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

October Term 2016

BRIEF FOR RESPONDENT

Attorneys for Respondent

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STATEMENT OF THE ISSUES

I. A warrantless special needs' search is permitted when the government can point to needs beyond ordinary law enforcement objectives. Local Ordinance 1923 allowed law enforcement to conduct warrantless searches in furtherance of sex trafficking prevention. Further, the ordinance allowed for searches beyond the scope of the law's purpose. Was Local Ordinance 1923 constitutional under the special needs' exception?

II. An apparent authority search is justified when an officer reasonably believes a third-party has common authority over a residence. Officer Nelson knew W.M. was a minor, was not on the lease, did not pay rent, and used a spare key to enter the apartment. Further, Officer Nelson knew W.M. possessed lessened control over the cell-phone than Larson. Was Officer Nelson reasonable in believing W.M. had common authority over the apartment and cell-phone?

STATEMENT OF THE CASE

I. Statement of the Facts

The Professional Baseball Association selected Victoria City, Victoria to host the 2015 All-Star Game. R. at 2. The game was scheduled for July 14, 2015, at Cadbury Park ("Stadium"), in the Starwood Park ("Starwood") neighborhood in downtown Victoria City. *Id*. Tens of thousands of visitors were expected to visit the area. *Id*. Prior to the All-Star game selection, the Starwood Homeboyz ("Homeboyz") and "707 Hermanos" gangs control the Starwood area. *Id*. These gangs engage in a wide range of criminal activity – including sex trafficking. *Id*. Both gangs utilize the "deep web" and post advertisements on sites such as backpage.com. *Id*. Therefore, law enforcement have difficulty preventing sex trafficking because both activities are hard to monitor. *Id*.

In response, several citizen groups argued the All-Star game would create a swell of human trafficking in Starwood. R. at 2, 40-41. As a result, the Victoria City Board of Supervisors passed Local Ordinance 1923 ("L.O. 1923"). *Id*. L.O. 1923's purpose was to prevent additional sex trafficking associated with hosting the All-Star game. *Id*.

L.O. 1923 allowed law enforcement to conduct warrantless searches of individuals visiting Starwood lodging facilities if an officer had reasonable suspicion the individual was engaged in sex trafficking. R. at 2, 27. L.O. 1923 was valid from July 11, 2015 to July 17, 2015 and was limited to Starwood. R. at 2-3. However, the searchable area encompassed a three-mile wide radius around the stadium, which included fifty-four city blocks. R. at 2-3, 45.

On July 12, 2015, Officer Joseph Richols ("Officer Richols") and Officer Zachary Nelson ("Officer Nelson") were observing guests at the Stripes Motel ("Stripes"). R. at 3, 27. Stripes is located four blocks away from the Stadium. R. at 3; 45. The Officers were there to detect possible

signs of sex trafficking. R at 3, 27. At approximately 11:22 p.m., William Larson ("Larson") and a female ("W.M") entered Stripes. *Id*. According to Officer Nelson, W.M. appeared to be much younger than Larson and was wearing a low cut top and tight-fitting shorts. R. at 3, 28. The Officers also noticed Larson had two tattoos identifying him as a member of the Homeboyz gang. *Id*. The first tattoo contained the letters "S" and "W" imprinted on a wizard's hat. *Id*. The second tattoo read "4-11-5-11," which Officer Nelson knew through experience referenced the fourth, eleventh, and fifth letters of the alphabet. *Id*. The numbers stood for the phrase "dinosaur killer, everybody killer." *Id*. A dinosaur is a derogatory term for the Homeboyz's rival gang, the "707 Hermanos." *Id*.

Pursuant to L.O. 1923, the Officers proceeded to search Larson without a warrant or probable cause. R. at 4, 28. The search revealed nine condoms, a butterfly knife, lube, two oxycodone pills, a list of names and corresponding allotments of time, and $600.00 in cash. *Id*. The search also revealed a set of house keys. R. at 28. On the other hand, W.M.'s search revealed a Victoria state driver's license identifying her as a 16-year old female. R. at 4, 29. Subsequently, Officer Richols handcuffed Larson and arrested him for sex trafficking a minor. R. at 4, 28.

Officer Nelson declined to arrest W.M. believing her to be a sex trafficking victim. R. at 4, 29. Thereafter, Officer Nelson proceeded to ask W.M. if she had a safe place to spend the night. R. at 4, 29, 36. W.M. stated she shared an apartment with Larson a couple of blocks away at 621 Sasha Lane. *Id*. However, W.M. told Officer Nelson her name was not on the lease and that she only kept a backpack and some spare clothes at the apartment. R. at 30; 33. Further, Officer Nelson knew W.M did not pay rent, nor did she have her own section of the closet to store her clothes. R. at 33. Based on this knowledge, Officer Nelson asked W.M. if she would consent to a search of the apartment; W.M. agreed. R. at 4, 31, 37.

Once the Officers and W.M. arrived, W.M. used a spare key underneath a fake rock to open the door to the apartment. R. at 31. Officer Nelson searched around and found a black semi-automatic handgun under the bed with the serial number scratched off. R. at 4, 31. Officer Nelson then walked into the bedroom and noticed two separate night stands. R. at 35, 37. One of the nightstands contained an Apple IPhone 5s ("cell-phone"), a pair of men's glasses, a fake Rolex watch, and some condoms. R. at 31; 35. The other nightstand contained an issue of "Seventeen" magazine and a pink eye cover with the word "Money" on it. R. at 37. The cell-phone had a sticker with an "S" and "W" wrapped around a wizard's hat – identical to Larson's tattoo. R. at 4, 31, 34. W.M. indicated she shared the cell-phone with Larson. R. at 4, 32. However, W.M. did not pay the cell-phone bill, nor was she able to use the cell-phone without Larson's permission. *Id*. After W.M. gave Officer Nelson the password, Nelson accessed the device. *Id*. Officer Nelson found several photos of Larson holding a gun, suggestive photos of W.M., and a video of Larson rapping about pimping. R. at 4; 43.

II. Procedural History

Thereafter, on August 1, 2015, a federal grand jury indicted Larson with 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. Larson filed a motion to suppress the evidence. *Id*. Larson contends the initial search was unconstitutional and that Officer Nelson lacked proper consent to search both Larson's apartment and cell-phone. *Id*. The United States District Court, Western District of Victoria denied Larson's motion. *Id*. The Thirteenth Circuit Court of Appeal's reversed the district court's holding. *Id*. Petitioner filed for relief in this Court, which granted certiorari. *Id.*

SUMMARY OF THE ARGUMENT

Fourth Amendment exceptions require clarity and specificity. Although the plain language of the Fourth Amendment states otherwise, this Court has pushed privacy rights aside in favor of law enforcement objectives. While an officer's duty to protect is important, this Court should revisit and reaffirm the tenets of the Fourth Amendment's privacy protections. Without a change in perspective, the Fourth Amendment becomes simply words with no judicial weight, not the privacy shield the Founding Fathers intended.

The "special needs" exception is an example of this Court's shift in perspective. The "special needs" exception has historically been limited in scope. However, this Court has broadened the exception allowing for *any* type of search under a "totality of the circumstances" approach. This Court should reaffirm the "special needs" doctrine and require the government to prove both a special need beyond ordinary law enforcement purposes exists and that the search was reasonable. This ensures the exception does not overpower the Fourth Amendment's privacy protections.

Here, L.O. 1923 is unconstitutional under the "special needs" doctrine. L.O. 1923 allowed for searches in furtherance of an ordinary law enforcement objective in sex trafficking prevention. Further, the consequences of the search were not simply administrative penalties –which this Court has upheld – but rather criminal prosecution. Accordingly, L.O. 1923 allowed law enforcement to circumvent the warrant and probable cause requirements under the guise of a special need.

Similarly, this Court has eroded the Fourth Amendment's protections by allowing apparent authority to serve as an exception to the warrant requirement. Currently, the apparent authority doctrine grants significant deference to law enforcement. Even if an officer's conduct is unfounded, searches will still be upheld as long as the conduct was reasonable. This doctrine

jeopardizes an individual's legitimate expectation of privacy. Therefore, absent exigent circumstances, warrantless searches of highly private places and effects are unreasonable.

Here, applying the apparent authority doctrine, Officer Nelson could not reasonably believe W.M. had the authority to consent to either the search of the apartment or the cell-phone. Viewed under the "totality of the circumstances," W.M. had significantly less control over the apartment and cell-phone than Larson. Officer Nelson's experience should have led him to doubt W.M.'s claim of authority. Further, no exigent circumstances were present to prevent Officer Nelson from obtaining a warrant. Therefore, even under apparent authority, Officer Nelson unreasonably intruded into Larson's highly private residence and effects.

Well-defined exceptions not only shield individuals from governmental intrusion, but also provide law enforcement with guidance as to when a search is constitutional under the Fourth Amendment.

STANDARD OF REVIEW

In reviewing the Thirteenth Circuit Court of Appeal's order suppressing evidence, this Court considers conclusions of law and application of the law to the facts *de novo*. *See Wright v. West*, 505 U.S. 277, 297-98 (1992); *see also Patton v. Yount*, 467 U.S. 1025, 1038 (1984).

ARGUMENT

I. LOCAL ORDINANCE 1923 UNCONSTITUTIONALLY ALLOWED LAW ENFORCEMENT TO CONDUCT FULL-SCALED PERSONAL SEARCHES ABSENT A SPECIAL NEED.

Without well-defined exceptions, the Fourth Amendment's privacy protections are left to a court's subjectivity rather than long-standing jurisprudence. This case exemplifies the need to clearly define and limit the "special needs" exception, ensuring the Fourth Amendment is not eviscerated by heightened governmental interests.

A. The Government Has Failed To Demonstrate Sex Trafficking Prevention Is A Special Need A Part From Ordinary Law Enforcement Objectives.

The Fourth Amendment provides, "the right of the people to be secure in their persons . . . against unreasonable searches and seizures . . . and no warrants shall issue, but upon probable cause, supported by oath or affirmation . . . ." U.S. Const. amend. IV. Warrantless searches, "are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971).

While the Fourth Amendment protects individuals from unreasonable governmental intrusion, "[a] search unsupported by probable cause can be constitutional . . . 'when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)). A special needs' search is therefore an exception to the Fourth Amendment's warrant requirement. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 736 (2011).

A special need exists when an individual possesses a lessened expectation of privacy and the purpose of the need is distinguished from ordinary law enforcement objectives. *See United States v. Knights*, 534 U.S. 112 (2001); *see also Skinner v. Railway Labor Executives' Assn*., 489 U.S. 602 (1989). For example, drug testing individuals possessing a lessened expectation of

privacy served a special need beyond normal law enforcement objectives. *See Acton*, 515 U.S. at 665 (The State has an interest in preventing drug use in schools); *see also Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989) (The government has an interest in drug testing U.S. Customs' employees because the employee's primary objective is drug prevention); *Skinner*, 489 U.S. at 634 (The government has an interest in drug testing railroad employees to maintain safety on the railroad). Further, this Court upheld a special needs' search of probationers or parolees because of the government's compelling interest in recidivism prevention. *See Samson v. California*, 547 U.S. 843, 853-54 (2006); *see also Knights*, 534 U.S. at 120. Several courts have also recognized the collection of a felon's DNA as a special need[1].

Today, two approaches are used to determine whether a special need existed to conduct a warrantless search. *See Griffin*, 483 U.S. at 873-74 (Applying the "special needs" doctrine); *see also Samson*, 547 U.S. at 849-50 (Applying a "totality of the circumstances" approach). The "special needs" doctrine requires the government to (1) establish a special need existed beyond ordinary law enforcement purposes and (2) prove the search was reasonable. *See Griffin*, 483 U.S. at 880; *see also New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). In contrast, a "totality of the circumstances" approach doesn't consider a special need. *See Samson*, 547 U.S. at 843; *see also Knights*, 534 U.S. at 112. This approach instead weighs only an individual's privacy against a legitimate governmental interest. *Id*.

This Court should find the "special needs" doctrine is the only approach to special needs' searches for three reasons. First, the "special needs" doctrine is better defined. *See McDonald v.*

[1] *Nicholas v. Goord*, 430 F.3d 652 (2d Cir. 2005); *United States v. Sczubelek*, 402 F.3d 175 (3d Cir. 2005); *Padgett v. Donald*, 401 F.3d 1273 (11th Cir. 2005); *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004); *Green v. Berge*, 354 F.3d 675 (7th Cir. 2004); *Groceman v. United States*, 354 F.3d 411 (5th Cir. 2004); *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992).

United States, 335 U.S. 451, 454 (1948); *see also Kincade*, 379 F.3d at 844 (Reinhardt, J., dissenting) ("Totality of the circumstances" test is "opaque"). The Fourth Amendment requires exceptions to be "jealously and carefully drawn," *Jones v. United States*, 357 U.S. 493, 499 (1958), protecting the common man, "against arbitrary intrusions by official power." *Coolidge*, 403 U.S. at 455. The "special needs" doctrine is a clearer approach because it requires the government to prove both prongs before a search is considered constitutional. *See Griffin*, 483 U.S. at 873-74.

Second – unlike the "special needs" doctrine – a "totality of the circumstances" approach is overly broad resulting in the potentiality for wide-spread law enforcement abuse. As noted above, the "totality of the circumstances" approach does not consider whether a special need existed at the time of the search. *See Samson*, 547 U.S. at 849. Moreover, the "totality of the circumstances" is not an exception to the Fourth Amendment. *See Missouri v. McNeely*, 133 S. Ct. 1552, 1570 (2013). Rather it is a test applied by courts when deciding whether an officer's conduct is appropriate under an exception. *Id*.

Third, under the "totality of the circumstances" approach, the defendant – *not* the government – bears the burden of proving a Fourth Amendment violation. The Fourth Amendment requires the government to point to a valid exception before a court considers the reasonableness of the search. *United States v. Jeffers*, 342 U.S. 48, 51 (1951) (Burden is on the government to point to a valid exemption). Rather than require the government to first establish a "special need," this approach improperly shifts the burden to the defendant to first prove unreasonableness. Applying this approach, a defendant is hard-pressed to ever prove the government lacked reasonable grounds for conducting a warrantless search. *See Kincade*, 379 F.3d at 864 (Reinhardt, J., dissenting) ("Under such an approach, all of us would inevitably have our liberty eroded when our privacy interests are balanced against the "monumental" interests of law enforcement"). The

"totality of the circumstances" approach transforms the Fourth Amendment from a protector of individual liberty into a mechanism for overt government intrusion.

For example, in this age of heightened terrorist concerns, a "totality of the circumstances" approach could validate any type of search. Since September 11, 2001, the U.S. Government has doubled its intelligence program expenditures. *See* Office Of The Director Of National Intelligence, *FY 2013 Congressional Budget Justification*, NATIONAL INTELLIGENCE PROGRAM SUMMARY, vol. 1, 72 (Feb. 2012). As of today, courts have concluded terrorism prevention is a special need. *See MacWade v. Kelly*, 460 F.3d 260, 263 (2d Cir. 2006); *see also United States v. Hartwell*, 436 F.3d 174, 179 (3d Cir. 2006). By applying a "totality of the circumstances" approach and not requiring proof of a special need, *any* warrantless search could be justified through terrorism prevention. *See* Dru Brenner-Beck, *Borrowing Balance, How to Keep the Special-Needs Exception Truly Special: Why a Comprehensive Approach to Evidence Admissibility is Needed in Response to the Expansion of Suspicionless Intrusions*, 56 S. TEX. L. REV. 1 (2014) ("The increase in these "security" special-needs searches in all aspects of modern life . . . make judicial involvement in their evaluation critical to the continued validity of the Fourth Amendment"). Because of heightened governmental interests – such as the threat of terrorism – this Court must properly weigh an individual's privacy against such enormous governmental interests.

Although the "special needs" doctrine is the better defined approach, the ambiguity within the special needs' definition has caused division within the circuit courts. *See* James R. Jolley, *Reemphasizing Impracticability in the Special Needs Analysis in Response to Suspicionless Drug Testing of Welfare Recipients*, 92 N.C. L. REV. 948, 967-68 (2014). This Court should adopt a bright-line rule defining what constitutes a special need. Accordingly, *unless* an individual is on

parole, probation, supervised release, or in police custody, *see Samson*, 547 U.S. at 849-50; *see also Knights*, 534 U.S. at 119-20, a special need exists *if* the following two prongs are met: (1) the government establishes a compelling interest beyond ordinary law enforcement objectives, *see Illinois v. Lidster*, 540 U.S. 419, 424 (2004), and (2) a violation of the regime does not result in criminal prosecution. *See Ferguson v. City of Charleston*, 532 U.S. 67, 84 (2001); *see also City of Indianapolis v. Edmond*, 531 U.S. 32, 41-42 (2000). If the government fails to satisfy this proposed rule, a special need does not exist.

Larson was not in custody, nor was he on probation, parole or supervised release. Therefore, applying the proposed rule, the Government must show a compelling interest beyond ordinary law enforcement objectives and that a violation of L.O. 1923 would not result in criminal prosecution.

Here, the Government has failed to show a compelling interest beyond ordinary law enforcement objectives. L.O. 1923's sole purpose was to combat sex trafficking and, "generat[e] evidence for law enforcement purposes." *See Ferguson*, 532 U.S. at 83; R. at 2, 3. As the Thirteenth Circuit noted, "while [combating sex trafficking] may . . . be a noble goal, it is the goal that many task forces set up to combat . . . every day." R. at 18.

L.O. 1923 served an ordinary law enforcement objective similar to the program in *Edmond*. 531 U.S. at 40-41. Similar to how *Edmond's* main purpose was to "interdict unlawful drugs in Indianapolis," *Id*., L.O. 1923's primary objective was to remove sex trafficking from the streets of Starwood. R. at 2, 41. Sex trafficking was a serious law enforcement concern prior to the All-Star game. R. at 2. Even before the All-Star game, law enforcement officers had difficulty monitoring gang members because they utilized the "deep web" for sex trafficking purposes. R. at 2.

Therefore, Victoria City enacted L.O. 1923 to give law enforcement the ability to conduct warrantless searches in furtherance of the agency's preexisting law enforcement mission.

Moreover, unlike the programs in *Acton* and *Skinner*, the consequence of violating L.O. 1923 was criminal prosecution. *Acton*, 515 U.S. at 658 (Purpose of program was drug prevention and evidence was "not turned over to law enforcement authorities . . . ."); *see also Skinner*, 489 U.S. 602, 620-21 (quoting 49 C.F.R. §219.1(a) (2016) (Government has, "prescribed . . . tests *not* to assist in the prosecution of employees, but rather 'to prevent accidents and casualties in railroad operations . . . .'") (emphasis added). Similar to the pregnancy tests in *Ferguson*, the "prosecutors and police [were] extensively involved in the day-to-day administration" of L.O. 1923. 532 U.S. at 82. L.O. 1923 authorized the Victoria City law enforcement to conduct the searches and permitted the U.S. Attorneys' Office to litigate the federal offenses. R. at 2, 5, 41. L.O. 1923 concerns an ordinary law enforcement objective and a violation of the ordinance results in criminal prosecution. Therefore, no special need existed and the second-prong of the test concerning the search's reasonableness is irrelevant.

The "special needs" doctrine strikes a perfect balance allowing for valid special needs' searches, while preserving an individual's freedom from government intrusion. This clarity not only protects the tenets of the Fourth Amendment, but also provides guidance to law enforcement as to when special needs' searches are permitted.

B. Even Applying A "Totality Of The Circumstances" Approach, Larson's Search Was Unreasonable.

The touchstone of the Fourth Amendment is reasonableness. *See Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006). Reasonableness is determined by, "examin[ing] the totality of the circumstances . . . [which considers] the degree to which [the search] intrudes upon an

individual's privacy . . . [and] the degree to which it is needed for the promotion of legitimate governmental interests." *Knights*, 534 U.S. at 118-19.

To determine whether Larson's search was reasonable, this Court must first consider whether Larson possessed a reasonable expectation of privacy while inside the Stripes' lobby. R. at 3. A reasonable expectation of privacy considers whether, "the person ha[s] exhibited an actual (subjective) expectation of privacy and . . . the expectation [is] one that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). An individual does not lose all claims to privacy or personal security because he or she enters a public place. *Oliver v. United States*, 466 U.S. 170, 179 n. 10 (1984) (referring to *Arkansas v. Sanders*, 442 U.S. 753, 766-67 (1979) (Burger, J., concurring)). Larson maintained a subjectively reasonable expectation of privacy in the items seized because he kept these items in his jacket pocket away from public viewing. R. at 4; *Oliver*, 466 U.S. at 179 n. 10. Objectively, society recognizes this privacy as reasonable. *Id*.

Because Larson maintained a reasonable expectation of privacy, this Court must then consider the search's reasonableness. Aside from a special need, warrantless searches are only allowed if probable cause supports the search and exigent circumstances such as a risk to officer safety exists. *See Kirk v. Louisiana*, 536 U.S. 635, 638 (2002); *see also Terry v. Ohio*, 392 U.S. 1, 30 (1968).

Applying the "totality of the circumstances" approach, this Court upheld the reasonableness of warrantless searches of a probationer's home and a parolee's person. *Knights*, 534 U.S. at 119; *see also Samson*, 547 U.S. at 853. This is due to probationers and parolees not possessing the same freedom as an ordinary citizen, along with the government having an interest in rehabilitation. *Knights*, 534 U.S. at 119; *see also Samson*, 547 U.S. at 853. Courts applying the

"totality of the circumstances" approach have also upheld warrantless searches of a felon's DNA. *See Padgett*, 401 F.3d at 1273; *see also Groceman*, 354 F.3d at 411. These searches were reasonable because the government has a compelling interest in, "advancing the overwhelming public interest in prosecuting crimes *accurately*," *Rise v. State of Oregon*, 59 F.3d 1556, 1561 (9th Cir. 1995) (emphasis in original), and "the intrusion effected by taking a blood sample . . . is minimal." *Nicholas*, 430 F.3d at 669 (citing *Skinner*, 489 U.S. at 624).

Here, L.O. 1923 is unconstitutional because Larson's privacy in his person outweighed the governmental interest in sex trafficking prevention. R. at 3-4. Aside from a probationer or parolee search, warrantless body searches based only on reasonable suspicion have historically been allowed to determine whether, "weapons [exist] which might be used to assault [an officer.]" *Terry*, 392 U.S. at 30; *see also Minnesota v. Dickerson*, 508 U.S. 366 (1993). Unlike the *Knights* and *Samson* defendants, Larson maintained a heightened expectation of privacy. Although Larson had been convicted for two prior drug trafficking offenses, R. at 4, Larson had served his time and re-established himself in the community. *See Banks v. United States*, 490 F.3d 1178, 1186-87 (10th Cir. 2007) (referring to *Green*, 354 F.3d at 679-81 (Easterbrook, J., concurring) (Felons whose terms have expired have a higher expectation of privacy than those on parole, probation, and/or supervised release).

Furthermore, the intrusion on Larson's privacy was not minimal, but rather overly obtrusive. *See Nicholas*, 430 F.3d at 669 (citing *Skinner*, 489 U.S. at 624). Unlike a blood sample, which this Court has held to be a minimal invasion of privacy, *Id*., Larson's search involved his entire body. R. at 3-4. The body is accorded the highest protection under the Fourth Amendment, requiring the Government to point to additional facts before engaging in such an intrusive search. U.S. Const. amend. IV.

Additionally, L.O. 1923 is unconstitutional because the ordinance allowed for searches beyond the scope of the special need. L.O. 1923 permitted searches of, "*any* individual obtaining a room in a hotel, motel, or other public lodging facility . . . [based on] reasonable suspicion" for the purposes of sex trafficking prevention. R. at 2 (emphasis added). As *Griffin* articulated, a "'special need' of the State permitting a degree of infringement upon privacy *would not be constitutional if applied to the public at large*." 483 U.S. at 875 (emphasis added). The purpose of L.O. 1923 was to address concerns associated with the, "high volume of men . . . prone to indulge in [sexual] entertainment" during the All-Star Game. R. at 2. Rather than limit searches to only men, the ordinance opened the floodgates allowing for full-bodied searches of the tens of thousands of visitors attending the All-Star Game.

Further, L.O. 1923's searchable area was overly broad. The area encompassed a three-mile wide radius around the Stadium, which included fifty-four city blocks. R. at 3, 45. This broad authority unquestionably included patrons of lodging facilities who were not in Starwood for the All-Star Game, but rather were visiting for business or leisure purposes. L.O. 1923's "search [was not] limited in scope to that which is justified by the particular purpose[]," but rather overly expansive resulting in an wide-spread intrusion into the private lives of thousands of individuals. *Florida v. Royer*, 460 U.S. 491, 500 (1983).

Without a well-defined special needs' exception, the protections intended by the Framers could easily disappear when faced with heightened governmental interests. *See Dunaway v. New York*, 442 U.S. 200, 213 (1979). Although sex trafficking prevention is a noble goal, it does not give the Government the unbridled ability to side-step the Fourth Amendment's privacy protections.

II. APPARENT AUTHORITY IS ILL-SUITED TO SEARCHES OF THE HOME OR OF CELL-PHONES BECAUSE BOTH CARRY A HEIGHTENED EXPECTATION OF PRIVACY.

The apparent authority doctrine marks a substantial deviation from the well-delineated exception requirement. The standard tilts the scales to reasonableness allowing for searches of even the most intimate places and effects with extraordinary ease. Without limitation, the Fourth Amendment's privacy protections become secondary to the government's need to search.

A. A Reasonable Officer Should Not Be Able To Rely on Appearances of Authority Before Conducting Searches of the Home.

All individuals have an undeniable right to be free within their home from unlawful government searches. U.S. Const. amend. IV. This right has its roots in English common law, where a man's home is his "castle." *See Semayne's Case,* (1604) 77 Eng. Rep. 194, 195-96 (KB). Further, the Fourth Amendment grants all individuals the, "right to be secure in their houses . . . against unreasonable searches and seizures." U.S. Const. amend. IV. Accordingly, "the physical search of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States Dist. Ct.*, 407 U.S. 297, 313 (1972). Absent a warrant, searches and seizures within a home are presumptively unreasonable. *See Coolidge,* 403 U.S. at 474-75.

Warrantless home searches are allowed when officers obtain valid consent from the defendant. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973). Over time, this Court has broadened the scope allowing third-parties to provide consent. *United States v Matlock*, 415 U.S. 164, 171 (1974) (Officers are allowed to rely on the consent of a third party if the third party, "possessed common authority over the premises or effects to be inspected"). Further, third-parties may now consent to searches despite having actual authority. *See Illinois v. Rodriguez*, 497 U.S. 177, 188-89 (1990). This is commonly referred to as apparent authority. *Id*.

Apparent authority has incorrectly been used to justify unreasonable searches of a person's home. *See United States v. Hudson*, 405 F.3d 425, 442 (6th Cir. 2005) (holding the "circumstances, considered in their totality, would lead a reasonable officer to conclude the [third-party] had actual authority to consent to the search of the residence"). This current trend significantly deviates from the high value this Court once placed on the warrant requirement. *See Rodriguez*, 497 U.S. at 190 (Marshall, J., dissenting). The warrant requirement, "interposed a magistrate between the citizen and the police so as to have an objective mind weigh the need to invade versus the privacy interests at stake." *McDonald*, 335 U.S. at 455-56. Previously this Court refused to excuse the absence of a search warrant without a showing of exigency. *Id*. As noted, no warrant is required if the government can establish the officer's safety or destruction of evidence were in jeopardy. *See Chimel v. California*, 395 U.S. 752, 778 (1969). However, the government cannot simply point to mere inconvenience and slight delay to justify a warrantless search. *See Johnson v. United States*, 333 U.S. 10, 15 (1948).

Furthermore, reliance on apparent authority to justify warrantless searches contradicts this Court's prior holdings. *See Stoner v. State of California*, 376 U.S. 483, 488 (1964). In *Stoner*, the defendant was suspected of committing a robbery. *Id*. at 484. The police relied only on the hotel clerk's consent before conducting a warrantless search of defendant's hotel room. *Id*. at 485. This Court refused to allow the hotel clerk to consent to the search because defendant's constitutional right was one in which, "only [he] could waive by word or deed." *Id*. at 489. Moreover, this Court made clear, "that the rights protected by the Fourth Amendment are not to be eroded . . . by the unrealistic doctrine[] of apparent authority." *Id*. at 488. Absent exigent circumstances, this Court should not allow officers to fall back on apparent authority as an excuse for conducting a warrantless search.

Applying a reasonableness approach, this Court upheld a warrantless search of a home where no exigent circumstances existed. *See Rodriguez*, 497 U.S. at 179. In *Rodriguez*, the police received a report from the defendant's girlfriend claiming the defendant had abused her. *Id*. The girlfriend told the police she owned the apartment and consented to the search. *Id*. Once there, the police found drug paraphernalia and containers filled with white powder and proceeded to arrest Rodriguez. *Id*. Abandoning its prior emphasis on the warrant requirement this Court – applying a reasonableness standard – upheld the search of the defendant's apartment. A reasonableness standard does not encourage officers to conduct searches with a normal degree of diligence. *See* Michael C. Weiber, *Theory and Practice of Illinois v. Rodriguez: Why an Officer's Reasonable Belief about a Third Party's Authority to Consent Does Not Protect a Criminal Suspect's Rights*, 84 J. CRIM. L. & CRIMINOLOGY 604, 639 (1993). Therefore, officers are increasingly free to test the bounds of the Fourth Amendment.

Because the reasonableness standard affords officers too much discretion, the *Rodriguez* dissent is instructive and provides the rule to be followed here. Rejecting the majority's approach, the dissent held, "in the absence of exigency, warrantless home searches and seizures are unreasonable." *Rodriguez*, 497 U.S. at 192 (Marshall, J., dissenting). The heightened expectation of privacy granted to persons within the home outweighs, "any law enforcement interest in relying on the reasonable but potentially mistaken belief that a third party has authority to consent." *Id*. Therefore, this Court should only allow warrantless searches of the home if sufficient exigencies exist.

Here, applying the proposed rule, Officer Nelson erred by not obtaining a warrant prior to searching Larson's apartment. After arresting Larson, Officer Richols and Officer Nelson questioned W.M. about her relationship with Larson. R. at 4, 29, 36. W.M. indicated she shared

the apartment with Larson and the Officers asked for her consent to search. *Id*. W.M. later consented allowing the officers to execute the search in question. *Id*. The Officers arrested Larson and detained W.M. for a ten-minute period. *Id*.; R. at 37. During this time, the Officer's safety nor the destruction of evidence were in jeopardy. There are no facts indicating the Officers knew the apartment contained incriminating evidence. The apartment itself was located a few blocks away from Stripes R. at 4, 31, 45. As such, neither Larson nor W.M. could readily destroy any incriminating evidence found in the apartment. Because there were no exigent circumstances preventing Officer Nelson from obtaining a warrant, Officer Nelson's search falls outside the scope of reasonableness under the Fourth Amendment.

The proposed rule is better defined than apparent authority. Apparent authority requires an officer to determine whether a third party has common authority over the premises or effects. *See Illinois v. Rodriguez*, 497 U.S. at 188-189. Common authority depends on, "mutual use of the property by persons having joint access or control for most purposes. *Id.* However, this language does not clearly define what constitutes "mutual use" or "joint access" and circuit courts have labored over the proper interpretation of this language. *See United States v. Groves*, 530 F.3d 506, 509-10 (7th Cir. 2008); *see also United States v. Cos*, 498 F.3d 1115, 1125 (10th Cir. 2007). Given this inherent ambiguity, the apparent authority doctrine is anything but a well-delineated exception to the Fourth Amendment.

However, even using lower courts' determinations of apparent authority, the Government's search was unreasonable. The Seventh Circuit considers a number of factors to evaluate whether a third-party satisfies apparent authority. *See Groves*, 530 F.3d at 509-10. These factors include:

> (1) possession of a key to the residence; (2) a person's admission to living at the residence; (3) possession of a driver's license listing the residence as the driver's legal address; (4) receiving mail and bills at the residence; (5) keeping clothes at the residence; (6) having one's children reside at the address; (7) keeping personal belongings such as a diary or a pet at the residence; (8) performing household chores; (9) being on the lease for the premises and/or paying rent; and (10) being allowed into the home when the owner is not present.

Id. at 510. Although the Seventh Circuit applies the above factors, certain factors should be more integral in the determination.

First, lower courts consider whether a party possessed a key to the premises. *See United States v. Buettner-Janusch*, 646 F.2d 759, 765 (2d Cir. 1981); *see also United States v. Turner,* 23 F. Supp. 3d 290, 304 (S.D.N.Y. 2014). The Second Circuit has held the possession of keys supports a finding of apparent authority. *See Buettner-Janusch*, 646 F.2d at 765. In *Buettner-Janusch*, the defendant's research assistant and fellow colleague found defendant manufacturing illegal drugs in his laboratory. 646 F.2d. at 765. The third-parties both had keys and access to the laboratory. *Id*. at 752. The parties notified law enforcement of defendant's illegal activities. *Id*. Once the officers arrived, the third-parties used their keys to access the laboratory and pointed out suspicious containers to the officers. *Id*. The court upheld the parties' consent because both had keys and therefore full access to the laboratory. *Id*. at 767. Possession of keys indicates a person may freely enter into the premises at his or her own discretion without the permission of the other party. *See generally United States v. Trzaska*, 859 F.2d 1118, 1121 (2d Cir. 1988).

However, this rationale cannot be applied here. Unlike the parties in *Buettner-Jannusch*, W.M. could only access the apartment by using a spare key. R. at 31. After consenting to the search, W.M. lead the officers to the apartment. R. at 4, 31. W.M. opened the apartment door using a spare key underneath a fake rock. R. at 31. Using a spare key, especially one not carried by the third-party at all times, does not convey the same degree of authority. *See generally Turner*,

F. Supp. 3d at 304. Typically, a party with unrestricted access to a residence does not find him or herself constrained by using a spare key in a hidden location. W.M. did not possess a reasonable degree of authority because she had to go through the added burdens of accessing and using a spare key.

Second, heightened attention should be given to whether an individual is on the lease and/or pays rent. *See United States v. Trotter*, 483 F.3d 694, 699 (10th Cir. 2007); *see also People v. Pickens*, 655 N.E.2d 1206, 1209 (Ill. App. Ct. 1995). Here, W.M. communicated to Officer Nelson she was not on the lease and did not pay rent. R. at 29, 33. As the Sixth Circuit noted, an individual not on the lease can still give authority. *United States v. Penny*, 576 F.3d 297, 308 (6th Cir. 2009) (In today's modern living arrangements, "consenting adults often co-habitat together without the benefit of legal formalities, including those formalities relating to the establishment of property interests"). However, while modern-day cohabitants may not always share a lease, adult occupants should bear the burden of making some financial contributions to the home. Obvious exceptions should exist when spouses or a family shares the home. Therefore, W.M.'s failure to make financial contributions or appear on the lease significantly detracted from her appearance of authority.

Additionally, this Court should give greater attention to the age of the consenting party. As the Tenth Circuit articulated, while consent by a minor does not bar a finding of authority, it certainly is *a* factor to be considered. *See United States v. Gutierrez-Hermosillo*, 142 F.3d 1225, 1230-31 (10th Cir. 1998). Here, W.M.'s age helps paint a troubling picture of Officer Nelson's unreasonableness. Initially, Officer Nelson believed W.M. to be a minor and a victim of sex trafficking and her status as a minor was confirmed by her driver's license. R. at 4, 29. At all times Officer Nelson reasonably believed W.M. to be a sex trafficking victim. *Id*.

Officer Nelson's unreasonable conduct began once he accepted W.M.'s claim of authority over Larson's apartment. The record reflects glaring inconsistencies in Officer Nelson's rationale for conducting both searches. Officer Nelson initially believed W.M. was a victim of sex trafficking. R. at 4, 31. Nonetheless, minutes later, he willingly accepted W.M.'s claim of authority over the apartment. R. at 4, 31. Officer Nelson sought to use W.M.'s age to benefit him in both searches.

Further, Officer Nelson relied on his law enforcement experience to recognize Larson as a member of the Homeboyz street gang. R. at 3, 28. By blindly accepting W.M.'s claim of authority, Officer Nelson abandoned any insight gathered throughout his tenure. While detaining W.M. for a ten-minute period, Officer Nelson failed to ask W.M. any questions regarding her age. R. at 37. Officer Nelson also testified that in his experience a minor such as W.M. typically does not possess the level of authority claimed by W.M. R. at 34. Therefore, Officer Nelson should have doubted W.M.'s claim of authority over the premises.

The construction of the apparent authority doctrine side-steps the longstanding warrant requirement. As a result, man's right to be free even in the most intimate of spaces has eroded, while officers conduct searches with ease. Absent exigent circumstances, officers should no longer be free to intrude into a person's home. However, even if such a right exists, the conduct here falls outside the scope of reasonableness under the Fourth Amendment.

B. Even if W.M. Possessed Authority Over the Premises, Officer Nelson Could Not Search Larson's Cell Phone Absent a Valid Warrant.

The Government improperly seeks to use apparent authority to justify the search of Larson's cell-phone. Because of increased technology, the search of cell-phones without a warrant is no longer justified. *See Riley v. California*, 134 S. Ct. 2473, 2493 (2014). Cell-phones for many people are more than "just another technological convenience," but rather "they hold for

Americans the privacies of life." *Id*. at 2494. Thus in light of *Riley's* holding, the increased privacy concerns inherent in cell-phones make the apparent authority doctrine inadequate.

When faced with items containing increased privacy concerns, law enforcement should not be able to rely on the consent of third-parties. "It may be unreasonable for law enforcement to believe a third party has authority to consent to the search of an object typically associated with a high expectation of privacy." *United States v. Andrus*, 483 F.3d 711, 717 (10th Cir. 2007). Rather, when "privacy concerns are weighty enough, a search may require a warrant." *Maryland v. King*, 133 S.Ct. 1958, 1970 (2013). Courts have recognized increased privacy protections to intimate containers such as footlockers, closet containers, and dresser drawers. *See United States v. Peyton*, 745 F.3d 546, 553 (D.C. Cir. 2014); *see also United States v. Block*, 590 F.2d 535, 539 (4th Cir. 1978).

In *Riley*, this Court found cell-phones quantitative and qualitatively different from even the most intimate containers protected under the Fourth Amendment. *Id*. at 2489. Cell-phones store significantly more information than ordinary containers and hold the intricacies of a person's everyday life. *Id*. Allowing officers to rely on apparent authority to search cell-phones, "permit[s] the government to execute an unwarranted search of the cell-phone user's life and habits." Bryan Stillwagon, *Bringing an End to Warrantless Cell Phone Searches*, 42 GA. L. REV. 1165, 1206 (2008). Therefore, the heightened level of protection afforded to intimate containers must be extended to cell-phones.

However, even applying apparent authority to the cell-phone here, Officer Nelson's search was still unreasonable. Common authority over a general area provides actual authority to consent to a search of that area. *See generally Matlock*, 415 U.S. at 171. However, "it does not automatically extend to the interiors of every discrete enclosed space capable of search within that

area." *Block*, 590 F.2d at 539. To determine whether W.M. could consent to the search of the cell-phone, "the relevant inquiry must address the third party's relationship to the object." *Andrus*, 483 F.3d at 717. A party's authority and relationship to the object must be viewed under the "totality of the circumstances" available at the time of the search. *See United States v. Buckner*, 473 F.3d 551, 555 (4th Cir. 2007).

Here, the "totality of the circumstances" reveal Officer Nelson could not reasonably believe W.M. had common authority over the cell-phone. There is little in the record to establish W.M. and Larson exercised similar authority over the cell-phone. The cell phone was located on Larson's nightstand. R. at 37; 38. Larson's nightstand contained men's glasses, a gold fake Rolex men's watch, and condoms, whereas the other nightstand contained an issue of "Seventeen" magazine and a pink eye mask. R. at 35; 37. Further, W.M. indicated the pink eye mask belonged to her. R. at 37. By placing the cell-phone on his nightstand, Larson took an affirmative step to assert authority over the cell-phone. Therefore, any reasonable officer would have believed the night stand containing the cell-phone belonged to Larson.

This case is dissimilar to where the defendant placed an item within a common living space. *See Buckner*, 473 F.3d at 555 (holding that both parties had equal control over a computer located in the common living area); *see also Peyton*, 745 F.3d at 553 (granting common authority to a shoebox located in the living room). Unlike *Buckner* and *Payton*, Larson placed his cell-phone on his own nightstand, not in the middle of a common living space. As such, Larson did not demonstrate a willingness to share his cell-phone with any mere guest who came to the apartment. Additionally, Larson took steps to personalize the phone as his own. For example, he chose both a sticker and a password to be applied and both were personal to him as they reflected his affiliation

in the Homeboyz gang. R. at 4, 28, 32. Therefore, Larson manifested a desire to keep the cell-phone under his exclusive control.

The circumstances in this case indicate W.M. and Larson did not possess the same degree of control over the cell-phone. Common authority exists, "if the third party's degree of control is equal to or greater than that possessed by the defendant." *People v. Huffar*, 730 N.E.2d 601, 605 (Ill. App. Ct. 2000). Larson only allowed W.M. to use the cell-phone to keep track of W.M.'s activities. R. at 30. While W.M. could send texts and make personal calls, this was only a mere privilege granted to her by Larson. R. at 32. Ultimately, W.M.'s freedom to use the cell-phone was secondary to Larson's need to conduct business on the phone. *Id*.

Lastly, Larson purchased the cell-phone and paid the monthly bills. R. at 34. In *Buckner*, the wife leased the computer searched by the police. 473 F.3d at 555. This allowed her the discretion to return the computer without defendant's full knowledge or consent. *Id*. Unlike the wife in *Buckner*, W.M. lacked the same level of control over the cell-phone than Larson. W.M. could only use the cell-phone when Larson did not need it and W.M.'s activities on the phone were monitored. R. at 30. Therefore, applying the "totality of the circumstances" to this case indicates W.M. lacked authority over the cell-phone. Accordingly, Officer Nelson failed to acquire appropriate consent for the search of the cell-phone.

This Court's holding in *Riley* transformed the way in which courts scrutinize the search of a cell-phone. With all the privacy rights carried within these devices, an officer's search on the basis of apparent authority is problematic. However, even applying a lower apparent authority standard does not allow a search of the cell-phone in this case.

Without limitation of the apparent authority doctrine, the Fourth Amendment's privacy protections becomes secondary to a government's need to search. Accordingly, this Court must reexamine the apparent authority doctrine as it applies to highly private places and effects.

CONCLUSION

For the foregoing reasons, Respondent requests this Court AFFIRM the Thirteenth Circuit's decision finding Local Ordinance 1923 unconstitutional. Respondent further requests this Court AFFIRM the Thirteenth Circuit's decision suppressing evidence gathered during the unconstitutional search of Respondent's home.