No. 03-240

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2016

UNITED STATES OF AMERICA,

Petitioner,

v.

WILLIAM LARSON,

Respondent.

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

BRIEF FOR RESPONDENT

ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The special needs doctrine permits government policies authorizing unreasonable searches and seizures when the immediate purpose of that policy is to further a special need outside the need for law enforcement. L.O. 1923 was enacted as a law enforcement instrument to assist in preventing human trafficking. Are searches authorized by L.O. 1923 constitutional under the special needs doctrine?

II. In *Illinois v. Rodriguez*, this Court held that an officer's reasonable but mistaken belief that a third-party had authority to consent to a search was sufficient to satisfy the Fourth Amendment, even if it was later discovered that the third-party had no such authority. Does this test require an officer to reasonably rely on a set of facts which as a matter of law would have resulted in a third-party having actual authority if those facts were true? Or is an officer's reasonable but mistaken interpretation of the Fourth Amendment sufficient?

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

In March of 2013, Victoria City was selected to host the 2015 Professional Basketball All-Star Game. R. at 2. Concerned with recent reports of an increase sex trafficking around major sporting events, Victoria City passed Local Ordinance 1923 ("L.O. 1923"). R. at 2. L.O. 1923 granted law enforcement officers permission to seize and search any individual obtaining a room in a public lodging facility if the officer reasonably suspected the individual was engaged in sex trafficking of minors. R. at 2. However, the ordinance did not provide any method or instructions describing proper protective measures of a minor should an officer suspect the minor was a victim of sex trafficking. R. at 2.

On July 12, 2015, William Larson was stopped and searched, without probable cause, after he walked through the lobby of the Stripes Motel. R. at 3. The officers who conducted the search, Officers Richols and Nelson, stated they believed they were authorized to search Mr. Larson pursuant to L.O. 1923. R. at 3. The officers initiated the search after observing several of Mr. Larson's tattoos and because of the age discrepancy between Mr. Larson and his companion, W.M. R. at 3. Upon searching Mr. Larson, the officers discovered evidence that was later used against him. R. at 4. Mr. Larson moved to suppress that evidence and the District Court denied his motion. R. at 1.

After Mr. Larson was searched, he was handcuffed and arrested by Officer Richols. R. at 28. While Officer Richols was arresting Mr. Larson, Officer Nelson began questioning W.M. R. at 29. Officer Nelson testified that he first learned of W.M.'s age by reviewing her driver's license immediately after Mr. Larson was arrested. R. at 29. Officer Nelson also testified that W.M. told him she was Mr. Larson's girlfriend. R. at 29. Nelson then asked W.M. where she

lived. R. at 29. W.M. stated that she and Mr. Larson lived together three blocks away. R. at 29. W.M. stated that even though Mr. Larson leased the apartment, the two shared everything. R. at 29. W.M. also told the officer she met Mr. Larson while she was homeless and Mr. Larson provided her with a place to stay. R. at 30. Officer Nelson then asked W.M. whether she lived at the apartment all of the time, to which W.M. responded that she had run away from home eighteen months before and had stayed there for about a year. R. at 30. Officer Nelson testified that after discovering all of this information, he still wasn't sure if W.M. had mutual use of the apartment. R. at 30. To quell this suspicion, Officer Nelson asked W.M. if she kept her belongings there. R. at 30. W.M. responded by stating that she kept about a duffle bag's worth of belongings at the apartment and received medical bills and other personal mail at that address. R. at 30. According to his testimony, these facts were apparently sufficient to cause Officer Nelson to believe W.M. was capable of consenting to a search of the premises. R. at 31.

Upon arriving at the apartment, Officer Nelson learned that W.M. did not own a copy of the key to the apartment. R. at 31. W.M. was forced to grab a spare key from under a fake rock to open the front door. R. at 31. W.M.'s need for a spare key to enter into Mr. Larson's apartment did not motivate Officer Nelson to further inquire in to W.M.'s authority to consent to a search. R. at 31. After W.M. opened the door, she expressly gave Officer Nelson permission to search the apartment. R. at 31. During this search, several items were discovered, seized, and subsequently introduced at trial. R. at 31. One of those items, an Apple IPhone 5S, was discovered on the nightstand alongside men's glasses and a men's watch. R. at 35. When Officer Nelson asked W.M. about the phone, she told him Mr. Larson paid the bill, that he chose the sticker placed on the back of the phone, and that she was permitted to use Snapchat,

Instagram, and Facebook without asking Mr. Larson for permission. R. at 32. Evidence was later discovered on the cell phone that that was used against Mr. Larson in trial. R. at 1.

II. Summary of the Proceedings

The District Court denied Respondent's Motion to Suppress Evidence discovered incident to both searches. R. at 1. Respondent was ultimately convicted. R. at 15. The Thirteenth Circuit Court of Appeals reversed the guilty verdict and ordered suppression of the evidence discovered from both searches. R. at 15.

SUMMARY OF THE ARGUMENT

The Fourth Amendment has a strong preference for warrants. The initial search of Mr. Larson was not performed subject to a warrant or with probable cause, but instead, was conducted under a local city ordinance (L.O. 1923). L.O. 1923 undermines the protections guaranteed by the Fourth Amendment by lowering the standard of suspicion required for a police officer to instigate a search. The only excuse the government has offered for this unreasonable and unlawful search is the special needs doctrine.

The exception to the warrant requirement granted by the special needs doctrine only applies when a special need, beyond the general need for law enforcement, renders the Fourth Amendment's warrant and probable cause requirements impracticable. In this case, L.O. 1923 is a law enforcement tool. Its immediate primary purpose is to gather evidence for criminal prosecution. This purpose is inseparable from any special need asserted by the government. Because the criminal prosecution purpose is inseparable from the special need, the special needs exception cannot apply. Further, there is no evidence to suggest the Fourth Amendment's warrant and probable cause requirements were impracticable in this case. Finally, because L.O. 1923 is a highly ineffective method of combating the purported special need, it does not justify

the highly intrusive searches it authorizes. Thus, all evidence discovered incident to that search must be suppressed as fruit of the poisonous tree.

Additionally, the searches of Mr. Larson's apartment and cell phone were unconstitutional. The government contends the searches were constitutional because W.M. consented to them. However, the government admits that W.M. did not have actual authority to consent to the searches. The government argues that this is irrelevant because W.M. had apparent authority to consent to the searches. However, this is not the case.

If a police officer reasonably relies on a set of facts that as a matter of law would have resulted in a third-party having actual authority, suppression of evidence is not justified merely because it was later discovered that those facts were not true. In other words, the apparent authority exception requires the police officers to rely on a *false statement of fact*. In this case, nothing W.M. told Officer Nelson was false. Therefore, the apparent authority exception does not apply.

Some Circuit Courts have held a reasonable mistake of law can lead to apparent authority. Even if this Court adopts that standard, Officer Nelson's mistake was still unreasonable. Officer Nelson knew W.M. was only sixteen and Mr. Larson was a grown man. He knew she did not pay rent, and only kept a duffle bags worth of personal items in the apartment. Further, Officer Nelson knew W.M. did not own a copy of the key to the apartment. Thus, it was unreasonable for Officer Nelson to believe W.M. had common authority over the apartment. Additionally, Officer Nelson knew W.M. was given limited access to the cell phone. He had actual knowledge of the extent of W.M.'s authority. It cannot be reasonable to rely on a theory of apparent authority when an officer knows the extent of actual authority.

The evidence, in this case, was discovered as a result of two unconstitutional searches. The first search pursuant to L.O. 1923 is unconstitutional because the special needs exception does not apply. The second search was unconstitutional because it was not conducted pursuant to a warrant or by consent of a third-party with actual or apparent authority to consent. Therefore, this Court should affirm the holding of the Thirteenth Circuit Court of Appeals and remand to the district court for further proceedings.

STANDARD OF REVIEW

The issues in this case present a question of law under the Fourth Amendment. This Court reviews questions of law *de novo*. *Ornelas v. United States*, 517 U.S. 690, 697 (1996).

ARGUMENT AND AUTHORITIES

This Court has routinely held the Fourth Amendment requires the suppression of evidence obtained "in searches carried out pursuant to statutes, not previously declared unconstitutional, which purported to authorize the searches in question without probable cause and without a valid warrant." *Michigan v. DeFillippo*, 443 U.S. 31, 39 (1979). In this case, L.O. 1923 purportedly authorizes the search of an individual without probable cause or a valid warrant. The government in fact conceded that Officer Richols and Officer Nelson did not have probable cause or a warrant to search Mr. Larson. Therefore, the evidence obtained during the search of Mr. Larson must be suppressed, unless this Court finds L.O. 1923 is constitutional. The United States offers only the special needs exception to support L.O. 1923's constitutionality. For the reasons discussed below this Court must hold L.O. 1923 is unconstitutional and order the suppression of all evidence discovered incident to the illegal search of Mr. Larson.

The constitutionality of L.O. 1923 is a threshold issue. Officer Richols and Nelson unconstitutionally searched Mr. Larson and then exploited that search to gain access to Mr.

Larson's apartment. The evidence discovered in Mr. Larson's apartment was not discovered by means sufficiently distinguishable as to be purged of its primary taint. Therefore, if L.O. 1923 is unconstitutional, the evidence discovered must also be suppressed. *See Wong Sun v. United States*, 371 U.S. 471, 486–87 (1963).

Should this Court find L.O. 1923 constitutional, the evidence discovered from the unlawful search of Mr. Larson's apartment must still be suppressed. Officer Nelson searched Mr. Larson's home without a warrant. A warrantless search of a individual's domicile is "per se unreasonable unless the police can show that it falls within one of a carefully defined set of exceptions." *Coolidge v. New Hampshire*, 403 U.S. 443, 474 (1971). For the reasons discussed below, no such exception applies. Because the evidence discovered in Mr. Larson's apartment was discovered incident to an unlawful search, this Court must order its suppression.

I. SEARCHES PURPORTEDLY AUTHORIZED BY L.O. 1923 ARE UNCONSTITUTIONAL BECAUSE THE ORDINANCE DOES NOT FURTHER A SPECIAL NEED BEYOND THE GENERAL NEED FOR LAW ENFORCEMENT.

A warrantless search is *per se* unreasonable unless it falls within a well-defined exception. *Katz v. United States*, 389 U.S. 347, 357 (1967). One such exception is the special need doctrine which was first adopted by this Court in *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment). The exception has three elements. First, the government must prove exceptional circumstances have created a special need, beyond the normal need for law enforcement. *Id.* Second, the government must prove the warrant and probable cause requirements of the Fourth Amendment are impracticable. *Id.* If the first two elements are satisfied, the Court must "substitute its balancing of interests for that of the Framers," rather than conducting a reasonableness analysis. *Id.* When the government seeks to

rely on an exception to justify a warrantless search, it bears the burden of proof. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

For several reasons, this Court must hold searches conducted pursuant to L.O. 1923 are *not* permissible under the special needs exception to the Fourth Amendment. First, it is clear from the record the statute's immediate purpose was the collection of evidence for use in criminal prosecution. Thus, the special needs exception does not apply. *See Ferguson v. City of Charleston*, 532 U.S. 67, 86–87 (2001). Second, the record is void of any evidence suggesting the warrant and probable cause requirement is impracticable. Finally, the government interest in continuing an ineffective program does not justify such an extreme intrusion into an individual's privacy. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995).

A. L.O. 1923 Does Not Serve a Special Need Beyond the Normal Need for Law Enforcement.

There are very few sets of circumstances that have compelled this Court to find a special need beyond the normal need for law enforcement exists.[1] While the facts of each case vary, in almost every instance, there was no criminal consequence to those who were subjected to a warrantless search. In *Ferguson*, this Court found no special need existed because "the central and indispensable feature of the policy from its inception was the use of law enforcement." 532

[1] *See, e.g.*, *Camara v. Mun. Court*, 387 U.S. 523, 534 (1967) (administrative searches to enforce reasonable municipal regulations); *T.L.O.*, 469 U.S. at 325 (searches of school children by school administrators); *O'Connor v. Ortega*, 480 U.S. 709, 714 (1987) (hospital searching doctor's office where there were no law enforcement consequences); *City of Ontario v. Quon*, 560 U.S. 746, 750 (2010) (search of public employee's government-owned mobile phone where the only consequence was job discipline); *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 619 (1989) (blood and urine tests of railway employees to ensure railroads were operated safely); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 662 (1989) (urinalysis for customs employees where employees who tested positive could be fired, but would not face criminal consequences); *Acton*, 515 U.S. 646, 657 (holding urinalysis of high school athletes was constitutional when results would lead to school consequences but not criminal prosecution); *Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002) (same).

U.S. at 80. The Court reasoned that while the policy's ultimate goal may have been beyond the reasonable need for law enforcement, the immediate objective of the program "was to generate evidence for law enforcement purposes." *Id.* at 83. When the immediate objective test is applied to the current case, it is clear the special needs exception does not apply.

In *Ferguson*, this Court was faced with the task of determining whether the special needs exception applied to a state-run hospital's mandatory drug testing of expectant mothers. *Id.* at 69–70. The city argued that the program furthered the special need of protecting unborn children and that the threat of criminal prosecution was the only effective way to deter pregnant women from using cocaine. *Id.* at 70. This Court rejected the argument for two reasons. First, the Court noted that law enforcement always involves some "broader social purpose," but to consider a broad social purpose a special need would annihilate the Fourth Amendment. *Id.* at 84. Second, this Court was particularly troubled by the use of law enforcement resources to effectuate the policy. *Id.* at 82. Particularly, the Court noted that the program relied on police operational guidelines, devoted attention to the chain of custody, and trained hospital employees on the range of possible criminal charges. *Id.* Finally, this Court observed that nowhere in the program was there any discussion of medical treatment for the mother or infant. *Id.* Based on these factors, the Court concluded, "the immediate objective of the searches was to generate evidence for law enforcement purposes." *Id.* at 83.

In this case, L.O. 1923 purports to "allow law enforcement to protect children by removing them from dangerous situations before they can escalate." Exhibit B, Victoria City Press Release, R. at 41. Similarly, in *Ferguson*, the city argued that the hospital program was designed to protect infants from mothers who were drug users. This Court rejected the city's purported special need because the broader social purpose of law enforcement is not a special need no

matter how noble. Undoubtedly L.O. 1923 serves a broad social purpose of protecting children, but just like in *Ferguson*, that broad social purpose is not a special need.

Further, L.O. 1923 was designed to give "Victoria City's finest the tools they need to act." Exhibit B, Victoria City Press Release, R. at 41. The "tool" the city is referring to is the elimination of the Fourth Amendment. Similarly, in *Ferguson*, hospital employees used police guidelines to gather evidence for criminal prosecution. This use of police tools and resources made it clear to this Court that the primary purpose of the program in *Ferguson* was the enforcement of the law. However, in this case, Victoria City skipped the middle man and instead chose to give its officers *carte blanche* to ignore the Fourth Amendment. This case is an even more blatant example of a government organization attempting to hide a general law enforcement practice behind the "closely guarded category of special needs." *Ferguson*, 532 U.S. at 84.

When applying the special needs exception "'actual motives' do matter." *Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011). It is clear from the city's press release that the actual motive behind L.O. 1923 was to give law enforcement a new tool to combat sex trafficking. However, this tool violated the Fourth Amendment. While it may have served a "broader social purpose," so do all law enforcement activities. *Ferguson*, 532 U.S. at 84. Further, its immediate objective was the gathering of evidence for criminal prosecution. "[T]his distinction is critical." *Id.* Because the immediate objective of L.O. 1923 was to assist police officers generation of evidence for law enforcement purposes, the special needs exception does not apply.

B. The Fourth Amendment's Warrant and Probable Cause Requirement Is Not Impracticable.

This Court's impracticability analysis has generally focused on the following two considerations: (1) the individual conducting the search (2) the observability of the unlawful

conduct. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 624 (1989) (individual); *Camara v. Mun. Court*, 387 U.S. 523, 537 (1967) (observability). Neither of these considerations support the conclusion that the government is able to prove this threshold issue.

In *Skinner*, this Court concluded that requiring railroad supervisors obtain warrants would significantly hinder the government's drug testing program. 489 U.S. at 624. In *Ortega*, this Court was concerned with the fact that government supervisors were unfamiliar with the process of obtaining a warrant and that requiring them to become familiar with it would be unreasonable. *O'Connor v. Ortega*, 480 U.S. 709, 722 (1987). In the current case, law enforcement officers administered L.O. 1923. Officers know the process of obtaining a warrant. They do it every day. Therefore, the individual conducting the search does not support the government's argument.

In *Camara*, this Court concluded obtaining a search warrant to enforce building codes was impracticable because conditions, such as faulty wiring, are not observable from the outside. 387 U.S. at 537. In *United States v. Martinez-Fuerte*, a search warrant was impracticable because heavy traffic at border crossings made studying every car individually impossible. 428 U.S. 543, 557 (1976). By contrast, sex trafficking is observable. Additionally, the city's press release asserted that it happens in large numbers, but that number is nowhere near the number of border crossings discussed in *Ortiz*. Further, when officers searched Mr. Larson, they discovered a list of several names. The City's press release even explains how prostitutes visit several customers a night. R. at 40. Thus, had the City chosen to comply with the Fourth Amendment, officers could have observed Mr. Larson over a short period, gathered the requisite probable cause, and obtained a warrant.

Undoubtedly, searching Mr. Larson under L.O. 1923 was easier than obtaining a warrant. However, there is no evidence on the record to suggest it was impracticable. Further, there is no case law to support the position that obtaining a warrant would be impracticable. When the government seeks to rely on an exception to justify a warrantless search, it bears the burden of proof. *Schneckloth*, 412 U.S. at 222. The state has failed to prove a threshold issue. Therefore, this Court should conclude that a search conducted pursuant to L.O. 1923 is unlawful and suppress its fruits.

C. The City's Interest in Inefficiently Reducing Sex Trafficking Does Not Justify Highly Intrusive Searches.

If the government can satisfy the first two threshold requirements of the special needs exception, the final step requires the Court balance the intrusiveness of the privacy invasion against the compellingness of the state interest. *New Jersey v. T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring in judgment). When considering the intrusiveness of the privacy invasion this Court has considered both the complainant's expectation of privacy as well as the character of the intrusion. *Acton*, 515 U.S. at 656–58. These considerations are then balanced against the nature and immediacy of the special need as well as the efficacy of the government's attempt to combat it. *Id.* at 660. When all of these factors are considered, it is clear L.O. 1923's purported special need does not justify the privacy invasion it facilitates.

A common theme among many of this Court's special needs cases is a diminished expectation of privacy. *See, e.g.*, *id.* at 656 (high school athletes have a lower expectation); *T.L.O.*, 469 U.S. at 384 (students at school have a lower expectation of privacy); *Hudson v. Palmer*, 468 U.S. 517, 526 (1984) (prisoners have no legitimate expectation of privacy); *Samson v. California*, 547 U.S. 843, 849 (2006) (paroles have a substantially diminished expectation of privacy); *New York v. Burger*, 482 U.S. 691, 700 (1987) (voluntarily engaging in closely

regulated industry diminishes your expectation of privacy). In this case, Mr. Larson merely walked into the lobby of a hotel. He had the full expectation of privacy guaranteed to him by the Fourth Amendment. This factor cuts strongly against the government's argument for the application of the special needs exception.

The second factor this Court considers is the intrusiveness of the search at issue. *T.L.O.*, 469 U.S. at 342. In *T.L.O.* the Court characterized the search of a student's purse as "not excessively intrusive." *Id.* In *Acton*, the Court acknowledged that urinalysis was intrusive. 515 U.S. at 660. However, the Court gave great weight to the fact that obtaining the sample was done in the least intrusive manner possible. *Id.*

In this case, Officers Richols and Nelson seized and physically searched Mr. Larson. In *Terry*, the Court described these searches as "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." *Terry v. Ohio*, 392 U.S. 1, 17 (1968). Thus, unlike the searches in *T.L.O.* and *Acton*, the searches in this case were extremely intrusive.

These first two factors are balanced against the nature and immediacy of the special need as well as the efficacy of the government means. *Acton*, 515 U.S. at 660. Respondent does not argue that sex trafficking is not a substantial and immediate government concern. However, the efficacy of the government's method is questionable at best. The record is void of any evidence that the ordinance was, in fact, effective at reducing sex trafficking. The record is also void of any evidence that the Victoria City Board of Supervisors considered any other methods for reducing sex trafficking. For example, the city could have focused their attention on going after the buyers of sex. In Sweden, this method resulted in a fifty percent reduction in street prostitution. *See* Swedish Institute, *The Ban Against the Purchase of Sexual Services. An*

Evaluation 1999–2008, at 8 (Mireille L. Key & Jennifer Evans trans., Nov. 2010), http://www.turnofftheredlight.ie/wp-content/uploads/2011/02/Swedish-evaluation-full-trasnlation.pdf. Additionally, the city could have elected to engage in undercover operations, which would have reduced sex trafficking without requiring an aggressive invasion of privacy rights.

The record is devoid of any rationale as to why the city elected to pursue the less effective method of solving the problem. Respondent is not arguing that the city is required to choose the least intrusive method. However, the fact that general, less intrusive, more effective alternatives existed should cut against the city's argument that the government's interest in its purported special need justified the assault on Mr. Larson's Fourth Amendment rights. When all of the aforementioned factors are balanced, it becomes clear that the city's interest in *ineffectively* reducing sex trafficking does not justify an extremely intrusive physical search of Mr. Larson.

II. W.M. Did Not Have Apparent Authority to Consent to the Search of Mr. Larson's Home or Cell Phone.

The doctrine of apparent authority is not a governmental tool to circumvent the protections of the Fourth Amendment. A warrantless search of a defendant's home is "per se unreasonable unless the police can show that it falls within one of a carefully defined set of exceptions." *Coolidge*, 403 U.S. at 474. In this case, the government has only offered one such exception, apparent authority. The doctrine of apparent authority was first adopted by this Court in *Illinois. v. Rodriguez*, 497 U.S. 177 (1990). In *Rodriguez*, the Court held that an officer's reasonable but mistaken belief that a third-party had authority to consent to the search was sufficient to satisfy the Fourth Amendment, even though it was discovered the third-party had no such authority. *Id.* at 194.

Since *Rodriguez*, a division has arisen amongst the Circuit Courts, as to how *Rodriguez* should be interpreted. The Circuit Courts' interpretations can generally be grouped into two

categories. In *United States v. Welch*, the Ninth Circuit Court of Appeals interpreted *Rodriguez* to mean that if a police officer reasonably relies on a set of facts which as a matter of law would have resulted in a third-party having actual authority, suppression is not justified merely because it was later discovered that those facts were not true.[2] 4 F.3d 761, 764–65 (9th Cir. 1993) ("However, the doctrine [of apparent authority] is applicable only if the facts believed by the officers to be true would justify the search as a matter of law . . . . A mistaken belief as to the law, no matter how reasonable, is not sufficient."). The second approach does not make a distinction between an officer's mistake of fact and mistake of law and instead asks whether the officer had an objectively reasonable belief that the third-party had actual authority to consent to the search.[3] *See United States v. Cos*, 498 F.3d 1115, 1128–29 (10th Cir. 2007).

When *Rodriguez* is compared to this Court's other apparent-authority precedent, it is clear the false fact test is the proper standard. Further, as a matter of public policy, the apparent authority exception can only be justified if the false fact test is required. When the false fact test is applied to this case, it is clear W.M. did not have apparent authority to consent to the search of the apartment or the cell phone. Alternately, under the objectively reasonable test, W.M. still does not have apparent authority. Therefore, this Court should affirm the judgment Thirteenth Circuit Court of Appeals and hold that the evidence found in Mr. Larson's apartment and on his cell phone must be suppressed.

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[2] For purposes of clarity, this brief will refer to this test as the false fact test.

[3] For purposes of clarity, this brief will refer to this test as the objectively reasonable test.

A. The Only Way to Interpret This Court's Precedent Consistently Is to Adopt the False Fact Standard.

This Court first addressed the issue of apparent authority in *Stoner v. California* and rejected its application in the context of the Fourth Amendment. 376 U.S. 483, 484 (1964). There, police officers responded to a robbery at a California grocery store. *Id.* After a brief investigation, the officers began to suspect Mr. Stoner. *Id.* During their investigation, the officers discovered that Stoner was staying at a local hotel. *Id.* The officers went to that hotel and asked the night clerk if Stoner was living there. *Id.* at 485. The night clerk told the officers he was. *Id.* The clerk also told the officers that Stoner had left his key in the mailbox on his way out, as all guests were required to do when they left the hotel. *Id.* The officers then asked the night clerk to allow them to search Stoner's room. *Id.* The clerk obliged, and the evidence discovered in the room was used to convict Stoner. *Id.* 485–86. This Court granted certiorari to determine whether the search could survive Fourth Amendment scrutiny. *Id.*

The State of California argued that the search was reasonable because the officers were relying on a California law "which gave a hotel proprietor blanket authority to authorize the police to search the rooms of the hotel's guests." *Id.* at 488. This Court acknowledged that the under the state law the officers had a reasonable basis to believe that the clerk had actual authority to consent to the search. *Id.* However, the Court refused to allow the officers *reasonable mistake of law* to serve as a basis to circumvent the Fourth Amendment's warrant and probable cause requirements. *Id.* The *Stoner* Court made it clear, "the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.'" *Id.*

Twenty-six years later this Court revisited the issue in *Rodriguez*. 497 U.S. at 177. There, the police were given access to Rodriguez's apartment with the consent and assistance of his former live-in girlfriend Ms. Fisher. *Id.* at 179. Before consenting to the search, she told the officers that she kept clothes and furniture in the apartment. *Id.* She used her own key to let the officers in. *Id.* She referred to the apartment has "our" apartment. *Id.* However, it was not really Fisher's apartment. *Id.* at 180. The truth was Fisher had moved out several weeks before the search. *Id.* The Illinois trial court held that Fisher did not have actual authority to consent to the search and rejected the argument that apparent authority might excuse the Fourth Amendment violation. *Id.* This Court reversed, holding that if the officers reasonably believed Fisher had actual authority to consent to the search, then the evidence was admissible. *Id.* at 189. However, the Court gave little guidance as to what constituted a reasonable belief.

At first glance, it appears *Rodriguez* contradicts *Stoner*. This is not the case. The facts in *Rodriguez* were extreme. "In *Rodriguez*, . . . the police officers were literally tricked into reasonably believing that the consenting party had actual authority." *United States v. Salimonu*, 182 F.3d 63, 76–77 (1st Cir. 1999). Thus, the key to *Rodriguez* was the officer's reasonable belief in the facts. Conversely, in *Stoner* the officers acted in reliance on a state law authorizing their warrantless search. Both the officers in *Stoner* and the officers in *Rodriguez* were acting reasonably. The only difference was in *Rodriguez* the officers reasonably believed facts provided by a third-party. Whereas, in *Stoner*, the officers reasonably believed the law gave a third-party authority to consent to the search. The only way to reconcile the two cases is to interpret *Stoner* as representing the rule that when an officers reasonable belief is based on a mistake of law, apparent authority does not excuse his failure to obtain a warrant. While

Rodriguez represents the rule that when an officer's reasonable belief is based on a third-parties untrue statements, apparent authority may excuse his failure to obtain a warrant.

Further, it is clear from *Rodriguez* that the Court only intended to create a narrow exception. The following language is particularly instructive: "[e]ven when the invitation is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivable be such that a reasonable person would doubt its truth and not act upon it without further inquiry." *Rodriguez*, 497 U.S. at 188. The assertion that a person lives at a residence, if true, would be sufficient to establish actual authority. *See United States v. Matlock*, 415 U.S. 164 (1974). However, the language of *Rodriguez* makes it clear that if an officer doubts the assertion is true he is required to inquire further. Thus, the inquiry is whether the officer was reasonable in believing the person lived in the home, not whether the officer was reasonable in believing someone living in a home had actual authority.

"Adherence to precedent promotes stability, predictability, and respect for judicial authority." *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). This Court can adhere to *Rodriguez* and *Stoner* by adopting the false fact test and should do so for the policy reasons set forth below.

B. The Policy Considerations Behind This Court's Fourth Amendment Doctrine Support the Conclusion That the False Fact Test Must Apply.

The doctrine of apparent authority requires the Court to consider and balance numerous policy considerations. The first and most obvious is reasonableness. *Kentucky v. King*, 563 U.S. 452, 459 (2011); U.S. Const. amend. IV ("The right of the people to be secure . . . against *unreasonable* searches and seizures") (emphasis added). However, before one can understand the policy behind apparent authority one must understand the policy behind third-party consent. This Court first ratified third-party consent in *United States v. Matlock*, 415 U.S. at 164. Since

Matlock, this Court has rationalized the third-party consent on the grounds that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third-parties." *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979). Thus, third-party consent in rationalized on the grounds that the *search itself* is reasonable because the defendant had no expectation of privacy. However, such a rationalization cannot possibly apply to the doctrine of apparent authority.

"It is important to bear in mind that it was the *petitioner's constitutional right* which was at stake here, and not the night clerk's nor the hotel's. It was a right, therefore, *which only the petitioner could waive* by word or deed, either directly or through an agent." *Stoner*, 376 U.S. at 489 (emphasis added). In cases where a third-party did not have actual authority, clearly the searched party has not waived his right to privacy. Thus, the rationale that a search was reasonable because a party had waived their privacy interest cannot apply to apparent authority. *Rodriguez*, 497 U.S. at 194 (Marshall, J., dissenting).

Unlike third-party consent, where the rationale is clear, the *Rodriguez* Court did not provide a clear policy explanation for apparent authority. The Court held the search was reasonable, but the only explanation the Court provided was that reasonableness is judged by the facts as they were known, not as they actually were. *Id.* at 186 n.2. In his dissent, Justice Marshall disagreed. *Id.* Justice Marshall argued that even third-party consent searches were unreasonable, but by waiving his privacy rights a defendant also waived his right to challenge the search as unreasonable. *Id.* The two opinions are at opposite ends of the spectrum. A middle ground is much more sensible. Clearly a search conducted pursuant to third-party consent is reasonable because there is no expectation of privacy. However, a search conducted pursuant to apparent authority is unreasonable. Consider the following example: a stranger, who is a really good liar, convinces police he has actual authority to consent to a search of your home. The

stranger's consent may make the officer's conduct reasonable, but it does not make the search any more reasonable as to you. Thus, a more judicious policy rationale for apparent authority is that the search was unreasonable, but because the officer's actions were reasonable the exclusionary rule does not serve to keep the evidence out. When the false fact and objectively reasonable test are examined under the policy of the exclusionary rule it is obvious the false fact test must apply.

A court's conclusion that a search is unreasonable does not itself entitle a defendant to suppression of evidence. *See Hudson v. Michigan*, 547 U.S. 586, 590 (2006) (holding that the exclusionary rule only applies when the deterrent against future unlawful searches outweighs the societal cost of suppressing evidence). Thus, the question this Court must answer is whether the objectively reasonable test serves as a sufficient deterrent against future unlawful searches, or whether the false fact test is required.

Adoption of the objectively reasonable test would not further the policy of deterring future unlawful searches. In fact, it would encourage police officers to adopt an "ignorance is bliss" approach when dealing with third parties. *See* 4 Wayne R. LaFave, *Search and Seizure* § 8.3(g), at 180 (4th ed. 2004); *Cos*, 498 F.3d at 1129; R. at 20. It would encourage officers to aim for a "reasonable basis" instead of seeking to get all the facts necessary to make an informed decision, or taking the time to get a warrant. The objectively reasonable standard is simply insufficient to serve as a deterrent to future police misconduct.

However, the false fact test fits perfectly with exclusionary rule policy. "[T]he exclusionary rule is not an individual right and applies only where it results in appreciable deterrence." *Herring v. United States*, 555 U.S. 135, 141 (2009). If a police officer reasonably relies on a set of facts which as a matter of law would have resulted in a third party having actual

authority, there would be no deterrent value in suppression merely because it was later discovered that those facts were not true. "The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct." *Id.* at 143. In the case of an officer relying on a third-party's false statements, there is no culpability on the part of the officer. Conversely, when applying the objectively reasonable test the court will be required to guess whether the officer was attempting to make an informed decision or simply adopting ignorance is bliss approach. This inquiry would not only be difficult it would be impossible. Therefore, to effectively enforce the Fourth Amendment this Court must adopt the false fact test.

C. When the False Fact Test Is Applied, the Evidence Discovered in Mr. Larson's Home and on His Cell Phone Should Be Suppressed.

Officer Nelson testified at the suppression hearing that when he questioned W.M. she made the following assertions: (1) she lived with Mr. Larson for about a year; (2) Mr. Larson leased the apartment; (3) W.M. only kept a backpack and some spare clothes in the apartment; (4) W.M. had medical bills sent to the apartment; (5) W.M. did not have a key to the apartment. Officer Nelson's testimony was corroborated by W.M., and at no point has Mr. Larson or the government challenged the truth of any of W.M.'s statements. The government has not argued that these facts are sufficient to support a finding of actual authority. The Thirteenth District Court of Appeals concluded that "[i]t is abundantly clear that W.M. did not have [actual] authority to consent to the search of [Mr. Larson's] apartment." R. at 20.

W.M. made no, and Officer Nelson did not rely on any, false statements of fact. Because Officer Nelson did not rely on any false statement of fact, the search of Mr. Larson's apartment was unlawful and all evidence discovered incident to that search must be suppressed. *See United States v. Whitfield*, 939 F.2d 1071, 1073–74 (D.C. Cir. 1991).

As to W.M.'s "apparent authority" to consent to the search of the cell phone, Officer Nelson testified that W.M. told him the following: (1) W.M. and Mr. Larson shared the cell phone; (2) Mr. Larson chose the sticker on the phone; (3) Mr. Larson paid the bill for the phone; (4) W.M. used the phone for Facebook, Instagram, and Snapchat and that she could use those apps without asking Mr. Larson. Again, the government has not argued that W.M. had actual authority to consent to the search of the cell phone. W.M. did not make any false statement regarding the cell phone. Further, Officer Nelson had actual knowledge that W.M. did not own the cell phone and was only given limited use of it. Therefore, Officer Nelson could not rely on W.M.'s "apparent authority" to search the cell phone. *United States v. James*, 353 F.3d 606, 615 (8th Cir. 2003) ("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.")

D. When Applying the Objectively Reasonable Test to the Facts of This Case the District Court Erred in Not Suppressing Evidence Discovered Incident to the Search of Mr. Larson's Home.

Although the Thirteenth Circuit Court of Appeals did not explicitly state which rule applied, it appears from the court's analysis that it applied the objectively reasonable test. R. at 19–20. Respondent maintains that the false fact test is the proper standard. Should this Court reject that argument, this Court should affirm the holding of the Thirteenth Circuit Court of Appeals because Officer Nelson's belief that W.M. possessed actual authority was not objectively reasonable.

In *Rodriguez*, one of the important factors the Court considered was the fact that the third-party used her own key to let officers into the apartment. 497 U.S. at 179. In *United States v. Richards*, the court concluded that a third-party did not have actual authority to consent to the search of a bedroom which was usually locked by a padlock. 741 F.3d 843, 850–51 (7th Cir.

2014). However, the court concluded the third-party had apparent authority because the padlock was hanging from the door in the open position and the officers did not know the third-party did not have a key. *Id.* at 851. The court reasoned that the officers did not have any reason to know that the third-party did not have a key to the padlock. *Id.* The court refused to put an affirmative duty on the officers to inquire. *Id.*

In this case, Officer Nelson testified that he "wasn't entirely sure" that W.M. had mutual use of the apartment. R. at 30. He further testified that his opinion changed when he learned that W.M. kept her backpack and some spare clothes and Mr. Larson's residence. R. at 30. That is it. Those are the facts that changed Officer Nelson's mind. However, after changing his mind, he also discovered that W.M. did not have her own key to access the apartment. In *Richards*, the officers had no reason to know the third-party did not have a key to the locked bedroom. Conversely, in this case Officer Nelson knew W.M. did not have a key to the apartment. The *Richards* court refused to place an affirmative duty on the officers to inquire as to whether the third-party had a key to an unlocked room. In this case, this Court must place an affirmative duty on an officer to inquire further when he discovers that a third-party does not have a key to a locked residence. Failure to do so would sanction officer adopting an ignorance is bliss approach to third-party searches.

Even if Officer Nelson's knowledge that W.M. did not have a key is not dispositive, when the situation is considered as a whole, the officer's conduct was unreasonable. Where "the circumstances make it unclear whether the property about to be searched is subject to mutual use by the person giving consent, then warrantless entry is unlawful without further inquiry." *United States v. Waller*, 426 F.3d 838, 846 (6th Cir. 2005). "To the extent a person wants to ensure that his possessions will be subject to a consent search only due to his own consent, he is free to place

these items in an area over which others do not share access and control, be it a private room or a locked suitcase under a bed." *Georgia v. Randolph*, 547 U.S. 103, 135 (2006). Officer Nelson knew W.M. was sixteen and was staying with a grown man who was not her relative. He knew she was not named on the apartment's lease. He knew that prior to moving in to the apartment she had been homeless. He knew she only kept a duffle bag worth of possessions at the apartment. He knew that she didn't have her own key to the apartment.

The facts known to Officer Nelson created an ambiguous situation. However, the ambiguity didn't motivate the officer to get a warrant. It didn't even motive him to inquire further. Officer Nelson simply closed his eyes to contradictory evidence and went forward. I guess ignorance truly is bliss.

Officer Nelson admitted the facts and circumstance were unclear. Officer Nelson had a duty to inquire further, but failed to do so. Therefore, this Court should affirm the Thirteenth Circuit Court of Appeals' judgment that the search of Mr. Larson's apartment was unlawful and the evidence discovered incident to that search must be suppressed.

E. When Applying the Objectively Reasonable Test to the Facts of This Case the District Court Erred in Not Suppressing Evidence Discovered Incident to the Search of Mr. Larson's Cell Phone.

Should this Court hold the search of Mr. Larson's apartment was unlawful, the discovery of Mr. Larson's phone and all data within must be excluded as the fruits of an unlawful search. *See Wong Sun*, 371 U.S. at 485 ("The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion."). However, should this Court conclude the search of Mr. Larson's apartment was lawful, a second inquiry is required as to whether or not the warrantless search of the cell phone was lawful. *See United States v. Basinski*, 226 F.3d 829, 834 (7th Cir. 2000) ("The key to consent is actual or

apparent authority over the area to be searched."). Closed and locked containers "historically command a high degree of privacy." *United States v. Salinas-Cano*, 959 F.2d 861, 864 (10th Cir. 1992). Computers, cell phones, and other digital devices commonly store intimate information and are akin to closed containers. *See, e.g.*, *id.*; *United States v. Andrus*, 483 F.3d 711, 718 (10th Cir. 2007).

The validity of third-party consent over a shared digital device is a reoccurring issue that this Court has yet to address. *United States v. Clutter*, 674 F.3d 980, 948 (8th Cir. 2012). A computer or cell phone is an individual's most private space. *Id.* The evidence discovered on the cell phone must be suppressed because Officer Nelson knew W.M. did not have actual authority over the cell phone.

In *James* the Eighth Circuit Court of Appeals addressed a case similar to the one at hand. 353 F.3d at 606. In that case, the third party was in possession of back-up computer disks. *Id.* at 615. The third-party was the defendant's long-time friend and was merely storing the disks for the defendant. *Id.* Further, the police were aware that the third-party had limited authority over the disks (destroying them). *Id.* The court noted that the final fact was critical. *Id.* The court concluded that "[i]t 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." *Id.*

In this case, W.M. told Officer Nelson her use of the phone was limited to Instagram, Facebook, and Snapchat. Therefore, Officer Nelson knew that W.M.'s authority over the phone was limited to using those three applications. The evidence the officers discovered from the phone were not discovered on those applications. Officer Nelson knew the extent of W.M.'s actual authority over the phone. Therefore, he could not reasonably rely on apparent authority

which exceeded W.M.'s actual authority. Therefore the evidence discovered on the cell phone should be suppressed.

CONCLUSION

For the reasons set forth above, this Court must affirm the decision of the Thirteenth Circuit Court of Appeals and hold that the evidence discovered incident to the search of Mr. Larson, his apartment, and his cell phone must be suppressed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT