TEAM R17

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 ON THE MERITS FOR RESPONDENT

Team No. R17
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QUESTIONS PRESENTED

1. Did the United States Court of Appeals properly hold that searches conducted pursuant to L.O. 1923 were not permitted under the special needs exception of the Fourth Amendment because the ordinance did not address a "special need" and served no purpose other than general enforcement of a specific criminal law?

2. Did the United States Court of Appeals properly hold that W.M. did not possess authority to consent to Officer Nelson's search of the apartment at 621 Sasha Lane or the cell phone found therein?

STATEMENT OF FACTS

This case arises out of a warrantless search of Respondent William Larson, without probable cause, conducted by law enforcement officers Joseph Richols and Zachary Nelson pursuant to Victoria City, Victoria, Local Ordinance 1923, which led to Mr. Larson's arrest. R. at 28.

The Ordinance: In March 2013, the Professional Baseball Association selected Victoria City, Victoria to host the 2015 All-Star Game. R. at 2. The event was staged at Cadbury Park Stadium, located in Starwood Park, an inner city neighborhood long afflicted by illegal and gang activity, including human trafficking by local gangs Starwood Homeboyz and 707 Hermanos. *Id.* A coalition of concerned citizens immediately expressed concern to the government that there would be a spike in illegal activity in the area by relying on speculation that there is a link between major sporting events and human trafficking. *Id.* On May 5, 2015, almost two years after Victoria City was selected as the host of the game, the Victoria City Board of Supervisors passed Local Ordinance 1923 ("L.O. 1923"). R. at 2, 40-41. For a one week period, the ordinance allowed law enforcement officers to perform warrantless searches only of guests checking into lodging facilities, located in the three-mile radius of Cadbury Park Stadium, if the officers had "reasonable suspicion" to believe that the guests were either minors engaging in a "commercial sex act" or an adult or minor "facilitating or attempting to facilitate" a minor for a commercial sex act. R. at 2-3, 27. The Board advised the public that the purpose of L.O. 1923 was to protect the safety of Starwood Park local children and those visiting the area for the game, by giving law enforcement

the means to remove children from dangerous situations before they could escalate. R. at 41.

The Warrantless Search: On the evening of July 12, 2015, Officers Richols and Nelson were on specialty detail at the Stripes Motel, located in Starwood Park, observing guests checking into the facility for signs of human trafficking as authorized by the ordinance. R. at 2, 26-27. Mr. Larson and W.M. attempted to check into the motel, but were intercepted by the officers. Officer Nelson based his reasonable suspicion that Mr. Larson was trafficking in persons on three pieces of information: He was not carrying luggage, had a tattoo that associated him with the local Starwood Park gang, and was accompanied by a young woman in revealing attire. R. at 27-28. Without any questioning or probable cause, Officer Nelson searched Mr. Larson's person. R. at 3, 28. As a result of the warrantless search, Officer Nelson recovered nine condoms, lube, a butterfly knife, 600 dollars in cash, two pills of oxycodone, a list of names, a pair of house keys, and Mr. Larson was arrested. R. at 28, 36.

While Officer Richols arrested Mr. Larson, Officer Nelson searched W.M. and found her wallet and driver's license, which revealed that she was 16 years old. R. at 29, 36. W.M. informed Officer Nelson that she ran away from home a year and a half earlier, and was homeless when she met Mr. Larson. R. at 30. While initially a temporary living situation, W.M. stated that Mr. Larson was very nice to her, treated her very well, gave her money to buy clothes and perfume, and they ran a business together. R. at 29-30.

After speaking with W.M. for approximately ten minutes, Officer Nelson discovered that she lived three blocks from the motel. R. at 29, 31, 37. W.M. informed Officer Nelson that while she lived with Mr. Larson, her name was not on the apartment lease. R. at 29. Although Mr. Larson was still nearby and the officers had no intent to arrest W.M., Officer Nelson asked W.M. for consent to search Mr. Larson's apartment. R. at 29, 31, 36. W.M. had just witnessed the arrest

of her boyfriend and was rightfully scared during her interaction with the officers, so she agreed to let them search the apartment. R. at 31, 37.

Upon arrival at Mr. Larson's residence, Officer Nelson noticed that W.M. did not have her own key because he watched her use a spare key from a hide-a-key to open the door. R. at 31, 33. Officer Nelson discovered that W.M. had minimal belongings at the apartment – just about everything fit in her backpack, some spare clothes were in the closet and nothing else, just a "duffel bag's (*sic*) worth of stuff." R. at 30, 33. W.M. further revealed that though they shared some things, she performed most of the chores around the house, they kept separate food, and she cooked for herself. R. at 33. While W.M. had some mail, such as medical bills sent to Mr. Larson's apartment, she did not pay any bills or rent R. at 31, 33.

Officer Nelson made no further inquiries as to what belonged to W.M. and Mr. Larson, and performed a thorough search of Mr. Larson's bedroom, during which he uncovered a loaded black semi-automatic handgun underneath the bed. R. at 31. Two nightstands were in the bedroom - A man's watch, glasses, condoms, and an Apple iPhone 5S were on one nightstand, and a women's magazine and eye mask on the other. R. at 31, 35, 37. The phone was labeled with an image that matched Mr. Larson's gang tattoo and was found on the "male" nightstand. R. at 32, 34. When asked, W.M. disclosed that she shared the cell phone with Mr. Larson. R. at 30-32. The arrangement was that he paid for the phone service and used it for personal and business purposes, but allowed her to also use the phone to use social media applications and send calls and texts. *Id.* W.M. gave Officer Nelson verbal permission to search the cell phone, and provided him with the password to unlock the phone and access its contents. R. at 32, 34.

Procedural History: During the trial in the United States District Court, Western District of Victoria, Mr. Larson moved to suppress evidence in this case because the initial search of his

person at the Stripes Motel was invalid because L.O. 1923 is facially unconstitutional under the Fourth Amendment. R. at 5. Further, Mr. Larson argued that his Fourth Amendment rights were violated when Officer Nelson searched his apartment and cell phone without his consent. R. at 5. The District Court denied the Motion to Suppress evidence in its entirety. R. at 13. Mr. Larson was convicted of one count of sex trafficking of children in violation of 18 U.S.C. § 1591(a)(1), and one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). R. at 5.

The United States Court of Appeals for the Thirteenth Circuit reversed and remanded the judgment of the District Court. R. at 23. Petitioner's Petition for Certiorari was granted by the United States Supreme Court. R. at 24.

SUMMARY OF ARGUMENT

The Court should affirm the Thirteenth Circuit's holding that searches conducted pursuant to L.O. 1923 were performed in violation of the Fourth Amendment and their fruits must be suppressed. The Fourth Amendment protects citizens from unreasonable searches and seizures by the government because the founders meant to prevent the government from arbitrary trespass upon a person's privacy and barging into a citizen's home to rummage through their papers and effects without a warrant evidencing probable cause.

I. This Court's Fourth Amendment jurisprudence supports the accuracy of the United States Court of Appeals ruling because searches conducted pursuant under L.O. 1923 for evidence of criminal activity, namely human trafficking, were performed without warrants or probable cause. The judicially created "special needs" exception argued by Petitioner has never before been

supported by a search primarily serving the normal needs of law enforcement and searches of citizens, whose reasonable expectation of privacy is undiminished. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985). First, Petitioner has not satisfied its burden of demonstrating that the circumstances evidenced the existence of a "special need" outside of the state's general obligation to enforce the laws and keep the peace. Second, searches conducted pursuant to L.O. 1923, exceed the bounds of reasonableness required by the Fourth Amendment when weighed against the intrusion on free citizens' interest in privacy. Misapplication of the very narrow "special needs" exception to a "normal" criminal search, would do violence to the privacy the founders intended the Fourth Amendment to secure.

II. The Court should likewise affirm the Thirteenth Circuit's holding that the search of the apartment and cell phone were not permitted under the Fourth Amendment, and all evidence gathered during the searches must be suppressed. Absent an exception to the warrant requirement, here namely consent to search, evidence illegally obtained must be suppressed. Here, Petitioner has not established the existence of neither actual nor apparent authority to consent for the search of Mr. Larson's apartment or cell phone found therein. Petitioner fails to establish that the law enforcement agent's reliance on apparent authority to consent to either search was reasonable considering the totality of the circumstances.

Mr. Larson therefore requests this Court to affirm the Thirteenth Circuit's order in all respects, finding that searches conducted pursuant to L.O. 1923 were performed in violation of the Fourth Amendment and their fruits must be suppressed.

STANDARD OF REVIEW

Challenges to warrantless searches, resulting from questions of law under the Fourth Amendment are reviewed by the Supreme Court *de novo*. *Ornelas v. United States*, 517 U.S. 690, 697 (1996).

ARGUMENT

I. THE THIRTEENTH CIRCUIT DID NOT ERR IN HOLDING THAT SEARCHES CONDUCTED PURSUANT TO L.O. 1923 WERE DONE IN VIOLATION OF THE FOURTH AMENDMENT AND THEIR FRUITS MUST BE SUPPRESSED

A. Searches conducted under L.O. 1923 are unconstitutional because the ordinance is simply a pretext for avoiding the Fourth Amendment warrant and probable cause requirements in conducting what is otherwise an ordinary criminal search.

The Thirteenth Circuit was correct in holding that searches conducted under L.O. 1923 are unconstitutional because the ordinance is simply a pretext for avoiding the Fourth Amendment warrant and probable cause requirements in conducting what was otherwise an ordinary criminal search. The Fourth Amendment to the United States Constitution guarantees "[t]he 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, … and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. A search conducted without a warrant is "per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well delineated exceptions." *Sibron v. New York*, 392 U.S. 40, 62 (1968). In the instant case, Petitioner asks this court, as it asked the lower courts before to do an unprecedented thing – to justify warrantless searches

conducted pursuant to L.O. 1923 through the "special needs" doctrine.

Justice Blackmun first coined the term "special needs" in his concurrence in *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) which allowed an administrative, warrantless search in the public school forum. Thereafter, in *O'Connor v. Ortega*, 480 U.S. 709, 720 (1987), and *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987), the Court held that "in limited circumstances, a search unsupported by either warrant or probable cause can be constitutional when 'special needs' *other than the normal need for law enforcement* provide sufficient justification." *Ferguson v. City of Charleston*, 532 U.S. 67, 76 (2001) (emphasis added). In application, the special needs doctrine has been delimited to cases that "fit within the closely guarded category" of constitutionally permissible suspicionless searches, which have been defined more by a list of examples than by a determinative set of criteria. *Chandler v. Miller*, 520 U.S. 305, 309 (1997). For example, in *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 671-72 (1989) this Court found a special need for the government as an employer to ensure government agencies operate in an effective and efficient manner. In *Griffin v. Wisconsin* 483 U.S. 873, 874 (1987) this Court found a special need to effect the supervisory arrangement and post incarceration authority of probation officers. In *Vernonia School Dist. 47J v. Acton* 515 U.S. 646, 654-655 (1995) the court found a special need *in loco parentis* authority of school officials.

Over time, this Court developed a test to support an exception under the "special needs doctrine." First, the government bears the burden of establishing that the need is "special" and "beyond the normal need for law enforcement." *Chandler,* 520 U.S. at 322; *Von Raab,* 489 U.S. at (1989). Only upon identification of a "special need," does the Court then apply a balancing test to determine the nature of the privacy interest, the character of the intrusion, and the nature and immediacy of the government's legitimate interest. See *Samson v. California*, 547 U.S. 843, 843

(2006); *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls,* 536 U.S. 822, 843 (2002); *United States v. Knights*, 534 U.S. 112, 113 (2001); *United States v. Alverez-Tejeda*, 491 F.3d 1013, 1016 (9th Cir. 2007).

The Thirteenth Circuit determined that the Petitioner did not meet its burden and this case does not fall into the "special needs" exception because L.O. 1923 serves "no purpose other than the general enforcement of a specific criminal law," namely human trafficking. Because the Petitioner still cannot meet its burden, the Thirteenth Circuit's holding should be affirmed.

1. Petitioner's "special need" does not fit within the "closely guarded category" of constitutionally permissible suspicionless searches because combatting human trafficking serves only the general interest society has in enforcing human trafficking laws.

The Fourth Amendment is triggered upon a warrantless search, therefore, this Court will not "simply accept the State's invocation of a "special need." *Ferguson v. City of Charleston*, 532 U.S. 67, 81 (2001); *Indianapolis v. Edmond*, 531 U.S. 32, 42-43 (2000). Rather, the Court carries out a "close review" of the scheme at issue, considering all the available evidence. *Id.*

Justice Blackmun emphasized that only a "special need" would justify the departure from the warrant and probable cause requirement. Although Petitioner argues that the special need is the protection of Starwood Park's vulnerable youth, it ignores that the protection of children in the community from commercial sex trafficking is part of the government's "general interest in crime control" which means it simply does not qualify as a special need. *Edmond*, 531 U.S. at 121. Constitutional application of warrantless searches under the special needs doctrine has focused on the correlation between the policy and prevention or deterrence of some ongoing future harm. *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls,* 536 U.S. 822, 824 (2002). For example, in *Marchwinski v. Howard*, 113 F. Supp. 2d 1134, 1141–44

(E.D. Mich. 2002), the court held that the government could not rely on the alleged nexus between the "special need" of preventing child abuse and random drug tests since the government assistance programs at issue were not designed to ameliorate child abuse. Similarly, here, although Respondent and the Thirteenth Circuit recognized that the high number of human trafficking cases creates a compelling interest for the state, it did not create a special need of "protection of Starwood Park's vulnerable youth" because as drafted, the ordinance was not designed to prevent ongoing sex trafficking due to its limited scope of public lodging in a three mile radius and duration of a one week period of time.

Petitioner's reliance on *Skinner* to support the proposition that the government may take steps to protect its citizens from the victimizing consequences of conduct that is also considered illegal is misplaced. *Skinner v. Railway Labor Execs' Ass'n*, 489 U.S. 602, 627-28 (1989). While this Court found a special need to regulate conduct of rail road employees in order to effect public safety, it was the regulatory objective of assurance of the safe operation of the United States' railways, in an industry that was already highly "regulated pervasively to ensure safety" that was the "special need." *Skinner*, 489 U.S. at 627. Here, L.O. 1923, as drafted, was limited to the protection of a very narrow group of individuals, checking into a hotel, who law enforcement officers suspected of engaging in a commercial sex act, during a one week period. R. at 2. There was no continuing regulatory safety or public safety interest at play due to the limitations of the ordinance.

Further, Petitioner is not able to counter evidence that L.O. 1923 served a special needs purpose by simply stating that the city is "determined to protect the safety of our local children as well as those that visit us for the Midsummer Classic" by pointing to various articles quoting human trafficking statistics, for which their own evidence states that there is "no hard data to

support that there is actually an increase [of sex trafficking] during [major sporting events]."[1] R. at 40. In *Chandler,* the state of Georgia enacted a scheme that involved the suspicionless drug testing of candidates for certain public offices. The Court discerned the warrantless search policy served a "symbolic" rather than "special" need because though a drug free candidate would foster compliance with campaign regulations, there was little, if any correlation between the regulatory end and Georgia's asserted special need to drug test the candidates absent any suspicion. *Chandler,* 520 U.S. at 322. Similarly, L.O. 1923 was an effort to demonstrate symbolic opposition to sex trafficking in order to avoid negative media coverage that would accompany illegal activity because it was designed for a one week period of compliance, thus lacking the real capacity to protect the Starwood Park youth from continuing harm. The ordinance simply gave law enforcement an expedient means of enforcing existing sex trafficking laws, without warrants and probable cause, in an effort to protect the city's image. If Petitioner' statistics are correct and there are more than 8,000 child sex trafficking victims in Victoria City, it is strikingly obvious that this issue is a serious concern to the city. R. at 41. However, what belies its concern is that the city waited until 2015, almost over 2 years after its selection to host the All-Star Game to enact any special legislation to interdict minors engaged in a commercial sex act. Further, human trafficking knows no time, place, or boundary because Petitioner admits that "human trafficking remains a problem every week of the year." R. at 41.

Therefore, Petitioner's general interest in protecting children, coupled with the manner in which the ordinance was written, does not fit into the narrow category of cases in which courts

[1] http://espn.go.com/espn/story/_/id/14720095/the-scope-human-trafficking-continues-grow-awareness

have accepted the existence of a special need.

2. The primary purpose of L.O. 1923 is not sufficiently divorced from the State's Interest in Law Enforcement, thus the special needs is inapplicable where, as here, the law enforcement purpose is integral to the searches.

In the criminal context, the Court has determined that Fourth Amendment rights are best protected when search are authorized by a warrant supported by probable cause. If the "primary purpose" or "immediate objective" of the scheme is to generate evidence for law enforcement purposes," then application of the special needs doctrine is not appropriate. *Ferguson*, 532 U.S. at 83. Thus, "beyond the normal need for law enforcement" will exclude cases in which an integral purpose of the search is arrest and prosecution. In *Von Raab, Skinner,* and *Acton,* this Court applied the special needs exception only after noting that the searches at issue were not part of a law enforcement program and that the results of the searches could not be disclosed to law enforcement. *See Acton,* 515 U.S. at 651 (access to test results were limited to school personnel, namely "the superintendent, principals, vice-principles, and athletic directors"); *Von Raab,* 489 U.S. at 666 (test results could not be used in criminal prosecution of the employee without the employee's consent); *Skinner,* 489 U.S. at 621 n.5, 626 n.7 (the Court noted that nothing in the record indicated that government would use test results for other than employment purposes). The cited cases arose from civil searches, thus, the law enforcement purpose for the search was either non-existent or clearly secondary to the non-law enforcement purpose of the search. Because Petitioner failed to prove a special need purpose beyond ordinary law enforcement, the ordinance violates the Fourth Amendment.

Further, law enforcement involvement to enforce the ordinance was directly built into the ordinance. L.O. 1923 authorized searches by Victoria City's "authorized law enforcement

officer," and was conducted "in conjunction with" and "at the behest of" law enforcement agencies. *Cf. T.L.O.*, 469 U.S. at 342 n.7. Law enforcement officials "ordinarily have a law enforcement objective." *Ferguson*, 532 U.S. at 100. L.O. 1923 identifies only law enforcement officers as authorized to search, rather than a school agent as in *T.L.O.* or a supervising employee in *Skinner*. *Skinner*, 489 U.S. at 627-28. The ordinance was simply intended to further the needs of the law enforcement during the one week period around the All-Star game by identifying and gathering evidence of commercial sex acts, in an effort to intercept sex trafficking, which is a component of general crime control.

"Law enforcement officers have the responsibility to investigate criminal activity, to locate and arrest those who violate our laws, and to facilitate the charging and bringing of such persons to trial. *T.L.O.*, 469 U.S. at 349. Any search that results in the detection and punishment of a crime necessarily deters crime. Here, a commercial sex act is defined by federal law as, "any sex act on account of anything of value is given to or received by any person." 22 U.S.C. § 7102. Punishment of violation of the statute is also codified. 18 U.S.C. § 1591(b). Thus, the ordinance that gave rise to the search and underlying arrest was conducted in order to detect a "commercial sex act," rather than to prevent it, and in fact resulted in Mr. Larson's conviction under the federal "Trafficking Victims Protection Act." Under federal law, sex trafficking is "ordinary criminal wrong doing" for which law enforcement and government have a duty to investigate and prosecute.

Petitioner cites to *Griffin*, the only "special needs" case that allowed some level of law enforcement involvement, and confuses an administrative "public safety" goal with a pretexual ordinance that actually authorized searches undertaken solely to uncover evidence of criminality, namely sex trafficking. In *Griffin,* this Court allowed a warrantless search by a probation officer pursuant to probation regulations allowing searches of probationers' homes for firearms. *Griffin*,

483 U.S. at 870-71. The search for firearms in *Griffin* served the "special need" of ensuring compliance with those regulations and not "normal" law enforcement needs of finding evidence in violation of a separate crime. This Court noted *Griffin's* holding was limited to a search of a probationer pursuant to a "valid regulation" and did not address whether "any search of a probationer's home by a probation officer is lawful when there are 'reasonable grounds' to believe contraband is present. *Id*. at 880. In this case, by contrast, the searches were specifically formulated and implemented for the purpose of "obtaining evidence for use in criminal… enforcement proceedings." *O'Conner v. Ortega,* 480 U.S. 709, 721 (1987). To say otherwise is disingenuous because that is exactly what happened to Mr. Larson. Any evidence found in the course of a search conducted pursuant to L.O. 1923 that implicated sex trafficking, as here, would lead to prosecution under full force and operation of the law.

Here, the conclusion drawn from all the available evidence is that the primary purpose of the ordinance is not divorced from the State's general interest in law enforcement. Because the primary purpose was to obtain evidence of criminal activity and law enforcement played an integral role in the search at issue, the special needs exception cannot be applied. Petitioner attempts to apply a civil search doctrine based on "special needs" to evade the more demanding Fourth Amendment protections applicable to criminal searches. Thus, any searches conducted under the ordinance actually required a criminal search warrant only on a showing of probable cause to believe that relevant evidence will be found in the place to be searched.

B. Searches conducted pursuant to L.O. 1923 exceeded the bounds of reasonableness required by the Fourth Amendment when weighed against the intrusion on individual privacy interests.

Because the search at issue served the goal of general law enforcement, i.e., ordinary crime detection activities, it is inappropriate to engage in a balancing test to determine whether the

ordinance meets the constitutional requirement of reasonableness. Assuming *arguendo* that a special need is present, the Petitioner still must show that the government interests at stake outweigh the private interests. Unlike here, cases that applied the special needs doctrine relied on the concept of a party's reduced expectation of privacy when engaging in the reasonableness determination. See *Samson v. California*, 547 U.S. 843, 849–50 (2006); *Griffin* at 874, 878. It cannot be the case that a motive to protect the public welfare removes the protections of the Fourth Amendment. *See Mincey v. Arizona,* 437 U.S. 385, 393 (1978).

The question presented is if Petitioner's desire to protect Starwood Park's youth "substantial – important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion." Petitioner relies on the three factor test set forth in *Acton*: 1) the nature of the privacy interest that is intruded upon, 2) the character of the intrusion upon that interest, and 3) the nature and immediacy of the government concern at issue. *Acton,* 515 U.S. at 654-61. As set forth herein, Petitioner is unable to show the government's interest "appears important enough to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy." *Acton,* 515 U.S. at 654-61.

1. Citizens in Starwood Park did not have a diminished privacy interest.

An essential purpose of a warrant requirement is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents. *Skinner*, 489 U.S. 621–22. "The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as "legitimate." *Acton*, 515 U.S. at 654, citing *T.L.O.,* 469 U.S., at 338. It is undisputed by the parties that the privacy

interest implicated by the ordinance is that of remaining free from unreasonable searches.

Even in cases involving searches with no law enforcement, this court has only applied the "special needs" doctrine when the citizens searched have a diminished expectation of privacy. In *Acton*, the Court noted that schoolchildren and student athletes have diminished expectations of privacy due to the "degree of supervision and control that could not be exercised over free adults" including health screenings and vaccination programs to which they must submit. *Acton*, 515 U.S. at 655. In *Skinner*, employees had a diminished expectation of privacy by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees. *Skinner*, 489 U.S. at 627-28. Here, the legislature and district court incorrectly determined that citizens in the immediate Starwood Park area, both residents and visitors from all parts of the country for a national event, had less privacy interests than those in the outlying areas because only those within the three mile radius, checking into a hotel were subject to the search. Thus, dispensing with the Fourth Amendment's warrant and probable cause requirements by expanding the "special needs" exception to cover individuals checking into a hotel, during a one week period, in one geographic region, is especially pernicious.

2. The character of the intrusion imposed by the ordinance was not minimal.

The Fourth Amendment protects two kinds of privacy: informational interests and dignity interests. *See* William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*. 93 MICH. L. REV. 1016, 1021 (1995). Informational interests relate to keeping information secret, while dignity interests relate to the right to be left alone. *Id.* By focusing only on the time and duration of the search, Petitioner ignores the threat to dignity interests posed by the implication of

being stopped under L.O. 1923. Even though Petitioner argues that searches under L.O. 1923 were limited in scope and duration, searches conducted pursuant to the ordinance subjected any person meeting a particular profile, the indignity of being stopped by officers, and searched for evidence of commercial sex acts without a warrant and probable cause, and without the opportunity to refuse the search. A nonconsensual search of a person's body for evidence of crime is among the most intrusive searches imaginable. *Terry v. Ohio*, 392 U.S. 1, 17, (1968). Also, being subjected to a search is not a normal component of checking into a hotel, or walking through a hotel lobby. *Horton v. California*, 496 U.S. 128 134 (1990).

While police 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*, 496 U.S. at 134 n 5 (1990), citing *Texas v. Brown*, 460 U.S. 730, 740 (1983). Thus, the nature of the intrusion permitted by the ordinance was quite intrusive.

3. There was no immediacy of the government's concern because human trafficking was a problem in Starwood Park before the ordinance was enacted and would continue after it expired.

The immediacy of the government concern and the efficacy of the search for meeting that concern focus on the government's interest and whether the ordinance will accomplish that interest. *Acton*, 515 U.S. at 661. While the threat of human trafficking may be "substantial and real," it is an everyday concern in Victoria City and Starwood Park. Here, there was no urgency or efficiency because Petitioner admits that human trafficking was an ongoing concern in Starwood Park, and would continue to be of concern after the All-Star game. R. at 41. The Victoria City Board's limited response to the protection of minors involved in sex trafficking was not directly proportional to the threat posed. If the specter of human trafficking was so daunting and its

approach urgent, the city had the opportunity to create programs, engage in community outreach, and draft a constitutionally sound ordinance that would effect change in the community. Victoria City's concern rings hollow because its response was to craft an ordinance which allowed warrantless searches during a one week period to protect the city's image. The Board did not act reasonably in attempting to balance the competing interests because the authorized searches were performed on private individuals, checking into lodging facilities, without a warrant, probable cause, and the citizens were not free to refuse the search. Therefore, the searches authorized pursuant to L.O. 1923 exceed the bounds of reasonableness required by the Fourth Amendment when weighed against the intrusion on free citizens' interest in privacy.

While privacy interests must be balanced against the state interest in preventing harm to members of society who are not always able to help or protect themselves, it is not the founder's intent to weigh such a broad goal of prevention of human trafficking, during a one week period, against the privacy intrusion a person experiences. "Constitutional rights have their consequences, and one is that efforts to maximize the public welfare, no matter how well intentioned, must always be pursued within constitutional boundaries." *Skinner*, 489 U.S. at 650. L.O 1923's "purpose" was couched in language of protecting the innocent, while simply giving law enforcement the tools to perform warrantless criminal searches, without probable cause. Based upon the foregoing, the privacy interests of the citizens of Victoria City are substantially greater than the government's interest in a general crime control interest.

II. THE THIRTEENTH CIRCUIT DID NOT ERR IN HOLDING THAT W.M. DID NOT POSSESS AUTHORITY TO CONSENT TO OFFICER'S NELSON SEARCH OF THE APARTMENT AT 621 SASHA LANE AND THE CELL PHONE FOUND THEREIN

A. Mr. Larson's Fourth Amendment rights were violated because Officer Nelson failed to obtain his consent to search the apartment.

"In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." *Riley v. California*, 134 S. Ct. 2473, 2482 (2014). The police may enter a house by "either complying with the warrant requirement or satisfying one of its recognized exceptions- through a valid consent or a showing of exigent circumstances." *Soldal v. Cook Cty., Ill.*, 506 U.S. 56, 65–66 (1992). "The Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained." *Georgia v. Randolph*, 547 U.S. 103, 106 (2006).

As the *Georgia* court opined, "[i]t would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field if we were to hold that reasonableness required the police to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received." *Id.* at 122. Here, Officer Nelson and Officer Richols stopped Mr. Larson and W.M. together, and discovered during a conversation with W.M. that she was staying with Mr. Larson while she watched him be arrested. R. at 27-28. During the conversation, Officer Nelson was put on notice that W.M. was not on the lease. R. at 29, 33. W.M. did not have keys because the keys were in Mr. Larson's pocket. R. at 28. Under the totality of circumstances, Officer Nelson was aware that Mr. Larson had actual authority over his apartment and should have asked for his consent to search the apartment. Officer Nelson's opportunities in

the field would not be limited because he did not need to take additional affirmative steps to find Mr. Larson since he was nearby, or there was plenty of time to obtain a warrant. His failure to obtain consent from Mr. Larson was a deliberated avoidance.

Petitioner may argue that Officer Nelson did not need Mr. Larson's consent because an officer may collect evidence with the consent of a third party if he or she has common authority over the home or effects searched. *United States v. Matlock*, 415 U.S. 164, 170 (1974). This argument fails because Officer's Nelson decision to not seek Mr. Larson's consent was deliberate. Consent of a third party co-occupant is not a violation of the Fourth Amendment "so long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection." *Id*. at 121. Here, Office Nelson deliberately avoided asking Mr. Larson, the person with actual authority because of the possibility that he might object. Officer Nelson intentionally circumvented the objection by obtaining W.M.'s consent, a third party with no actual or apparent authority; thus, Officer Nelson violated Mr. Larson's Fourth Amendment right.

1. Officer Nelson's search of Mr. Larson's apartment was unreasonable because he lacked an objective belief that W.M. had the apparent authority to consent to the search.

Whether apparent authority exists is a factual question for which the police are expected use their judgment; "and all the Fourth Amendment requires is that they answer it reasonably." *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990). Even though W.M. consented to the search, she did not have apparent authority to consent Officer Nelson, as "a man of reasonable caution" could not have believed that she had such authority. *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968).

In order to determine whether the existence of apparent authority the court should apply a three-part test: "First, did the searching officer believe some untrue fact that was then used to

assess the consent-giver's use of and access to or control over the area searched? Second, was it under the circumstances objectively reasonable to believe that the fact was true? Finally, assuming the truth of the reasonably believed but untrue fact, would the consent-giver have had actual authority?" *United States v. Reid*, 226 F.3d 1020, 1025 (9th Cir. 2000).

First, Petitioner's assertion that Officer Nelson did not believe an "untrue fact" fails because W.M. provided a wealth of conflicting information for which he did not clarify to discern that she did in fact have authority to consent to the search. Namely, Officer Nelson used W.M.'s statements that had been living in Mr. Larson's apartment for the past year, and that they shared everything together, though this statement was shown as false after further inquiry. R. at 29. While W.M. and Mr. Larson shared some things, what they did share, he controlled. They did not share the same food, and kept their own groceries. R. at 33. According to W.M., he gave her allowances to purchase trinkets and clothes but no other necessities of life, thus evidencing they did not actually share money from the business. R. at 29-30. W.M. did not contribute to rent and the cell phone bill. R. at 33. They did not share in the household chores, but rather she performed most of the chores. R. at 33. Sole access to the apartment was through Mr. Larson, who had the key, and W.M. only had access to a hide-a-key that anyone else could use. R. at 31, 33. Therefore, access to the apartment was limited to Mr. Larson providing permission to others at his discretion. R. at 31, 33.

Second, under the circumstances, it was unreasonable to believe that W.M., a sixteen year old female, had joint access and control of the apartment. Officer Nelson admitted that most sixteen year olds do not have control over an apartment. R. at 34. Officer Nelson was aware that W.M. had been homeless which should have led him to believe that she was likely in a transient position. R. at 29. Further, since he suspected that W.M. was the victim of human trafficking, and

thus a "possession" of the trafficker, she would not have authority over herself much less the premises she is kept. Further support is that W.M. told Officer Nelson that Mr. Larson used violence to make W.M. do his bidding, thus exhibiting a further lack of control. R. at 30. A reasonable officer would have taken into consideration the all of these facts, and would have found that her statement that she shared the apartment was untrue.

Finally, if there was truth that W.M. shared the premises with Mr. Larson, W.M. would still not have had actually authority over the apartment. Officer Nelson knew that Mr. Larson had actual authority because his name was on the lease and he paid the rent. R. at 29, 33. W.M. moved into an apartment already occupied by Mr. Larson, was not added to the lease, did not pay rent, and did not even have her own room. R. at 29, 30, 33. W.M. did not even keep all or most of her belongings at the apartment. R. at 30. Thus, W.M.'s lack of permanency in the apartment was additional evidence of her lack of actual authority to consent to the search. Therefore, Officer Nelson's search violated Mr. Larson's Fourth Amendment right because a reasonable officer would have had an objective belief that W.M. did not have apparent authority.

2. Officer Nelson failed to properly investigate W.M.'s claim of joint-possession and control.

Petitioner correctly states that Officer Nelson, prior to relying on W.M.'s consent to search the apartment, had a duty to further investigate whether W.M. had authority to consent because the facts of her purported authority were ambiguous. *United States v. Kimoana*, 383 F.3d. 1215, 1222 (2004). "Sometimes the facts known by the police cry out for further inquiry, and when this is the case it is not reasonable for the police to proceed on the theory that ignorance is bliss." *United States v. Cos*, 498 F.3d 1115, 1129 (10th Cir. 2007). Here, Officer Nelson should not have relied on W.M.'s statement that she lived with Mr. Larson, and that they shared everything together, especially since he was aware that rarely do sixteen year olds have control over the

premises where they lived. R. at 34. In addition, Officer Nelson suspected that the relationship was abnormal. R. at 34. If Officer Nelson's instincts are to be believed, it was a relationship founded on victimization, which belief is evidenced by the fact that he chose not to arrest her. R. at 29. Even though W.M. told Officer Nelson that she was Mr. Larson's girlfriend, he believed her to be a victim. Victims are not given authority or power, and are the puppets and possessions of the person victimizing them. Had Officer Nelson properly investigated W.M.'s claim further, he would have discovered that W.M. did not have joint-possession or control over the premises.

Furthermore, Petitioner's reliance on numerous factors to evidence apparent authority is misplaced. *United States v. Groves*, 530 F.3d. 506, 509-10 (7th Cir. 2008). First, Petitioner relies on *United States v. Weeks* where a live-in girlfriend was found to have apparent authority even though she was not on the lease, did not pay rent or utilities and did not have her own keys to the apartment. *United States v. Weeks*, 666 F. Supp. 2d 1354, 1378 (2006). This case is distinguishable. First, in *Weeks*, the officer knew the girlfriend had been living with Weeks because they had been monitoring the apartment and the girlfriend's mother corroborated that fact she lived there by telling the officers that she did. Second, she was at the apartment sleeping in their bedroom around 6:30 a.m. Lastly, her children were staying at the apartment and they had their own bedroom. None of these facts exist in this case.

Petitioner's reliance on *United States v. Goins* is also misplaced because the girlfriend in *Goins* had apparent authority because her response to the officer's questions was consistent to a person living in the apartment, such as she had keys to the residence, clothing, children's toys, and household goods such as pots and pans that she used to prepare meals. *United States v. Goins*, 437 F.3d 644, 648 (7th Cir. 2006). The facts here are distinguishable because W.M. only had a few items, like a backpack and some "spare clothes" and did <u>not</u> have her own key which is a major

indicator of lack of authority because she only gained access to the apartment with a spare key that was kept outside the apartment. R. at 31, 33. "The fact that a third party does not have keys to the premises to be searched has been found to be suggestive of a lack of actual authority to consent to a search of those premises." *United States v. Turner,* 23 F. Supp. 3d 290, 304 (S.D.N.Y. 2014), *appeal withdrawn* (Aug. 25, 2014).

The fact that she knew where the spare key was only evidences knowledge of the location of a key to gain access, but not possession. "The mere fact of access, without more, does not indicate that the access was authorized." *United States v. Reid*, 226 F.3d 1020, 1025 (9th Cir. 2000). The fact that she did not possess her own key, yet Mr. Larson did have his own keys, evidences that she lacked authority.

B. Officer Nelson's search of Mr. Larson's cell phone without a warrant was unreasonable because W.M. merely had simple access to the cell phone.

In *Riley* the court opined that "Petitioner has a greater expectation of privacy in the data contained in his cell phone than he does in other physical items such as a show box or jacket pocket." *Riley*, 134 S. Ct. at 2489. "Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification." *City of Ontario, Cal. v. Quon*, 560 U.S. 746, 760 (2010). "The information on a cell phone is (not) immune from search; it is that a warrant is generally required before a search…. In addition, although the search incident to arrest exception does not apply to cell phones, the continued availability of the exigent circumstances exception may give law enforcement a justification for a warrantless search in particular cases." *Riley*, 134 S. Ct. at 2479.

Petitioner argues that access to an electronic device can be determined if the consenting

third party has installed an application on to it. *United States v. Morgan*, 435 F.3d 660, 664 (6th Cir. 2006). Unlike in *Morgan*, where the court found consent because the third party told the officer that she installed an application on the computer, here the facts are distinguished because W.M. told the officers that she used the cell phone to access her social media accounts, but there was no inquiry as to whether she actually installed the applications on the cell phone. R. at 32.

Next, Petitioner contends that simply playing a game on a cell phone may give the person authority to consent. *United States v. Buckner*, 473 F.3d 551, 555 (4th Cir. 2007). However, the inquiry must go further because search of an electronic device depends on the "*totality* of the circumstances known to the officers at the time of the search." *Id.* at 555. In *Buckner*, the totality of circumstances included the wife's name on the accounts, her ability to return the computer if she chose too without her husband's knowledge or consent, and the computer was kept in a common area of the martial home. *Id.* Again, the facts are distinguishable in several ways. First, the relationship between Mr. Larson and W.M. was not martial. Although W.M. stated she was Mr. Larson's live in girlfriend, there was no appearance of permanence in the relationship because she was possibly transient based on most of her belongings residing in a single bag and did not have a key to the apartment. R. at 29-30.

Second, while Mr. Larson "gave" the phone to W.M., he paid for it and controlled her use of the phone. R. at 30-32. The only applications she was allowed to access without Mr. Larson's permission were social media accounts, Facebook, Snapchat, and Instagram. R. at 32. Lastly, although the cell phone was in bedroom, a room that W.M. claimed to share with defendant, the cell phone was located on the nightstand that had predominately masculine items such as men's glasses and men's watch and condoms. R. at 35. As opposed to, the other nightstand which had predominately feminine items such as an issue of "Seventeen" magazine and a pink eye mask. R.

at 37. In addition, the logo affixed to the cell phone matched the design of Mr. Larson's tattoo, which is associated with the Starwood Homeboyz street gang. R. at 3. The location of the cell phone mixed in with Mr. Larson's belongings, and known gang affiliation image, further evidences his control over the cell phone. As in *Turner*, the court held that the "girlfriend did not have apparent authority to consent to search of backpack in shared hotel room where her apparent authority had dissipated after only men's clothing was found in a nearby duffel bag. *United States v. Turner*, 23 F. Supp. 3d 290, 311 (S.D.N.Y. 2014), appeal withdrawn (Aug. 25, 2014). Thus, assuming *arguendo* that W.M. had had the apparent authority to consent to search the apartment, she did not have apparent authority to consent to search of the cell phone because any apparent authority dissipated once there were facts that a reasonable person would question ownership of the phone.

Therefore, given the totality of the circumstances, Officer Nelson should have recognized that W.M. did not have authority to consent to the search of the cell phone. Officer Nelson's failure to recognize W.M.'s lack of authority and his reliance on her purported consent resulted in an illegal search of the cell phone which was in violation of Mr. Larson's Fourth Amendment right.

III. CONCLUSION

For the foregoing reasons, and in order to insure the continued protections of the Fourth Amendment, Mr. Larson respectfully requests that the Court affirm the judgment of the United States Court of Appeals for the Thirteenth Circuit.