R.12

No. 03-240

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Petitioner,

v.

JAMES LARSON,
Respondent.

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

Brief for Respondent

October Term 2016

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ISSUES PRESENTED

1. Whether searches conducted pursuant to L.O. 1923 are permitted under the special needs exception to the Fourth Amendment?

2. Whether W.M. possessed authority to consent to Officer Nelson's search of the apartment at 621 Sasha Lane or the cell phone found therein?

I. STATEMENT OF FACTS

This matter arises out of Victoria City's attempt to address the sex-trafficking problem in the Starwood Park neighborhood ("Starwood Park"). In March of 2013, the Professional Baseball Association selected Victoria City, Victoria to host the 2015 All-Star Game. R. at 2. The Victoria City Board ("Board") and the Association agreed the game would occur in July 2015 at Cadbury Park located in Victoria City's Starwood Park neighborhood. *Id.*

A. Starwood Park's Sex-Trafficking Dilemma.

Starwood Park is located in downtown Victoria City and home to two prevalent gangs: the Starwood Homeboyz and the 707 Hermanos. *Id.* These gang members engage in a wide range of illegal activity, the most profitable of which is human trafficking. *Id.* A recent study found that Starwood Park accounts for 1,500 sex-trafficking victims, nearly triple that of any other region of the city. *Id*. at 40. The Starwood Park gangs prefer this criminal enterprise because it is more lucrative and less risky. *Id.* at 2. These perpetrators use the "deep web" to post their advertisements, e.g. backpage.com. *Id.* These sites are hard to actively monitor making it difficult for law enforcement to locate them. *Id.*

B. The Board Passes Local Ordinance 1923 to Prevent Sex-Trafficking During the All-Star Game.

The July 2015 All-Star game was expected to attract tens of thousands of visitors to Victoria City and concerned citizens worried it would only exacerbate Starwood Park's existing sex trafficking problem. *Id.* In response to these concerns, the Board passed Local Ordinance 1923 ("the Ordinance") on May 5, 2015, which allowed officers to search any person checking into a hotel, motel, or public lodging facility they reasonably suspected of engaging in a commercial sex transaction. *Id*. The Ordinance was only applicable in the Starwood Park neighborhood from July 11, 2015 through July 17, 2015. *Id.* Five days before the Ordinance was

to go into effect, the Board released a press statement announcing the Ordinance. *Id*. at 3. In the press release, the Board emphasized the prevalence of child sex trafficking in Starwood Park and the damaging effects suffered by its victims. *Id.* The statement further indicated that the purpose of the Ordinance was to protect children and the All-Star game visitors by giving Victoria City police the tools they need to act when they spot signs of child sex trafficking. *Id*. at 41.

C. Officer Nelson and Officer Richols Search and Arrest Mr. Larson at the Stripes Motel.

Two days before the All-Star game, Officer Joseph Richols ("Richols") and Officer Zachary Nelson ("Nelson") were observing guests checking into the Stripes Motel located in Starwood Park to take advantage of the Ordinance. *Id*. at 27. At approximately 11:22pm, defendant William Larson ("Mr. Larson") and a female ("W.M.") entered the Stripes Motel. *Id*. at 3. The officers noticed Mr. Larson tattoos, which led them to believe he was affiliated with the Starwood Homeboyz. *Id*. They also noticed that Mr. Larson was with a young female wearing a low cut top and shorts and they had no luggage. *Id*. Based on these facts, the officers searched Mr. Larson pursuant to the Ordinance and recovered from his jacket: nine condoms, a butterfly knife, lube, two oxycodone pills, a list of names and allotments of times, and $600 in cash.

D. Officer Nelson Questions W.M. and Obtains Consent to Search Mr. Larson's Home and Cell Phone.

After the arrest of Mr. Larson, Officer Nelson proceeded to search W.M. and recovered her driver's license. R. at 28. W.M.'s license revealed she was only sixteen years old, however the record does not indicate the address listed on her license. R. at 29. After realizing she was sixteen, Officer Nelson believed she was the victim and declined to arrest her. R. at 4. He asked if she had a safe place to stay for the night, and she told him that she lived in an apartment a few blocks away with Mr. Larson. *Id.* Officer Nelson then proceeded to question W.M. further about her relationship with Mr. Larson. R. at 29. W.M. told Officer Nelson she met Mr. Larson a year

ago when she was homeless, and he offered to let her live with him. R. at 30. W.M. accepted so that she would have a roof over her head but, as it turned out, she enjoyed his company, and that he gave her money to buy clothes and perfume. *Id.* At this point, Officer Nelson was unsure if W.M. possessed authority to consent to a search of Mr. Larson's apartment because this was a "pretty abnormal situation." R. at 30, 34. After learning W.M. usually stored her backpack and "spare" clothes at Mr. Larson's and had some mail and bills sent there, Officer Nelson then asked W.M. if she would consent to a search of Mr. Larson's apartment. R. at 31. W.M. said "okay." *Id.*

E. Officer Nelson Searches Mr. Larson's Apartment and Cell Phone.

Before entering Mr. Larson's apartment, Officer Nelson knew that W.M. did not have a key and used a spare key to open the door. R. at 31, 33. Officer Nelson also knew that W.M. did not pay rent, was not on the lease, and only did chores around the house. R. at 33. Officer Nelson also knew that W.M. and Mr. Larson kept their food separate and that W.M. had her own section of the closet to keep her clothes. *Id.* Additionally, she stated that she and Mr. Larson shared the bedroom. R. at 38. After entering the apartment, Officer Nelson immediately searched under Mr. Larson's bed and found a handgun. R. at 31.

After impounding the handgun, Officer Nelson located a cell phone next to a pair of men's glasses, a man's watch, and some condoms on a nightstand next to the bed. R. at 35. Another nightstand located on the opposite side of the bed contained a "Seventeen" magazine and an eye mask with pink writing on it. R. at 37. Officer Nelson knew W.M. did not have a phone because and that Mr. Larson only allowed her to use one the one he paid for so he could monitor her communication. R. at 30. W.M. said she shared the phone with Mr. Larson and could use it for Snapchat, Facebook, and Instagram without Mr. Larson's permission. R. at 32. Although Mr. Larson used the phone regularly, she occasionally sent personal texts and made

calls on the phone. *Id.* This phone had a sticker matching Mr. Larson's tattoo attached to it and W.M. said that Mr. Larson selected the sticker. R. at 32. Relying on these facts, Officer Nelson asked W.M. if a password was needed to access the phone, and she typed in 4-11-5-11, another of Mr. Larson's tattoos. R. at 4. Officer Nelson then searched the phone and discovered a few inappropriate pictures of W.M. and video of Mr. Larson rapping about pimping. *Id.*

The cell phone and evidence recovered from Mr. Larson's person were used to indict him under 18 U.S.C. § 1591(a)(1) (Sex Trafficking of Children) and 18 U.S.C. § 1591(e)(3) (soliciting minors to engage in commercial sex acts), and the gun recovered from his room was used to indict him under 18 U.S.C. § 922(g)(1) (felon in possession of a firearm).

II. SUMMARY OF THE ARGUMENT

This Ordinance is an unconstitutional attempt by the Board to conduct commercial sex trafficking investigations to combat this growing epidemic in Starwood Park. The record establishes that Starwood Park is afflicted with this criminal enterprise and that police have experienced difficulty addressing it. As such, several concerned citizens groups have raised fears that the All-Star game would exacerbate this growing problem. With the amount of visitors the All-Star game was expected to attract to Starwood Park, the Board seized an opportunity and passed the Ordinance to combat this threat under the guise of child and visitor safety. In reality, the Board passed the Ordinance to side-step the Fourth Amendment and conduct otherwise illegal searches of suspected sex traffickers. After getting their hand caught in the cookie jar, the Board sought to validate this Ordinance under the special needs exception to the Fourth Amendment.

The special needs doctrine is inapplicable it primary purpose is general law enforcement. This Court has never applied the special needs doctrine under such circumstances. Although the Ordinance may have removed some minors from dangerous situations, this purpose was

secondary to its immediate goal of arresting sex traffickers. Moreover, even if the Board's ultimate purpose was child and visitor safety, it is well-established law that the special needs doctrine is not justified by a search's ultimate purpose. Otherwise, the government could conduct suspicionless searches for almost any proffered concern.

Additionally, assuming *arguendo* that the primary purpose is separate from general law enforcement, obtaining a warrant was practicable. The Ordinance provided for the search of any individual obtaining a room in a public lodging facility. This type of search is one of the most heavily guarded by the Fourth Amendment. Moreover, the Ordinance only allowed people suspected of one specific crime, sex trafficking, to be searched at an officers' discretion. This type of search has been found unconstitutional because it severely intrudes one's privacy interest and results in the highest-degree of surprise and shock. Finally, although the dangers to sex trafficking victims can be immediate in the time before the act occurs, Starwood Park experiences this epidemic every day. The Board had ample notice of the All-Star game to employ other constitutional means to protect potential victims.

Furthermore, the special needs doctrine has only applied to cases involving suspicionless searches. Here, the Ordinance's express terms require reasonable suspicion before an officer can conduct a search. This is counterintuitive to the special needs doctrine's rationale. Thus, even it passed special needs doctrine muster, it is inapplicable in this situation. Thus, this Court should affirm the court of appeals decision and suppress the evidence obtained from the search of Mr. Larson.

Additionally, the evidence obtained from Mr. Larson's apartment should be suppressed because W.M. did not have authority to consent. W.M.'s actual authority has not been argued, thus, Officer Nelson's search would only be valid if he reasonably believed she had authority to

consent to the items. Here, Officer Nelson knew W.M. was a sixteen year old runaway, did not have a key to Mr. Larson's apartment, did not pay rent, and only kept a backpack and "spare" clothing at the apartment. Moreover, Officer Nelson admitted that this was an abnormal situation. These facts should have prompted Officer Nelson to inquire further or obtain a warrant. Regardless, he proceeded to search the apartment without valid authority. As a result, the handgun recovered from the apartment should be suppressed.

The evidence from Mr. Larson's phone should be suppressed for similar reasons. Officer Nelson located the phone on what appeared to be a man's nightstand that was on the opposite side of the bed from what appeared to be a woman's nightstand. The phone was covered with a sticker that was identical to Mr. Larson's gang moniker and tattoo. Additionally, the password to the phone was identical to another of Mr. Larson's tattoos, and W.M. admitted that she had limited use of the phone. Based on these ambiguous facts, Officer Nelson should have inquired further or obtained a warrant before searching the phone.

III. STANDARD OF REVIEW

This interlocutory appeal is from the grant of Larson's motion to suppress based on the defenses that searches conduct pursuant to L.O. 1923 are unreasonable and do not satisfy the special needs doctrine and the W.M. did not have authority to consent to the search of Larson's apartment or phone. The validity of a warrantless search is reviewed de novo. *United States v. Kyllo*, 140 F.3d 1249, 1251 (9th Cir. 1998). The same standard applies here.

IV. ARGUMENT

A. The "Special Needs" Doctrine.

The Fourth Amendment of the Constitution guards "[t]he right of the people to be secure in their *persons*, *houses*, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV (emphasis added). If a search is conducted without a warrant then the

government must show that an exception to the warrant requirement makes the search reasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971). The "special needs" doctrine is one such exception. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

The "special needs" doctrine appeared in Justice Blackmun's concurring opinion where he concluded that limited exceptions to the probable cause requirement should only apply "in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Id*. To justify a warrantless search under the special needs doctrine, the Governmet must establish: (1) that the search serves a purpose related to a special need that is *separate from ordinary law enforcement*, and (2) that this special need makes the ordinary requirement of a warrant impracticable under the circumstances. *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665 (1989) (emphasis added). Since its inception, this Court has limited the special needs doctrine to a "closely guarded category" of cases. *Chandler v. Miller*, 520 U.S. 305, 309 (1997).

The Government's only argument to justify the search of Mr. Larson is the special needs doctrine. To invoke this exception, the Government must first convince this Court to do what is has previously refused to do: extend the special needs doctrine to a search with the primary purpose of general law enforcement and under circumstances that make obtaining a warrant practicable. This Court has never applied the special needs exception in such circumstances.

1. The Special Needs Doctrine Is Inapplicable Because the Ordinance's Primary Purpose Is General Law Enforcement.

For the special needs doctrine to apply, a search's programmatic (primary) purpose must be separate from the ordinary need of law enforcement. In determining the programmatic purpose, the court should consider all the available evidence to determine the relevant primary

purpose. *Ferguson v. City of Charleston*, 532 U.S. 67, 81 (2001). The relevant inquiry is whether the search "serve[s] as its *immediate* purpose an objective distinct from the ordinary evidence gathering associated with crime investigation." *United States v. Amerson*, 483 F.3d 73, 81 (2nd Cir. 2007) (emphasis added). "If the primary purpose is ordinary law enforcement, the special needs doctrine does not apply and the search cannot be upheld under the doctrine." *United States v. Sczubelek*, 255 F. Supp. 2d 315, 320 (D. Del. 2003).

i. The Ordinance's Express Terms Establish Its Primary Purpose Is General Law Enforcement.

The "close category of cases" that have applied the special needs doctrine involved special needs with primary purposes distinct from general law enforcement. In *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, (1990), this Court applied the special needs doctrine to a vehicle sobriety checkpoint because the primary purpose was public safety, i.e. preventing the immediate hazard posed by drunk drivers, not arresting drunk drivers. In *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987), a suspicionless search of a probationer's home was justified because the state's operation of a probation system presented a special need beyond normal law enforcement. Although evidence of criminal activity was discovered during the search, the court found that the primary purpose was ensuring compliance with state probation regulations, and the discovery of criminal evidence was incidental to this special need. *Id.* In *Skinner v. Ry. Labor Executives'* Ass'n, 489 U.S. 602 (1989), this Court held that warrantless alcohol and drug tests of Railroad employees were reasonable because the primary purpose was not to assist in the prosecution of employees, but rather "to prevent accidents and casualties in railroad operations that result from employees impaired by alcohol or drugs." In each of these cases and other

justified special needs cases,[1] the programmatic purpose of the search was divorced from general law enforcement and not designed to gather evidence of ordinary criminal wrongdoing.

This Court has never applied the special needs doctrine to a search if the programmatic purpose is general law enforcement. In *City of Indianapolis v. Edmund*, 531 U.S. 32 (2000), this Court invalidated a vehicle checkpoint because the conceded primary purpose was interdicting illegal narcotics. The defendant city argued the special needs doctrine applied because of the "severe and intractable nature of the drug problem." Although the court acknowledged the problems associated with drug-trafficking it concluded that "the gravity of the threat alone cannot be dispositive of questions concerning what law enforcement officers may employ to pursue a given purpose." *Id.* at 454-55.

In *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), this Court struck down a state hospital's policy designed to identify pregnant patients suspected of drug abuse because the policy's primary purpose was to gather evidence and prosecute drug-abusing mothers. Similar to the city of Indianapolis in *Edmond*, the defendant hospital argued the special needs doctrine applied because their "ultimate purpose" was a "beneficent one,"—the protection of women and children. *Id.* at 81. Again, the court recognized the serious problem of drug-abuse but echoed the *Edmund* holding that the "gravity of the threat alone" cannot justify unlawful means. *Id*. at 86. In reaching this conclusion, the court noted that "virtually any nonconsensual search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate,

[1] *See also, O'Connor v.* Ortega, 480 U.S. 709 (1987) (holding that the special needs doctrine applied to warrantless searches by government employers or supervisors for work-related, non-investigatory intrusions); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (holding that warrantless searches of some student property fell under special needs doctrine); *Martinez-Fuerte v. United States*, 428 U.S. 542 (1976) (holding that a border checkpoint fell under the special needs doctrine because its primary purpose was border security).

rather than immediate, purpose." *Id*. at 84. *Edmund* and *Ferguson* are instructive of the special needs doctrine's limits. If the primary purpose is to detect evidence of crime, it is inapplicable.

Here, then, the relevant inquiry is the Ordinance's "immediate," primary purpose, not its ultimate purpose. On its face, the Ordinance expressly provides for a "search by an authorized *law enforcement officer*" of any person the officer *reasonably suspects to be involved in a commercial sex transaction*. This provision stands in direct contrast to the special needs doctrine rationale. Here, the Ordinance expressly allows law enforcement to search for evidence of sex trafficking—a crime. Never has a special needs case has expressly allowed for the detection of criminal evidence. In fact, cases justifying special needs were only upheld if the discovery of criminal evidence was incidental to the search's primary purpose.[2] Moreover, unlike *Skinner* where incriminating evidence was not used for prosecution, the evidence recovered from Mr. Larson was only used to indict him. Here, detection of criminal evidence was not incidental, it was mandated.

The Government will likely contend the Ordinance's primary purpose is the protection of sex trafficking victims, but a closer analysis reveals the contrary. The amount of sex trafficking victims in Starwood Park is nearly triple that of any other area in Victoria City. Law enforcement has been unable to sufficiently address this problem because the perpetrators are difficult to track. As a result, Starwood Park experiences a high rate of sex trafficking every night of the year. Indeed, in the press release statement, the Board emphasized the prevalence of sex trafficking in Starwood Park and that the All-Star game may increase the number of victims. However, victim protection is only a guise to mask its primary purpose—arresting sex traffickers.

[2] *See, e.g. T.L.O.*, 469 U.S. at 347-48.

At its crux, the Ordinance was implemented to combat the growing commercial sex-trafficking epidemic afflicting Starwood Park. Passing the Ordinance under these pretenses allowed the City to conduct otherwise unconstitutional searches to detect evidence of commercial sex trafficking. The Ordinance's ultimate purpose may very well have been to protect sex trafficking victims. However, its immediate purpose was to detect evidence of commercial sex trafficking. This is the precise reason this Court invalidated the *Ferguson* policy because "virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate purpose." Moreover, although sex trafficking has significant impacts on its victims, "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement may employ to pursue a given purpose." Thus, despite the severe nature of sex trafficking, this threat alone does not justify the special needs doctrine.

ii. The Search Was Conducted Exclusively by Law Enforcement, Further Establishing Its Primary Purpose as General Law Enforcement.

Notably absent from the "closely guarded category of cases" justifying special needs "beyond the normal need of law enforcement" is—*law enforcement.* In cases involving law enforcement, the special needs doctrine has only been applied where law enforcement's involvement was incidental, or secondary to the primary purpose of the search. *See, e.g.*, *T.L.O.*, 469 U.S. 328, 347-48 (upholding a warrantless search of a student's purse suspected of smoking marihuana by a school official. It was only after the school official found marihuana in the student's purse that it was turned over to law enforcement).

By contrast, in determining the programmatic purpose in *Ferguson* was general law enforcement, the court relied heavily on the policy's purposeful inclusion of police and police

guidelines.[3] Additionally, the court recognized that, although the hospital contended the primary purpose was mother-child safety, the policy was devoid of alternative treatments aside from treating the mother's addiction through threat of prosecution. *Id*. at 82. Because of the policy's heavy police involvement and its lack of treatment options for the mother and child, the court concluded that the program's "ultimate purpose" may have been to get the women into treatment and off drugs but its "immediate objective . . . was to generate evidence for *law enforcement purposes*." *Id*. (emphasis in original).

Here, this case is distinguishable from *T.L.O.* because this search was conducted exclusively by police officers. Additionally, *T.L.O.*, where police became involved after a justified warrantless search, the police here were involved for the entirety of the search and arrest. Moreover, unlike *T.L.O.*, who was searched to ensure compliance with school regulations, Mr. Larson was not subject to any special regulations and was only searched because he was a suspected sex trafficker.

Similar to the policy in *Ferguson*, this Ordinance was also devoid of alternative plans to protect sex trafficking victims. In fact, arresting suspected sex traffickers was the only protection it offered. Thus, protection of the victims was incidental to the primary purpose—searching and arresting suspects. Moreover, the officers' actions further evidence that victim protection was a secondary purpose. The only precaution the officers took to ensure W.M.'s safety and well-being was asking her if she had a safe place to stay that night. After W.M. replied that she could stay at Mr. Larson's house (the suspected sex trafficker), Officer Nelson questioned her to illicit more evidence and never attempted to evaluate her well-being or seek additional treatment. Despite all the damaging effects of sex trafficking the Government used to justify the Ordinance, they fell

[3] These operational guidelines included the chain of custody of evidence, the range of criminal charges, and logistics of police notification and arrest. *Ferguson*, 532 U.S. at 82.

terribly short of ensuring W.M's safety. However, the Ordinance did efficiently effectuate the immediate search and arrest of Mr. Larson.

Although commercial sex trafficking presents serious societal concerns, this Court cannot allow the Government to employ unconstitutional means each time it is faced with difficult issues. This Court should continue to reject the special needs doctrine in cases such as this, where the primary purpose is to detect evidence of criminal conduct. To hold otherwise would all but eviscerate the protections of the Fourth Amendment. Thus, because the Ordinance's primary purpose is to detect evidence of commercial sex trafficking, the special needs doctrine is inapplicable.

2. Assuming *Arguendo* That the Practicality of Obtaining a Warrant Must Be Determined, the Special Needs Doctrine Is Still Inapplicable Because a Warrant Could Have Been Obtained.

The text of the Fourth Amendment indicates that the measure of the constitutionality of a governmental search is "reasonableness." *Vernonia School District 47J v. Acton*, 515 U.S. 646, 652 (1995). Whether a particular search meets the reasonableness standard "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Id.* at 652-653. Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires a judicial warrant. *Id.* at 653. A search unsupported by probable cause and a warrant can be constitutional when special needs, beyond the normal need for law enforcement make the warrant and probable cause requirement impracticable." *Id.*

The first factor to be considered is the nature of the privacy interest upon which the search at issue intrudes. Here, the privacy interest implicated by the Ordinance was that of remaining free from unreasonable searches. The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as "legitimate." *Id.* at

654. In the context of a special needs inquiry, an individual's expectation of privacy must be objectively reasonable. *Wilcher v. City of Wilmington,* 139 F.3d 366, 374 (3rd Cir. 1998). While officers may observe an individual from a public place, such as a motel lobby, without violating any reasonable expectation of privacy, this does not afford them the right to search an individual's person or possessions. *Horton v. California*, 496 U.S. 128, 137 (1990). As the district court correctly noted, the interest in not having one's person searched while checking into a hotel is substantial and cuts against a finding of reasonability. R. at 8-9.

Here, Mr. Larson did not abandon his expectation of privacy by entering the Stripes Motel lobby, nor was it diminished. The Government may contend that, like Griffin in *Griffin*, 483 U.S. 868 (holding that probationers/parolees do not enjoy the absolute liberty to which every citizen is entitled), Mr. Larson had a diminished expectation of privacy because of his previous convictions, but these facts are distinguishable. As previously stated, the record only indicates that Mr. Larson had two previous drug-trafficking convictions. Again, this is not indicative that Mr. Larson was on conditional release that would diminish his privacy interest. Thus, Mr. Larson had an objectively reasonable expectation of privacy when he entered the Stripes Motel.

The second factor to be considered is the character of the intrusion upon the privacy interest. *Vernonia School District 47J,* 515 U.S. at 658. The relative inquiry here is nature of the search. In *Vernonia,* all students participating in high school athletics were required to sign a form and consent to drug tests. *Id.* at 659. This Court examined how the urine samples were produced to determine the nature of the intrusion. *Id.* There, the urine samples were conducted in conditions nearly identical to those of using public restrooms. *Id*. Thus, because the samples were obtained through a commonplace practice, this Court found the intrusion to be negligible. *Id.* Moreover, the urine tests were only disclosed to a limited class of "need to know" school

personnel and were not turned over to law enforcement or used for internal disciplinary function. *Id.* at 658.

Here, although the Ordinance was limited in geographic scope and required individualized suspicion, the manner in which it was executed was unreasonable. Unlike *Vernonia*, where the nature of the intrusion was almost identical to a persons' daily activity, here, the search of Mr. Larson was abnormal because checking into a motel does commonly subject one to a search by police. Moreover, Mr. Larson never had notice, much less consented like the students in *Vernonia*, to this search and the evidence obtained, unlike the evidence in *Vernonia*, was used for a single purpose—prosecution.

The final consideration is the nature and immediacy of the governmental concern and the efficacy of this means for meeting it to determine if obtaining a warrant is impracticable. *Vernonia School District 47J*, 515 U.S. at 660. In *T.L.O.*, this court held that the warrant requirement was impracticable because it "would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed," and "strict adherence to the requirement that searches be based upon probable cause" would undercut "the substantial need of teachers and administrators freedom to maintain order in the schools." *T.L.O*, 469 U.S. at 340, 341.

By contrast, here, law enforcements' duty is to conduct criminal investigations, obtain warrants, and adhere to the constitutional scheme. The Government's interest does not rely on "swift and informal disciplinary procedures." Moreover, the Government had ample time and other available options to address the possible influx in sex-trafficking. The government could have elected other options to address this problem such as devoting more personnel to monitoring online ads and increasing police presence in the community and at public lodging

places. Here, sex trafficking occurred in Starwood Park nightly. Thus, while there is an immediate threat to sex trafficking victims in the time before the act, the Government had ample time and options to gather evidence for probable cause and a warrant before the week of the All-Star game to reduce this threat.

As evidenced, the Ordinance's primary purpose was solely to detect evidence of sex trafficking and the special needs doctrine is inapplicable. Even if it had a valid purpose separate from general law enforcement, the Government had ample time to obtain a warrant. To hold otherwise would turn the special needs doctrine on its head and muddle the line this Court has delineated.

3. Even If the Search Passed Special Needs Muster (which it does not), the Special Needs Doctrine Only Applies to *Suspicionless* Searches.

This Court has only applied the special needs doctrine to cases involving suspcicionless searches and seizures. For example, it has upheld suspicionless searches and seizures to conduct drug testing of railroad personnel involved in train accidents, *Skinner*, 489 U.S. 602*;* to conduct random drug testing of federal customs officers who carry arms or are involved in drug interdiction, *Von Raab*, 489 U.S. 656*;* to maintain automobile checkpoints looking for illegal immigrants and contraband, *Martinez–Fuerte*, 428 U.S. 543; and drunk drivers, *Sitz*, 496 U.S. 444. As *Skinner* stated: "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the *absence of such suspicion*." *Skinner*, 489 U.S. at 624 (emphasis added).

In each of these cases the special needs applied because the searches were suspicionless. Here, the Ordinance expressly requires reasonable suspicion. Applying the special needs doctrine in such circumstances cuts against the doctrine's rationale. To expand the special needs doctrine

to the circumstances in this matter would contravene its intended purpose and circumvent well-established precedent.

B. W.M.'s Consent Was Invalid Because Officer Nelson Could Not Have Reasonably Believed She Had Authority to Consent To A Search Of The Apartment or Cell Phone

Officer Nelson unreasonably believed that W.M. possessed apparent authority to consent to a search of Mr. Larson's apartment and cell phone because, viewing the totality of the circumstances, an officer of reasonable caution would have discovered ambiguity regarding W.M.'s mutual use and joint-access or control over the apartment, cell phone, and area beneath the bed.

A third party can validly consent to a search of property over which he or she possesses common authority. *United States v. Matlock*, 415 U.S. 164, 171 (1974). Courts determine whether a third party possesses common authority based on "mutual use" and "joint access or control for most purposes." *Id.* at n.7. Unless co-occupants "fall within some recognized hierarchy," each occupant's right is complete, as though he or she were the sole occupant. *Georgia v. Randolph*, 547 U.S. 103, 114 (2006). Where a third party does not possess actual common authority, but the police reasonably believed the third party had common authority, the warrantless exception is valid. *Ill. v. Rodriguez*, 497 U.S. 177, 187 (1990). Reasonableness drives the fact-intensive inquiry as to whether a third party possesses apparent authority. *Id.* at 185; *Kentucky v. King*, 563 U.S. 452, 460 (2011). If the circumstances are such that ambiguity regarding the third party's authority exists, the officers have a duty to inquire further before relying on the third party's consent. *Id.* at 188-89. The test is an objective standard of whether all the facts would "warrant a man of reasonable caution" in believing a third party had authority over the property. *Terry v. Ohio*, 392 U.S. 1, 22 (1968).

1. Officer Nelson Unreasonably Relied on W.M's Consent to Search the Apartment

Determining mutual use and joint access or control is a fact-intensive inquiry, including factors like whether the third party possessed a key, was on the lease, and paid rent. *United States v. Groves*, 530 F.3d 506, 510 (2008). For example, in *Groves* the third party answered the door at her boyfriend's dwelling when officers arrived following up after a 911 call. *Id.* at 508. The officers learned that the third party had a key and claimed unlimited access to the dwelling, paid for and had a phone registered in her name to the dwelling address, registered her child in school using the dwelling address, and received her mail and bills there. *Id.* at 510. Looking at the totality of the circumstances, the court held the officers were reasonable in believing that the third party had apparent authority over the dwelling. *Id.*

Here, Officer Nelson relied on ambiguous facts to establish W.M.'s authority to consent to a search of Mr. Larson's apartment. Under circumstances such as these, Officer Nelson should have inquired further to establish authority or obtained a warrant before conducting a search. Unlike the third party in *Groves*, who possessed keys to the dwelling, had a phone registered to the address, enrolled her daughter in school using the address, paid the phone bill registered to the address, and had unlimited access to the dwelling, W.M. is not an independent and did not control the apartment. By contrast, W.M. told Officer Nelson she was a sixteen-year-old runaway. Officer Nelson saw that W.M. did not possess a key to the apartment and had to use a spare. Officer Nelson knew Mr. Larson maintained possession of the apartment keys, but did not inquire as to the reasons W.M. did not possess her own key. Although W.M. did chores around the house and received some mail at Mr. Larson's apartment, Officer Nelson knew W.M. was not on the lease and did not pay any bills or rent. W.M. claimed she kept all of her belongings at Mr. Larson's apartment, but she referred to her things as a backpack and "spare" clothes. Officer Nelson did not question W.M. further on her claim or testify whether Mr. Larson's address was

the address on W.M.'s driver's license, despite her claim that she lived there for a year. Based on these facts, Officer Nelson should have further questioned W.M. to resolve these ambiguities and determine if she had authority.

2. Officer Nelson Unreasonably Relied on W.M.'s Consent to Search Within the Apartment.

Even when an officer reasonably believes a third party has authority to consent to a search of a dwelling, the scope does not extend to every object and area. The officer must determine whether the third party has mutual use and joint access or control to those areas before continuing a search. *United States v. Waller*, 426 F.3d 838, 845 (6th Cir. 2005) (citing *United States v. Karo*, 468 US 705 (1984)). In *McGee*, the court determined that if a third party depends on another with formal possessory interest to grant or deny access, the third party does not have joint access. *United States v. McGee*, 564 F.3d 136, 141 (2nd Cir. 2009). Physical ability or inability to access an area is therefore not dispositive but rather the understanding regarding access between the titular owner and the third party is important. *Id.* at 140. The court provided an example reasoning that if a room in a dwelling lacked a lock, but one member of the household was not permitted to enter the area, the individual would not have apparent authority to consent for the area to be searched. *Id.* at 141.

Similarly, in *Welch*, a male third party consented to a search of a vehicle he shared with Welch, a female. *United States v. Welch*, 4 F.3d 761, 762 (9th Cir. 1993). In the vehicle, the officers found and searched a purse, clearly belonging to a woman. *Id.* The officers knew that Welch was the third party's girlfriend and that they travelled in the vehicle together. *Id.* at 765. On that basis, the court held that none of the facts available would have warranted an officer to reasonably believe the third party had mutual use and joint access or control over the purse. *Id.*

Likewise, in *Waller*, officers searched a third party's dwelling and found luggage belonging to Waller. *United States v. Waller*, 426 F.3d 838, 842 (6th Cir. 2005). The officers knew Waller had just moved from his former dwelling. *Id.* Without inquiring as to the mutual use or joint access and control of the luggage, the officers opened and searched the luggage. *Id.* The court concluded that the officers were not interested in searching any of the third party's belongings and only searched items they believed belonged to Waller. *Id.* at 849. The court found that, under these cirumstances, the officers should have questioned the third party's use, access, and control over the luggage instead of remaining deliberately ignorant regarding the nature of the third party's authority over the luggage. *Id*.

Here, even if Officer Nelson reasonably believed W.M. possessed authority to enter the dwelling, it was unreasonable to believe she had mutual use and joint access or control over every object and area. Following the court's holding in *McGee*, mere ability to access an object or area does not provide apparent authority over the object or area. W.M. provided clear information about hierarchical relationship between her and of Mr. Larson. Mr. Larson kept his food separate from W.M.'s food; he made her get rid of her phone so he could monitor her activity; and he only gave her a specific section of the closet for her belongings. Officer Nelson admitted the relationship was "pretty abnormal." Although W.M. may have possessed the physical ability to access all areas of the house, it was ambiguous whether she was actually free to do so. Again, Officer Nelson failed to resolve this ambiguity.

Additionally, Officer Nelson did not exercise reasonable caution when he proceeded to search the cell phone he found on Mr. Larson's nightstand. Like in *Taylor*, where the officers found a shoebox surrounded by male belongings, and in *Welch* where the officers found a female's purse after obtaining a male's consent to search a vehicle, here Officer Nelson found a

cell phone with Mr. Larson's tattoo symbol on the case surrounded by a male watch, male glasses, and male condoms. Officer Nelson saw another nightstand that contained items indicating female ownership, including a 17 magazine and pink eye mask. Just as the facts in *Taylor* and *Welch* cast significant doubt as to whether the third party possessed authority over the items, here Officer Nelson should have had the same doubt. Additionally, Officer Nelson learned that W.M. did not pay for the phone and did not pick the case. Although W.M. claimed to "share" the phone, she explained that Mr. Larson had purchased the phone in order to restrict, not liberate, her control over a phone. Yet another ambiguity Officer Nelson did not resolve.

3. It Was Not Reasonable For Officer Nelson to Believe He Could Search Under the Bed.

Aside from straightforward, recognizable exclusions from the third party's authority to consent, like those discussed above, the location and expectation of privacy commonly associated with areas or objects can prompt ambiguity and the need for further inquiry before extending a search based on third party consent. *Taylor*, 600 F.3d at 683; *United States v. Andrus*, 483 F.3d 711, 719(10th Cir. 2007); *United States v. Davis*, 332 F.3d 1163, 1168 (9th Cir. 2003). For example, in *Taylor*, the court held that shoeboxes are "often used to store private items, such as letters and photographs," and that Taylor had manifested an expectation of privacy by closing the shoebox and partially covering it with clothes. 600 F.3d at 683.

Similarly, in *Davis*, relying on third party consent to search a dwelling, officers searched a gym bag found under Davis's bed. 332 F.3d at 1168. The court held that "[t]he fact that Davis stored his bag under a bed, even though the bed was not exclusively under his control, strongly support[ed] [the] conclusion that his expectation of privacy in the bag was reasonable." *Id.*; *See United States v. Karo*, 468 U.S. 705, 725-27 ("The shared control of 'host' property does not serve to forfeit the expectation of privacy in containers within that property").

Here, Officer Nelson unreasonably relied on W.M.'s authority over the area under Mr. Larson's bed. Just as in *Davis*, Mr. Larson did not have exclusive control of his entire bed. However, the court in *Davis* held that the defendant still maintained a high expectation of privacy beneath his bed. Likewise, here, Officer Nelson knew that W.M. had very few belongings. Officer Nelson was aware that W.M. stored her belongings in a specific section of the closet. Officer Nelson therefore could not reasonably conclude that W.M. had mutual use of the storage area beneath the bed without inquiring further. Thus, Officer Nelson should have excluded the area from his search until he addressed the ambiguity or obtained a warrant.

4. W.M. Did Not Have Authority to Consent to a Search of the Phone.

Likewise, in *Andrus*, the court analogized files on a computer to individual private containers. 483 F.3d at 718. In *Andrus*, the court relied on a third party's consent to search a computer. *Id.* at 715. Although a third party can unambiguously disclaim authority over areas and objects, the third party in *Andrus* gave no indication that he did not have authority over the computer. *Id.* at 720-721 (citing *Trulock v Freeh*, 275 F.3d 391, 403 (4th Cir. 2001)). Because the incriminating computer files were registered to the third party's email address, the third party paid the Internet bill, the computer was in plain view, and the third party did not indicate a lack of authority, the court held that the officers finding of the third party's apparent authority was reasonable. *Id.* at 715.

Here, Officer Nelson relied on ambiguous facts to establish W.M. had authority to consent to a search over Mr. Larson's apartment. Under circumstances such as these, an officer of reasonable caution would have inquired further to establish authority or obtained a warrant before conducting a search. Unlike the third party in *Groves*, W.M. is not an independent, responsible controller of a dwelling. In *Groves* the third party possessed keys to the dwelling, had a phone registered to the address, enrolled her daughter in school using the address, paid the

phone bill registered to the address, and had unlimited access to the dwelling. In contrast, W.M. told Officer Nelson she was a sixteen-year-old runaway. Officer Nelson saw that W.M. did not possess a key to the apartment and had to use a spare. Officer Nelson knew Mr. Larson maintained possession of the apartment keys, but did not inquire as to the reasons W.M. did not possess her own key. Although W.M. did chores around the house and received some mail at Mr. Larson's apartment, Officer Nelson knew W.M. was not on the lease and did not pay any bills or rent. W.M. claimed she kept all of her belongings at Mr. Larson's apartment, but she referred to her things as a backpack and "spare" clothes. Officer Nelson did not question W.M. further on her claim. Officer Nelson did not testify whether Mr. Larson's address was the address on W.M.'s driver's license, despite her claim that she had lived there for a year. Nor did Officer Nelson inquire which address W.M. used for school. A reasonably cautious officer would have continued inquiring until W.M. resolved the ambiguities, or sought a warrant before concluding W.M. possessed authority over the dwelling.

Even if Officer Nelson could reasonably have concluded that W.M. possessed authority to enter the dwelling, Officer Nelson unreasonably determined that W.M. had mutual use and joint access or control over objects and areas within the dwelling. Following the court's holding in *McGee*, mere ability to access an object or area does not provide apparent authority over the object or area. W.M. provided clear information to Officer Nelson regarding the hierarchical nature of Mr. Larson and her relationship. Mr. Larson kept his food separate from W.M.'s food; he made her get rid of her phone so he could monitor her activity; and he only gave her a specific section of the closet for her belongings. Officer Nelson admitted the relationship was "pretty abnormal." Although W.M. may have possessed the physical ability to access all areas of the house, W.M.'s testimony to Officer Nelson was ambiguous as to whether she was actually free to

do so. Nonetheless, Officer Nelson failed to resolve whether W.M. possessed joint access and control for most purposes over the areas and objects within the dwelling.

Additionally, Officer Nelson did not exercise reasonable caution when he proceeded to search the cell phone he found on Mr. Larson's nightstand. Like in *Taylor*, where the officers found a shoebox surrounded by male belongings, and in *Welch* where the officers found a female's purse after obtaining a male's consent to search a vehicle, here Officer Nelson found a cell phone with Mr. Larson's tattoo symbol on the case surrounded by a male watch, male glasses, and male condoms. Officer Nelson saw the opposite nightstand contained items indicating female ownership, including a 17 magazine and pink eye mask. Just as the facts in *Taylor* and *Welch* cast significant doubt as to whether the third party possessed authority over the items, here Officer Nelson had significant ambiguous facts to overcome. Upon further inquiry, Officer Nelson learned that W.M. did not pay for the phone and did not pick the case. Although W.M. claimed to "share" the phone, she explained to Officer Nelson that Mr. Larson had purchased the phone in order to restrict, not liberate, her control over a phone. Officer Nelson therefore did not reasonably conclude W.M. had resolved the ambiguities.

Furthermore, just as the court in *Andrus* recognized that separate files on a computer are analogous to separate containers, the phone had separate equivalent "containers" or applications. Following the court's holding in *Andrus* that individuals may disclaim authority over some files while maintaining authority over others, W.M. could disclaim authority over certain application on the phone. Unlike in *Andrus* where the third party gave no indication that he did not possess authority over the computer files, here W.M. specified she could access and use her social media without requesting Mr. Larson's permission. As stated in *McGee*, when a formal possessor has to grant or deny access to a third party, the third party does not have joint access. Officer Nelson

knew that Mr. Larson had formal possession over the phone and had the authority to grant or deny W.M. access to the phone. As explained earlier, Mr. Larson paid for the phone, picked the phone case, kept the phone on his nightstand, and monitored W.M.'s use of the phone. Although W.M. also occasionally sent personal messages or calls on the phone, Mr. Larson used the phone regularly. Such facts should not have given Officer Nelson a reasonable belief of authority.

Mr. Larson maintained a high expectation of privacy over his phone despite W.M.'s use of social media. Just as the court in *Davis* held that an individual does not forfeit his or her expectation of privacy of the contents in containers within shared host property, Mr. Larson maintained his expectation of privacy over the pictures in his phone. *Taylor* noted that storing pictures in a shoebox carried a high expectation of privacy. W.M. specifically informed the officers which applications she could use which did not include the pictures application. Officer Nelson should have concluded that W.M. did not have mutual use or joint access or control over the pictures application. Instead, Officer Nelson disregarded this information and searched the pictures application. Thus, like the officers in *Taylor* and *Waller,* Officer Nelson appears to have deliberately remained ignorant as to W.M.'s authority over the applications within the phone. Similarly, he also failed to search any items W.M. actually possessed authority over.

In conclusion, Officer Nelson did not reasonably determine that W.M. had authority to consent to a search of Mr. Larson's apartment, cell phone, and area beneath his bed because after considering all available facts, significant ambiguity remained regarding W.M.'s mutual use and joint access or control over the objects and areas.

V. CONCLUSION

Because the special needs doctrine is inapplicable and W.M. did not have authority to consent, this court should affirm the appellate court's decision and suppress the evidence obtained from these unlawful searches.