computer when officers knew that the father owned the house, paid the internet and cable bill, and had access to the son's room at will. *See Andrus*, 483 F.3d at 717. Similarly, the Sixth Circuit found a wife to have apparent authority over a

computer she shared with her husband when officers knew the computer was located in a common area, the wife had access to and used the computer, husband and wife did not have separate usernames or passwords, and the wife installed spyware software on to the computer. *See Morgan*, 435 F.3d at 663-64.

Additionally, the Fourth Circuit found a wife to have apparent authority over her husband's computer when the officers knew that the computer was located in a common area of the home and the computer was on and the screen lit despite the husband's absence. *See United States v. Buckner*, 473 F.3d 551, 555 (4th Cir. 2007). The court further considered that the fraudulent activity had been conducted from the computer using accounts in the wife's name, the computer was leased solely in the wife's name, and she had the ability to return the computer to the rental agency at any time, without her husband's knowledge or consent. *See id.*

The Federal Courts of Appeals have also provided guidance through a line of "lockbox" cases. *See Peyton*, 745 F.3d at 553-554; *United States v. Taylor*, 600 F.3d 678, 679 (6th Cir. 2010). The D.C. Circuit found that a great-grandmother did not possess the apparent authority to consent to a search of a shoebox when the police knew that some spaces in the apartment were used exclusively by the defendant, and that the defendant kept his "personal property" in the area where the shoebox was found. *Peyton*, 745 F.3d at 553-554. That court explained that while two individuals may agree to share a room, "they often retain private interior spaces—a closet, a footlocker, a dresser drawer—that they do not let the other use and that they do not assume the other will allow a third-party to inspect." *Id*. Moreover, the Sixth Circuit found ambiguity to exist as to whether a cotenant had authority over a shoebox when the appearance of the shoebox itself and the items in the room where it was found indicated that the box did not belong to the cotenant, officers believed the shoebox belonged to defendant before they opened it, and the

defendant took precautions to manifest his expectations of privacy. *Taylor*, 600 F.3d at 679.

The present case is clearly distinguishable from each of the computer-centric cases. While W.M. appeared to have access to the bedroom at will, unlike the father in *Andrus*, she neither owned the apartment where the cell phone was located, nor did she pay any bills associated with the phone. *See* 483 F.3d at 716-17; R. at 32. Additionally, while W.M. knew Mr. Larson's password, she was either a live-in girlfriend or sex trafficking victim, not Mr. Larson's wife like the consenter in *Morgan*. *See* 435 F.3d at 663-64; R. at 4, 29. Finally, though W.M. was permitted to use applications without asking Mr. Larson, unlike the case in *Buckner*, the cell phone was not registered in W.M.'s name and she did not have the authority to dispose of the device. *See* 473 F.3d at 555; R. at 32.

Instead, the present circumstances are more analogous to the "lockbox" cases. Similar to the living arrangement in *Peyton*, Mr. Larson and W.M. kept their belongings in different spaces. *See* 745 F.3d 546, 554; R. at 37. The cell phone was discovered on a nightstand with men's glasses, a gold fake Rolex men's watch, and some condoms— items that an officer of "reasonable caution" would infer belonged to Mr. Larson and not W.M. *See* 497 U.S. at 188; R. at 35. Further, like the shoebox in *Taylor*, the appearance of Mr. Larson's cell phone should have quickly indicated his ownership, as it displayed a sticker the officer associated with his gang affiliations. *See* 600 F.3d at 679; R. at 31, 32. Additionally, the cases are analogous because like the defendant in *Taylor*, Mr. Larson indicated his expectation of privacy through the use of a passcode, and Officer Nelson knew at the time of the search that Mr. Larson paid for and regularly used the phone. *See* 600 F.3d at 679; R. at 34.

It is clear from the facts that no reasonable officer would have believed that W.M. maintained apparent authority over the phone. Nothing aside from W.M.'s contention that she

used the cell phone to access applications, send "some personal texts" and make "some personal calls," would lead a reasonable officer to believe the truth of her statements. R. at 32. Furthermore, it is quite possible that W.M. believed her situation to be entirely different than the reality, as Officer Nelson hypothesized. R. at 29. The Eight Circuit stated this prospect clearly, that it "cannot be reasonable to rely on a certain theory of apparent authority, when the police themselves know what the consenting party's *actual* authority is… The standard of reasonableness is governed by what the law-enforcement officers know, not what the consenting party knows." *United States v. James*, 353 F.3d 606, 615 (8th Cir. 2003). Here, the consenting party believed herself to be a "girlfriend" or "business partner" of Mr. Larson, but Officer Nelson did not believe that to be the case. R. at 29.

The Court in *Riley* noted that the "fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought." 134 S. Ct. at 2496. The Court should strongly consider the dangerous implications of extending the apparent authority exception to the specialized privacy interest inherent in cell phones. Therefore, the Court should uphold the Thirteenth Circuit's ruling and grant Mr. Larson's motion to suppress.

CONCLUSION

The Court of Appeals properly reversed the lower court's denial of the motion to suppress because the warrantless searches were not justified under the special needs or apparent authority exceptions. Therefore, the searches present in this case were conducted in direct violation of the Fourth Amendment and all illegally obtained evidence must be suppressed.