R15

No. 03-240

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner

v.

WILLIAM LARSON,

Respondent.

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

BRIEF FOR THE RESPONDANT

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ISSUES PRESENTED

I. The Fourth Amendment requires a warrant to be issued upon probable cause for a search or seizure to be reasonable in most circumstances. However, there are exceptions to this general rule. Considering the nature of one's liberty interest in privacy, did the Court of Appeals properly conclude that L.O. 1923 is facially unconstitutional given that the search authorized by police fail to meet the requirements of the special needs exception?

II. The Fourth Amendment protects citizens from unreasonable search and seizures and allows for third parties to give consent to searches only if the third party has authority to do so. Here, Officer Nelson searched the apartment and other property of Mr. Larson after gaining consent from W.M. who did not have a key to the apartment and also did not own the other property. Under the circumstances, did the Court of Appeals properly conclude that W.M did not have the requisite authority to consent to this search?

STATEMENT OF FACTS

I. Introduction

On July 12, 2015, William Larson's ("Larson") and his companion, W.M., were visiting the Stripes Motel, located in Victoria City, Victoria. As the two were checking in they were stopped by police. Subsequently, Larson's apartment and cell phone were searched without a warrant by consent of W.M. The stop and subsequent search was pursuant to Local Ordinance 1923 ("L.O. 1923"). Officer Nelson ("Nelson") was the police officer who conducted the search.

II. The passing of Local Ordinance 1923

Victoria City, Victoria was the host city of the Professional Baseball Association's ("PBA") 2015 All-Star Game. The game was held on July 14, 2015 at Cadbury Park which is located in the Starwood Park neighborhood in downtown Victoria City. Concerned citizen groups raised fears that the game would create a swell of human trafficking activity in the neighborhood, a phenomenon often accompanying large sporting events. Further, gangs in the area also allegedly participated in human trafficking and pimping as a form of profit. The most notable gangs in the Starwood Park area was the Starwood Homeboyz and the 707 Hermanos.

Taking all of this into consideration, the Victoria City Board of Supervisors ("Board") passed L.O. 1923 on May 5, 2015. In full, L.O. 1923 reads:

> "1. Any individual obtaining a room in a hotel, motel, or other public lodging facility shall be subject to search by an authorized law enforcement officer if that officer has reasonable suspicion to believe that the individual is:
>
> a. A minor engaging in a commercial sex act as defined by federal law
>
> b. An adult or a minor who is facilitating or attempting to facilitate the use of a minor for a commercial sex act as defined by federal law.

2. This ordinance shall be valid only from Monday July 11, 2015, through Sunday, July 17, 2015.
3. A search conducted under the authority of this provision shall be limited in scope and duration to that which is reasonably necessary to ascertain whether the individual searched is engaging in the conduct described in subsection (1).
4. This ordinance shall be valid only in the Starwood Park neighborhood**.**
a. Starwood Park is defined to encompass the area within a three-mile radius of Cadbury Park Stadium."

The Board released a statement to the press announcing L.O. 1923. This statement emphasized a few reasons why the ordinance was passed. First, the statement focused on the unique prevalence of child sex trafficking in the Starwood Park area and the tremendously damaging effects that sex trafficking has on victims. Second, the statement showed statistics about the surge in sex trafficking that regularly accompanies major sporting events.

III. The stop of Mr. Larson and W.M.

On the night of July 12, 2015, Officer Joseph Richols and Officer Nelson stopped Larson and W.M. at approximately 11:22 p.m. at the Stripes Motel. The Stripes Motel is located in the Starwood Park neighborhood. The stop was pursuant to L.O. 1923.

In justifying the stop, the officers said that they noticed the female appeared much younger than Larson and that she had on a low-cut top and tight fitting shorts. Additionally, the officers said that Larson had tattoos identifying him as a member of the Starwood Homeboyz street gang. Specifically, there was a tattoo on Larson's left forearm depicting an "S" and a "W" wrapped around a wizard's hat. Another tattoo, on the back of Larson's neck read 4-11-5-11. Nelson knew that these numbers corresponded with a popular phrase used by the Starwood Homeboyz gang members. Also, the police officers noticed that neither of them were carrying luggage.

The officers searched Larson first and recovered condoms, a knife, oxycodone ills, and a list of names with times, and $600 in cash. W.M. was also searched and produced a valid State of Victoria driver's license identifying her as W.M., a 16-year-old female. However, the Government has conceded that there was not probable cause to initiate a search in this situation. Larson was immediately arrested for sex trafficking a minor in violation of 18 U.S.C. § 1591(a)(1). W.M. was not arrested.

IV. The search of Larson's apartment.

Nelson begin to question W.M. Nelson asked W.M. if she had a place to stay and W.M. responded that she lived in an apartment a couple block away. W.M. was referring to Larson's apartment. Nelson asked W.M. if she was willing to speak with him a little bit more and W.M. agreed. W.M. explained that she's only lived there for a year. Nelson testified that at this time the was not entirely sure if there was mutual use of the apartment. W.M. further explained that she only kept a backpack and spare clothes in the apartment, and had some mail sent to the apartment.

Upon arriving at the apartment located at 621 Sasha Lane, W.M. did not have a key to enter. W.M. had to use the spare key that was under a rock to get into the apartment. W.M. also told Nelson that only Larson paid the rent. Nelson testified that when he asked W.M. for permission to search the apartment, she replied "yah that's fine" or "okay."

In the apartment Nelson found a black semi-automatic handgun with the serial number scratched off.

V. The search of Larson's phone.

On the nightstand, Nelson found a smart phone. The nightstand that the phone was found on also had men's glasses, a men's watch, and condoms on it. W.M. testified that the

only other nightstand in the room had a “Seventeen” magazine and W.M.’s eye cover that she uses for sleep. When asked, W.M. said that she shared the phone with Larson.

The phone had a custom cover emblazoned with an “S” and a “W” wrapped around a wizard’s hat which was identical to Larson’s left forearm tattoo. W.M. explained that this was Larson’s sticker. The phone’s lock screen was a picture of Larson and W.M. together. The phone’s password was “4-11-5-11” which is the same as the tattoo on Larson’s neck. W.M. also explained that Larson paid the phone bill. W.M. said that she had some social media accounts on the phone and had some texts and calls on the phone. She also explained that Larson used the phone for his calls and texts for their business together. Nelson asked W.M. to search the phone and he agreed. Nelson found pictures of W.M. and a video of Larson rapping.

SUMMARY OF THE ARGUMENT

Larson's Fourth Amendment right of being safe from unreasonable search and seizures were violated in this case pursuant to L.O. 1923's unconstitutionality. The evidence in this case supports the affirmation of the Court of Appeals that L.O. 1923 is unconstitutional and that a suppression of the evidence found in Larson's apartment and in Larson's phone is proper. This Court should affirm the ruling of the Court of Appeals.

The Court of Appeals properly held that L.O. 1923 was facially unconstitutional because the search by the police does not meet the requirements of the "special needs" exception to the warrant requirement. The Fourth Amendment protects citizens from unreasonable searches and seizures, and when one is required a warrant must be issued upon probable cause. There are circumstances that would justify a warrantless search. One of these exceptions is the "special needs" exception. To meet this exception, the State must demonstrate that the search or seizure is not within the scope of normal law enforcement and that a warrant would be impractical given the circumstances Under the first prong, the State must show that their search or seizure is properly divorced from law enforcement or evidence collection. This is done by an evaluation of the entire record and evidence in a given case. Under the second prong, the court must evaluate the nature of the privacy interest, the nature of the intrusion, and the state interest. In this case, the State does not provide enough evidence to show that either of these requirements are met.

The Court of Appeals properly suppressed the evidence found in Larson's apartment and in Larson's phone. The Fourth Amendment protects citizens from unreasonable search and seizures. However, when voluntary consent has been obtained, either from the individual whose property is searched, or from a third party who possesses common authority over the premises, a search is proper. "Common authority" is determined by "mutual use, joint access, and

control, and is a question of fact." *Id.* (2009). Further, the officer has to have enough information to reasonably believe that the person giving consent has the authority to do so. *Ill. v. Rodriguez*, 497 U.S. 177, 188.

There is substantial evidence that W.M. did not have common authority over the apartment and Nelson could not have reasonably believed that she did. Nelson knew that W.M. did not have a key to the apartment, she did not pay the rent to the apartment, and she only kept spare clothes and a backpack in the apartment. There is also substantial evidence that W.M. did not have common authority over the cell phone. Nelson knew that the sticker on the phone was identical to a tattoo on Larson's forearm, the numbers in the password were also identical to a tattoo on Larson's neck, also the picture on the lock screen depicted Larson and W.M. The evidence shows that the information that W.M. gave Nelson would not lead an officer to reasonably believe that W.M. had common authority over the apartment or the cell phone. The Court of Appeals properly found that W.M. did not have the authority to consent to a search of Larson's apartment and cell phone.

STANDARD OF REVIEW

There are two standards of review that the Court must apply in this case. The first issue address whether the Court of Appeals properly held that L.O. 1923 to unconstitutional. Because this statute infringes upon the Fourth Amendment fundamental right of Mr. Larson to be free from unreasonable search and seizures, the Court must apply a strict scrutiny standard. *See Roe v. Wade*, 410 U.S. 113, 155 (1973). The only way that the statute can be upheld is if it is narrowly tailored to a compelling state interest. *Id.*

The second issue addresses whether the Court of Appeals properly granted Mr. Larson's motion to suppress the evidence found in the warrantless search of his apartment and cell phone. The Court in reviewing a motion to suppress, should review questions of law de novo and questions of fact for clear error." *United States v. Montgomery*, 555 F.3d 623, 629 (7th Cir. 2009) (citing *United States v. Scheets*, 188 F.3d 829, 836 (7th Cir. 1999)

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT L.O. 1923 IS FACIALLY UNCONSTITUTIONAL BECAUSE THE STATE'S SEARCH DOES NOT MEET THE REQUIREMENTS OF "THE SPECIAL NEEDS" EXCEPTION TO THE FOURTH AMENDMENT WARRANT REQUIREMENT.

a. THE FOURTH AMENDMENT OF THE UNITED STATES PROTECTS AGAINST UNREASONABLE SEARCHES AND SEIZURES, AND ONLY IN LIMITED AND SPECIFIC CIRCUMSTANCES CAN THE GOVERNMENT OVERRIDE THE WARRANT REQUIREMENT.

In the United States, one's person is protected from arbitrary and unreasonable assertion of governmental power and intrusion. See *Camara v. Municipal Court of San Francisco,* 387 U.S. 523 (1967) The Fourth Amendment states,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Const. amend. IV.

In order to effectuate the goal of the Fourth Amendment, the first clause prevents unreasonable searches and seizures, and the second clause requires that warrants be issued upon probable cause. Thus, the first clause is simply restating a preexisting right, and the second clause ensures that the government take all precautions necessary to protect that preexisting right. Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment,* 2011 Indiana L.J. (2011)

The importance of this right cannot be understated, both historically and philosophically; this Court has time and time again reasserted its importance. This Court has held to principle that

the Fourth Amendment is intrinsic to the preservation of ordered liberty in society and the natural rights of the individual. *Mapp v. Ohio*, 367 U.S. 643 (1961); see *Boyd v. United States*, 116 U.S. 616, 630 (1886); see also *Weeks v. United States*, 232 U.S. 383 (1914); see also *McNabb v. United States*, 318 U.S. 332 (1943)

The practicalities of living in a society governed by law compels the courts to consider pragmatic interpretations of the Fourth Amendment, while at the same time preserving the fundamentally important principles derived from it. As such, there are certain exceptions to the warrant requirement that have been narrowly cut out. In the words of this Court, warrantless searches are "per se unreasonable" aside from "a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967); see *Arizona v. Gant*, 556 U.S. 332 (2009); see also *Flippo v. West Virginia*, 528 U.S. 11 (1999)

b. THE WARRANT REQUIREMENT MAY BE OVERRIDEN BY THE "SPECIAL NEEDS" EXCEPTION.

Since the Fourth Amendment ensures that the public is safe from unreasonable searches and seizures, it is within the purview of the judicial branch to decide the reasonable from the unreasonable. See *United States v. Sharpe*, 470 U.S. 675, 682 (1985) The court does this by evaluating the totality of the circumstances surrounding a particular search or seizure, and then balancing the interests of the individual with the interests of the community. *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989); *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976)

One recognized exception to the general warrant requirement is the "special needs" exception. Under this exception, the warrant requirement may be overridden "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement

impracticable.'" *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987), quoting *New Jersey v. T. L. O.*, supra, at 351 (Blackmun, J., concurring in judgment) Thus, there is a two prong test that the State must meet in order for the special needs exception to apply: (1) the State's search or seizure must not be in the course of normal law enforcement routine, and (2) the issuance of a warrant must be impractical under the circumstances based on a balancing of an individual's liberty interest with that of State interests. See *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989); see *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989)

(i) Non-Law Enforcement Requirement.

Under the first prong of the test, the State's search or seizure must not be part of the need for normal law enforcement. There are cases where the line between law enforcement and non-law enforcement is clear. In *Skinner v. Ry. Labor Executives' Ass'n,* the Federal Railroad Administration (FRA) proscribed a rule that railroad workers that had been involved in major train accidents must undergo mandatory blood, urine, and breath tests for drug and alcohol use. This Court ultimately ruled that the mandatory testing of workers was outside the scope of law enforcement because the purpose of the regulation was to "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs." *Id*. at 621 The court specifically notes that the regulation of an industry, such as the railroad, is akin to other highly regulated entities, like probation schemes. *Id*. at 620; see *Griffin v. Wis*., 483 U.S. 868 (1987) (holding that a home search of a criminal, while on probation, falls within the special needs exception because the probation system is highly regulated and a warrant in this context disrupts that regulatory scheme.) Further, employees governed by FRA regulations are within safety-sensitive occupations, which trumped the law enforcement component. *Id*. at 620 Therefore, three

elements were key in this case: (1) the stated purpose of the regulation was safety, (2) the industry is a highly regulated one, and (3) the occupation, by its nature, is "safety-sensitive."

Within the jurisdiction of a regulatory scheme, courts have in some circumstances allowed investigators the ability to search and seize without a warrant. This Court in *Griffin* notes, "…in certain circumstances government investigators conducting searches pursuant to a regulatory scheme need not adhere to the usual warrant or probable-cause requirements as long as their searches meet 'reasonable legislative or administrative standards.'" *Griffin v. Wis*., 483 U.S. 868 (1987) However, this Court limits these circumstances to investigators, not to police: "although a probation officer is not an impartial magistrate, neither is he the police officer who normally conducts searches against the ordinary citizen." *Id*. at 876

There are instances where the programmatic or regulatory scheme veils the ultimate purpose of law enforcement. This Court makes clear that the "special needs" exception does not apply simply because the intent or facial purpose of the statute explicitly or implicitly denotes a non-law enforcement goal. In *Ferguson v. City of Charleston*, the court struck down a policy, known as M-7, that allowed urine testing of pregnant women at the Medical University of South Carolina. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) The State in that case asserted the "special needs" exception based on the fact that the policy was meant to protect the health of the mother and the fetus. *Id*. at 81 Evaluation of a policy's actual purpose is highly fact intensive, and thus requires a review of all the available evidence. *Id*. at 81 This Court in that case looked at: (1) operational guidelines for police, (2) the chain of custody requirements, (3) possible criminal charges, (4) logistics of arrest, and (5) level of involvement of law enforcement. *Id*. at 82 Also in *Indianapolis v. Edmond*, this court asserts the principle that the "special needs" exception can only be applied in situations that are separate from normal law enforcement, because a "general interest

in crime control" could justify any amount of suspicion-less searches, stops, or seizures. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). Finally, in *Illinois v. Lidster* this Court upheld a temporary checkpoint system that was used to question passengers about a hit and run that had occurred previously since the stop was not being used to find criminals but rather to find information about other crimes that had taken place or will take place in the future. *Illinois v. Lidster*, 540 U.S. 419 (2004)

(ii) Impracticability Requirement.

Under the second prong of the test, the State must demonstrate that the issuance of a warrant would be impractical under the circumstances based on a balancing of liberty with state interests. See *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989); see *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) This Court in *Vernonia School Dist. 47J v. Acton* applies a three-part test: (1) the nature of the privacy interest, (2) the nature of the intrusion, and (3) the nature and immediacy of the governmental concern. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995)

In *Nat'l Treasury Employees Union v. Von Raab*, this Court upheld drug testing of government employees who were directly involved in drug interdiction, required to carry a firearm, or handled classified material. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) In that case, this Court stated that the privacy interest of the employees was outweighed by the state's interest in protecting the U.S. borders from illegal narcotics trafficking. Id. at *677* However, this Court provides reasons why the issuance of a warrant were particularly impractical: (1) requiring a warrant every time an employee had to be tested would divert necessary resources, (2) employees are aware of the fact that covered positions require drug testing, and (3) because every

covered position requires a drug test, there are no additional or discretionary facts that a neutral magistrate would need to evaluate. *Id*. at 666, 667

c. THE STATE FAILS TO PROVE THAT THE PURPOSE OF L.O. 1923 IS SUFFICIENTLY SEPARATE FROM NORMAL LAW ENFORCEMENT AND THAT THE ISSUANCE OF A WARRANT IS IMPRACTICAL, THUS FAILING TO MEET THE REQUIREMENTS OF THE "SPECIAL NEEDS" EXCEPTION.

(i) L.O. 1923 serves primarily law enforcement ends.

The first requirement needed to satisfy the "special needs" exception is that the search or seizure is outside the scope of normal law enforcement. Here, L.O. 1923 does not fall outside the scope of normal law enforcement. This Court must evaluate the situational and contextual specifics to determine whether in each case the policy in question is law enforcement based or not. See *Griffin v. Wis*., 483 U.S. 868 (1987) There are numerous reasons why L.O. 1923 does not primarily serve non-law enforcement ends.

First, unlike cases analogous to *Vernonia School District* or *Skinner*, the place of the search is not a school district, government building, or safety-sensitive work place. The place of the search was Stripes Motel. (R at 2) L.O. 1923 generally would not fall under any of these categories since the ordinance applies across Starwood Park. (R at 3) Second, unlike the investigators in *Griffin*, the agents of the ordinance are actual law enforcement. (R at 2) This Court makes specific note in that case that police officers receive higher scrutiny because they are the agents who would normally conduct searches and seizures for law enforcement purpose. *Griffin v. Wis*., 483 U.S. 868 (1987) Third, analogous to *Ferguson*, the text of L.O. 1923 is primarily about the activity of the law enforcement officer as well as the crime of sex trafficking. The relevant portions of the text are:

> Any individual obtaining a room in a hotel, motel, or other public lodging facility ***shall be subject to search by an authorized law enforcement officer*** if that ***officer*** has reasonable suspicion to believe that the individual is: a. ***A minor engaging in a commercial sex act as defined by federal law*** b. ***An adult or a minor who is facilitating or attempting to facilitate the use of a minor for a commercial sex act as defined by federal law.***

L.O. 1923. (emphasis added). It is clear from the case law that the division between primarily serving law enforcement purposes and non-law enforcement purposes is blurry. However, in the cases where law enforcement agents have been present, *Ferguson*, and those agents have been doing searches more in line with generic evidence collection, *Edmond*, this Court has never found the search or seizure to be for non-law enforcement purposes. See *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); see *City of Indianapolis v. Edmond,* 531 U.S. 32 (2000) Where there have been police officers and the search had been affirmed, the nature of the search was inquiry about a specified past crime, not evidence collection about ongoing criminal activity. *Illinois v. Lidster*, 540 U.S. 419 (2004)

Petitioners may argue that the State interest in preventing sex crimes and harm to youth is a compelling enough non-law enforcement end that it trumps the law enforcement nature of the search. L.O. 1923, they argue, is specifically tailored to combat the prevalence of sex trafficking: the state offered "…recently collected statistics and the personal stories of victims…arguments…focused on the tremendously damaging effects that child sex trafficking has on virtually all of its victims…statistics showing the surge in sex trafficking that regularly accompanies major sporting events." (R at 3) However, this Court should take note of *Prosecutor v. Doe*, an Indiana District Court case that also addresses sex crimes. That court struck down a

statute that allowed police officers to search the computers of sex offenders on the fact that the policy did not meet the "special needs" exception, which is the issue here. *Doe v. Prosecutor*, 566 F. Supp. 2d 862 (S.D. Ind. 2008) The State argued there, as here, that the blight of sex crimes is heinous enough and harmful enough to require special need. *Id*. at 887 However, that court aptly notes that any amount of crimes is heinous and harmful to the population, and the State fails to prove beyond that why sex crimes should be separated from any other type of heinous crime. *Id*. at 887 That logic applies here as well. The State fails to demonstrate how the damage inflicted by sex crimes rises to the level of "special" in the realm of all crimes.

Therefore, because (1) the agent of the state is a police officer, (2) the area of jurisdiction is not special, (3) the text of L.O. 1923 is primarily about the activity of law enforcement and the application of criminal law, and (4) the stated objective of youth protection from sex crimes does not itself separate it from the normal course of evidence collection nor does the state provide compelling reasons why sex crimes are uniquely harmful, L.O. 1923 does not serve primarily non law enforcement ends.

(ii) <u>The issuance of a warrant is not impractical</u>.

This Court should apply the test set in *Vernonia*: (1) the nature of the privacy interest, (2) the nature of the intrusion, and (3) the nature and immediacy of the governmental concern. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995)

Under the first prong of the test, it is clear that the nature of the privacy interest is of high magnitude here. The Fourth Amendment specifically states that one's "person" is safe from "unreasonable searches." U.S. Const. amend. IV. Here, Mr. Larson's person was violated when the police searched his person unreasonably and then confiscated his belongings as a result of the

search. (R at 28) It should be noted that just because Mr. Larson was in the lobby of a motel does not reduce his privacy expectations for his own person. See *Horton v. California*, 496 U.S. 128 (1990) Thus, when this Court weighs this prong of the test in relation to the other prongs, it should be weighed highly because they privacy interest at stake is a core constitutional liberty protected by the Fourth Amendment.

Under the second prong of the test, this court should find that the nature of the intrusion is unreasonable. The lower court makes note that the statute is in its nature limited in scope and therefore not unreasonably intrusive. (R at 9) However, this Court should reject this line of thinking as being the only measure of unreasonableness here. Although the time is a week, the scope of impact on the number of people is immense. Since the week is that of a sporting event, the number of people traveling is exponentially increased. (R at 9) Therefore, the number of people being potentially subjected to this search is not narrow in scope. Moreover, these individuals are probably unaware of the possibility of being searched. Unlike *Von Raab*, where this court found that employees were well aware of the policy as well as the fact that it covered every employee in a covered position, *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), that is not the case here. Here, the ordinance is a local ordinance and thus not limited to employees or individuals with specified knowledge, and the ordinance is particularized against suspected individuals. (R at 2) Therefore, the nature of the intrusion is unreasonable.

Under the third prong of the test, this court needs to evaluate the nature and immediacy of the governmental concern. Here, the concern for sex crimes as indicated by the State is one of concern. (R at 3) However, in line with the logic of the Southern District Court of Indiana in *Doe*, the fact that crimes are immediate or harmful does not outweigh the constitutional and liberty concerns associated with unreasonable searches and seizures. *Doe v. Prosecutor*, 566 F. Supp. 2d

862 (S.D. Ind. 2008) The first two factors should weigh in favor of the Respondents here, and significantly outweigh the third prong of the test. Therefore, the issuance of a warrant is not impractical given the nature of the constitutional concern and the nature of the intrusion.

II. THE COURT OF APPEALS CORRECTLY HELD THAT MR. LARSON'S FOURTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE OFFICER NELSON DID NOT HAVE ENOUGH INFORMATION TO REAONABLY BELIEVE THAT W.M. HAD APPARENT AUTHORITY TO CONSENT TO A SEARCH OF MR. LARSON'S APARTMENT AND CELL PHONE.

"Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court for the Eastern District of Michigan, Southern Division, et al.*, 407 U.S. 297, 313 (1972). Whether the defendant's reasonable expectation of privacy was infringed by the third party's consent to the search is a paramount. *United States v. Cos*, 498 F.3d 1115, 1126 (10th Cir. 2007).

The Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects. *Ill. v. Rodriguez*, 497 U.S. 177, 181 (1990); *See also United States v. Matlock*, 415 U.S. 164, 171 (1974). The prohibition does not apply, however, to situations in which voluntary consent has been obtained, either from the individual whose property is searched, or from a third party who possesses common authority over the premises. *Id.* (internal citations omitted). However, the existence of consent to a search is not lightly to be inferred the government always bears the burden of proof to establish the existence of effective consent. *United States v. Reid*, 226 F.3d 1020, 1025 (9th Cir. 2000). Although W.M. gave voluntary consent, she did not possess the requisite common authority over the premises for this consent to be effective. W.M.'s consent infringed upon Mr. Larson's reasonable expectation of privacy.

Also, the determination of consent to enter must be judged against an objective standard: "would the facts available to the officer at the moment . . . 'warrant a man of *reasonable caution* in the belief' that the consenting party had authority over the premises?" *Ill. v. Rodriguez*, 497 U.S. 177, 188. (citing *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968)) (emphasis added). The evidence is clear that W.M. did not give enough information for Officer Nelson to reasonably believe that W.M. had common authority over the apartment or the cell phone.

The Court of Appeals properly ruled W.M. did not possess common authority to give consent to search the apartment or the cell phone and Officer Nelson did not have enough information to reasonably believe that W.M. had this authority. Mr. Larson's fourth amendment right was violated and the search of his apartment and cell phone were unreasonable.

a. *OFFICER NELSON VIOLATED LARSON'S CONSTITUTIONAL RIGHTS WHEN HE SEARCHED THE APARTMENT WITHOUT ADEQUATE INFORMATION TO REASONABLY BELIEVE THAT W.M. HAD THE COMMON AUTHORITY OF THE PREMISES TO BE SEARCHED.*

"Consent to search . . . may be given either by the suspect or by some other person who has common authority over, or sufficient relationship to, the item to be searched." *United States v. James*, 353 F.3d 606, 613 (8th Cir. 2003). "Common authority" is determined by "mutual use, joint access, and control, and is a question of fact." *Id.* (2009). Common authority depends not on property rights, but on mutual use of the property by persons generally having joint access or control for most purposes. *United States v. Penney*, 587 F.3d 297, 307 (2009) (quoting *United States v. Matlock*, 415 U.S. 164, 171 n. 7 (1974)). Further, the officer has to have enough information to reasonably believe that the person giving consent has the authority to do so. *Ill. v. Rodriguez*, 497 U.S. 177, 188.

Ill. v. Rodriguez, 497 U.S. 177 (1990) is the leading case law on apparent authority. (cite). However, the facts in the present case are distinguishable from those in *Rodriguez*. In *Rodriguez*, Gail Fisher ("Fisher) led police officers to the defendant's apartment after alleging that the defendant had assaulted her. *Id*. at 179. Fisher referred to the apartment as "our apartment" and said that she kept "clothes and furniture" in the apartment. *Id*. Fisher also opened the apartment with her own key. *Id*. at 180. This court found that although Fisher did not have actual authority to consent to search, she could have given adequate information to the officers for them to reasonably believe that she had the common authority over the premises. This case created the subset of apparent authority. *Id*. at 188, 189.

The present case is different. In the present case, the evidence shows that Officer Nelson did not have sufficient information to reasonably believe that W.M. had the authority to consent to search the apartment. Here, W.M. did not have a key to open Larson's apartment. (R. at 21) W.M. also said that she only kept a backpack and spare clothes at the apartment. (R. at 30). W.M. said that she did not pay the rent at the apartment. (R. at 33). Unlike *Rodriguez*, W.M. could not enter the apartment on her own, she did not keep many items in the home, and based on this information Nelson could not have reasonably believe that she had common authority to consent to a search of the apartment.

Additionally, Nelson testified that he knew W.M. was a 16-year-old minor. (R. at 29). Nelson should have known that a minor rarely has common authority over an apartment. While "minority does not, per se, bar a finding of actual authority to grant third-party consent to entry," it certainly undermines the government's assertion in this case. *United States v. Guiterrez-Hermosillo*, 142 F.3d 1125, 1231 (10th Cir. 1998). When the facts known by the police "cry out for further inquiry, and when this is this case it is not reasonable for the police to proceed on the

theory that "ignorance is bliss." *United States v. Cos*, 498 F.3d 1115, 1128 (10th Cir. 2007). Here, Nelson should have further inquired into W.M.'s authority in the apartment before he searched the apartment. The Court of Appeals properly found that W.M. did not have common authority to consent to a search of the apartment and that the information given by W.M. would not lead Nelson to reasonably believed that she did.

b. OFFICER NELSON VIOLATED LARSON'S CONSTITUTIONAL RIGHTS WHEN HE SEARCHED THE CELL PHONE WITHOUT ADEQUATE INFORMATION TO REASONABLY BELIEVE THAT W.M. HAD THE COMMON AUTHORITY OF THE ITEM TO BE SEARCHED.

The information known to Nelson about the cell phone was also not enough for a reasonable person to believe that W.M. had common authority over the cell phone. The test to determine whether W.M. had common authority over the cell phone is the same test that is set out above. The requirement that the Officer need only have enough information to reasonably believe that W.M. had authority applies here as well. However, Larson has a greater expectation of privacy in the data contained in his cell phone. *See Riley v. California*, 134 S. Ct. 2473, 2489 (2014).

In *United States v. Taylor*, 600 F.3d 678 (6th Cir. 2010) the court affirmed a motion to suppress because the defendant's aunt did not give enough information to show that she had apparent authority to consent to a search of defendant's shoe box. The court looked to many factors to determine whether there was ambiguity in who had control over the shoebox. *Id.* at 680-685. Specifically, the court looked to the appearance of the shoebox, where the shoebox was located, and if the defendant had taken precautions to manifest his expectations of privacy. *Id.* The court found that there was an ambiguity about who owned the phone and the officers should have asked more questions in order to clear the ambiguity. *Id*. at 685.

The case here is analogous. First, the appearance of the phone showed that it most likely belonged solely to Larson. The sticker on the outside of the phone was identical to the tattoo that Larson had on his forearm. (R. at 4). Second, the phone was located on a nightstand that also had men's glasses, a men's watch and condoms on it. (R. at 34). The only other nightstand in the room contained a "Seventeen" magazine and an eye mask which W.M. testified was hers. (R. at 37). When comparing the two nightstands, it is clear to see that the nightstand with the phone on it was the nightstand primarily used by Larson. Third, Mr. Larson had guarded the cell phone with a password and did not simply leave it open, which he could have. The password was also a set of numbers ("4-11-5-11") that matched the numbers of the tattoo on the back of Larson's neck. (R. at 4). This shows that he took the steps necessary to manifest his expectations of privacy. Finally, although the lock screen photo depicted a picture of Larson and W.M., this further adds to the ambiguity of who owned the phone. Additional information shows that W.M. told the officers that Mr. Larson paid the bill and that she only had a minimal amount of information on the phone. (R. at 34).

Nelson was presented with a set of information that contained many ambiguities about who actually had authority over the phone. Nelson had a duty to clear that ambiguity before he decided to search the phone. *See Id*.; *United States v. Cos*, 498 F.3d 1115, 1128 (10th Cir. 2007). The Court of Appeals properly found that W.M. did not have common authority to consent to a search of the cell phone and that the information given by W.M. would not lead Nelson to reasonably believed that she did.

CONCLUSION AND PRAYER

The importance of the Fourth Amendment cannot be understated; it has wide spread ramifications for everyone in the United States, but most importantly, for people targeted by the criminal justice system. The Framers, understanding the possibility of oppression on ordinary citizens, wanted to protect the most sacred aspects of a person's life – his/her home, his/her papers, and his/her effects. The expectation of privacy that comes from these domains have been protected by this Court for centuries. Do not turn an eye to precedent and the critical factor it is in protecting the liberty and privacy of the American citizen. The case before this Court represents a threat to not just one man's individual liberty, but a threat to everyone's individual liberty. Err on the side of liberty.

Therefore, because the Court of Appeals correctly found L.O. 1923 facially unconstitutional for permitting an inexcusable violation of the warrant requirement because the search it authorizes does not meet the "special needs" exception, and because the Court of Appeals correctly found that that Mr. Larson's Fourth Amendment rights were violated because Officer Nelson did not have enough information to reasonably believe that W.M. had apparent authority to consent to search of Mr. Larson's apartment or cell phone, this Court should affirm the judgement of the Court of Appeals.