Brief on the Merits

No. 03-240

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,

Petitioner,

v.

WILLIAM LARSON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRTEENTH CIRCUIT

BRIEF FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Courts of Appeals:

United States District Courts:

Constitutions and Statutes:

ISSUES PRESENTED

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

2. Did W.M. 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

On the night of July 12, 2015, Officers Zachary Nelson and Joseph Richols were observing patrons as they checked in at the front desk of the Stripes Motel. R. at 3. The Stripes Motel is located in the middle of the Starwood Park neighborhood. *Id*. In March 2013, Victoria City, Victoria was selected to host the 2015 Professional Baseball Association's All-Star Game at Cadbury Park, in the Starwood Park neighborhood. R. at 2. The Starwood Park neighborhood is notorious for gang activity, namely the Starwood Homeboyz and 707 Hermanos. *Id.* The Victoria City Board of Supervisors ("Board"), were concerned that the game would create an increase in human trafficking activity because the high number of men travelling without their wives would be prone to engage in the gang's human trafficking activities. *Id.*

As a result, the Board passed Local Ordinance 1923 ("L.O. 1923") on May 5, 2015. *Id.* In short, L.O. 1923 states that any individual obtaining a hotel/motel room shall be subject to search by a law enforcement officer if the officer has reasonable suspicion to believe that the individual is: (a) a minor engaged in a commercial sex act as defined by federal law or (b) an adult or a minor who is facilitating or attempting to facilitate the use of a minor for a commercial sex act as defined by federal law. *Id.* L.O. is effective for a six-day period that includes the three days before and after the July 14 game. *Id.*

At approximately 11:22 p.m. on July 12, 2015, Respondent William Larson ("Mr. Larson") entered the Stripes Motel with a female. R. at 3. Mr. Larson had two tattoos – one on his forearm with the letters "S" and "W" imprinted on a wizard's hat and another on his neck with the numbers "4-11-5-11." *Id.* Officer Nelson knew the numbers meant "dinosaur killer, everybody killer," which was a reference to members of the Starwood Homeboyz rival street gang, the "707 Hermanos." *Id.* Based on the tattoos and that Mr. Larson's companion was

wearing a "low-cut top" and "tight fitting shorts that exposed much of her legs," Officer Nelson believed he was authorized to search Mr. Larson and his companion pursuant to L.O. 1923. *Id.*

Officer Nelson searched Mr. Larson and found nine condoms, a butterfly knife, lube, two oxycodone bills, a list of names and corresponding allotments of time, and $600 in cash. R. at 4. When searched, Mr. Larson's companion produced a valid State of Victoria driver's license identifying her as W.M., a sixteen-year-old female. *Id.* Officer Richols handcuffed Mr. Larson and arrested him for sex-trafficking a minor in violation of 18 U.S.C. § 1591(a)(1). *Id.* When asked how she knew Mr. Larson, she said they were boyfriend and girlfriend and that they were in the area to do business. R. at 29. Officer Nelson asked W.M. if she had a safe place to stay the night and she responded that she had a safe place to stay and lived with Mr. Larson at 621 Sasha Lane, even though the lease for the apartment was in Mr. Larson's name. R. at 29.

W.M. told Officer Nelson that she met Mr. Larson while she was homeless and he offered to let her live with him. R. at 30. At the time of the arrest, W.M. had been living with Mr. Larson for about a year, R. at 30, but did not pay any rent. R. at 33. W.M did not have her own room because her and Mr. Larson slept together. *Id.* Officer Nelson, still unsure whether W.M. had mutual use of the apartment, asked her whether she kept her belongings in the apartment, and she said that she usually kept her backpack and some spare clothes there but other than that did not keep belongings in the house. R. at 30. However, she did say that she had medical bills and other personal mail sent to Mr. Larson's apartment. R. at 31.

Officer Nelson felt that he had enough evidence that Mr. Larson and W.M. were sharing the apartment so he asked if he could search the home and W.M. responded affirmatively. R. at 31. Upon arrival at the home, W.M. used a spare key underneath a fake rock to open up the door. *Id.* Officer Nelson found a loaded handgun underneath the bed. *Id.* Upon further

inspection of the bedroom, Officer Nelson also found a cell phone on the nightstand. *Id.* W.M. noted that on one occasion, Mr. Larson was upset that W.M. was texting another male from school and Mr. Larson told her that she could only use the cell phone he had given her, from then on, so that he could check it. R. at 30.

W.M. said it was the phone that her and Mr. Larson shared. R. at 31. W.M. mentioned that the sticker on the phone was Mr. Larsons, Mr. Larson paid the bill, she could check her social media accounts without asking for permission, and she could send personal texts and make personal calls but Mr. Larson also used it to make calls and send texts for the business they had together. R. at 32. The sticker on the phone was the same design as the tattoo on Mr. Larson's neck. R. at 34. W.M. provided Officer Nelson with the password to the phone, which just so happened to be the numbers tattooed on Mr. Larson's neck. *Id.*

On the nightstand where the phone was located there were men's glasses, a gold fake Rolex men's watch, and some condoms. R. at 35. On the other nightstand, there was an issue of "Seventeen" magazine and an eye cover to sleep. R. at 37. W.M. consented to a search of the phone, where Officer Nelson found inappropriate pictures of W.M. and a video of Mr. Larson rapping about pimping. R. at 32.

SUMMARY OF ARGUMENT

This Court should find that L.O. 1923 primarily serves a normal law enforcement purpose, and that searches conducted pursuant to L.O. 1923 are therefore not excused from the Fourth Amendment's procedural requirements by the special needs exception. If the Court applies the special needs analysis, it should conclude that the government interest in the search is outweighed by the significant invasion of individual privacy inherent in the search.

This Court should also find that W.M. did not possess apparent authority to consent to a search of Mr. Larson's home because W.M. lacked common authority over the home. As a minor, W.M.'s relationship to the home was insufficient to establish a reasonable officer's belief that she had authority over the premises. W.M. also lacked apparent authority to consent to a search of Mr. Larson's phone because she was too young to consent and did not exercise common authority over the phone.

STANDARD OF REVIEW

This Court reviews *de novo* the denial of a motion to suppress evidence and the application of the exclusionary rule. See *United States v. Krupa*, 633 F.3d 1148, 1151 (9th Cir. 2011); *United States v. Crews*, 502 F.3d 1130, 1135 (9th Cir. 2007). The factual findings underlying the district court's determination that probable cause existed and that investigators acted in good faith in relying upon a warrant are reviewed only for clear error, however, and are provided great deference. See *Krupa*, 633 F.3d at 1151.

ARGUMENT

I. MR. LARSON'S MOTION TO SUPPRESS SHOULD HAVE BEEN GRANTED BECAUSE PETITIONER OBTAINED THE EVIDENCE IN QUESTION THROUGH AN UNCONSTITUTIONAL WARRANTLESS SEARCH NOT JUSTIFIED BY THE FOURTH AMENDMENT'S "SPECIAL NEEDS" EXCEPTION.

This Court should affirm the ruling of the Court of Appeals and hold that the search in question violated Mr. Larson's Fourth Amendment right. The District Court applied the Fourth Amendment's so-called "special needs exception" to hold that such searches are facially reasonable, and denied Mr. Larson's motion to suppress. R. at 5–10. The Court of Appeals reversed, holding that L.O. 1923 "has no purpose other than the general enforcement of a specific criminal law" and therefore serves a normal law enforcement purpose. R. at 19.

Searches "conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment." *Katz v. United States*, 389 U.S. 347, 357 (1967). "Nevertheless, because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). "[W]hen special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable," *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (internal marks omitted), courts must "balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context." *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 619 (1989). This rule applies only "in those exceptional circumstances in which special needs, beyond the normal need for law enforcement" render the Fourth Amendment's usual requirements impractical. *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring); *see also Skinner*, 489 U.S. at 619 (noting that the purpose of the balancing test is "to assess the practicality of the warrant and probable-cause requirements in the particular context"); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 666–67 (1989) (finding that constitutionalizing employment decisions would make it difficult for the government to function). Absent a persuasive showing that a program authorizing searches is a pretext, which provides a veneer of acceptability for law enforcement interests, courts evaluate such a program "in light of its obvious administrative purpose." *Skinner*, 489 U.S. at 621 n.5.

This Court should affirm the ruling of the Court of Appeals, and hold that L.O. 1923 is at best an ill-conceived attempt to allow law enforcement to circumvent the Fourth Amendment's warrant and probable-cause requirements in the service of everyday law enforcement interests, and is therefore not within the ambit of the special needs exception. To the extent it purports to

do otherwise, L.O. 1923 is pretextual. If this Court nonetheless finds that the special needs exception does apply, this Court should still affirm. Searches authorized under L.O. 1923 invade fundamental privacy interests to a degree, which is difficult to overstate. Next, the government's weighty interest in punishing those who engage in sex trafficking of minors is—while unquestionably of profound importance—fundamentally different in kind from other government interests which have been recognized under the special needs exception. Finally, there is no characteristic of the conduct targeted by L.O. 1923 which "make[s] the warrant and probable-cause requirement impracticable . . . " *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

A. The special needs exception does not apply because L.O. 1923's primary purpose is to serve a normal law enforcement purpose.

The special needs exception does not apply because L.O. 1923 primarily serves a law enforcement purpose. Normal government interests in law enforcement are insufficient to justify suspension of the Fourth Amendment protections to which a citizen is ordinarily entitled. *See*, *e.g.*, *Von Raab*, 489 U.S. at 665 (1989) (special needs exception applies only "where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement"); *Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001) (special need must be "divorced from the State's general interest in law enforcement"). Gathering evidence to assist in criminal prosecutions is also not a special need. *Id.* at 83 n.21 (finding no qualifying special need where "the policy was specifically designed to gather evidence of violations of penal laws"). "[T]he gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose." *Indianapolis v. Edmond*, 531 U.S. 32, 42–43 (2000). When determining whether a governmental interest qualifies as a special need, courts must closely scrutinize the immediate objectives of the search or policy: an analysis which proceeds by "defining the search solely in terms of its ultimate,

rather than immediate purpose . . . is inconsistent with the Fourth Amendment." *Ferguson*, 532 U.S. at 84.

When conducting a special needs inquiry, courts "consider all the available evidence in order to determine the relevant primary purpose" of the search. *Id.* at 81. This Court has placed particular weight on several factors, such as the participation of law enforcement in developing and conducting the search policy, *id.* at 82–84; and whether the decision to search a particular person is discretionary or ministerial, *Von Raab*, 489 U.S. at 667. Courts also consider whether the evidence gathered may be provided to law enforcement without the searched person's consent for purposes of criminal prosecution. *Id.* at 666.

In *Ferguson*, this Court held that the special needs exception did not apply to a hospital policy requiring drug testing of expectant mothers and also of women who had recently given birth. The policy in question was drafted by the hospital with the help of local law enforcement, and "stated that a chain of custody should be followed when obtaining and testing urine samples, presumably to make sure that the results could be used in subsequent criminal proceedings." 532 U.S. at 71–72. Not all mothers at the hospital were searched, but instead only those mothers identified by hospital staff as likely drug users by reference to a list of general criteria. *Id.* at 71 n.4. "The policy also prescribed in detail the precise offenses with which a woman could be charged," and provided protocols for positive results in post-birth testing under which "the police were to be notified without delay and the patient promptly arrested." *Id.* at 72.

This Court refused to apply the special needs exception because "the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment." *Id.* at 79. "While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment . . . the

immediate objective of the searches was to generate evidence *for law enforcement purposes*." *Id.* at 82–83 (emphasis in original). This Court particularly emphasized that the hospital's policy "incorporates the police's operational guidelines" and that "Charleston prosecutors and police were extensively involved in the day-to-day administration of the policy." *Id.* at 82. This "extensive entanglement with law enforcement cannot be justified by reference to legitimate needs." *Id.* at 83 n.20.

In *Chandler v. Miller*, this Court struck down a Georgia policy requiring candidates for high office to submit to mandatory drug testing in the absence of any particularized suspicion. 520 U.S. 305 (1997). The Court declined to reach the special needs exception's balancing test, because the State failed to identify "any indication of a concrete danger demanding departure from the Fourth Amendment's main rule." *Id.* at 318–19. Furthermore, candidates could easily frustrate the test by abstaining from drug use before its publicly-known administration date, and there was "no reason why ordinary law enforcement methods would not suffice" to serve the State's interest. *Id.* at 319–20.

Courts have found a qualifying special need where the search policy in question is focused on a legitimate administrative end divorced from law enforcement objectives, and cannot be used for law enforcement purposes absent some other intervening circumstance. In *Von Raab*, the Court found that mandatory drug testing of individuals employed in certain job categories within the United States Customs Service qualified as a special need, because the purpose of the program was to "deter drug use among those eligible for promotion to sensitive positions within the Service and to prevent the promotion of drug users to those positions." 489 U.S. at 666. The Court's decision placed special reliance on the fact that "[t]est results may not

be turned over to any other agency, including criminal prosecutors, without the employee's written consent." *Id.* at 663.

In *Skinner*, this Court upheld a federal rule mandating drug and alcohol testing of certain railroad employees "engaged in safety-sensitive tasks," 489 U.S. at 620, both in the normal course of work and after certain types of accidents. *Id.* at 608–11. The special need in question was the government's administrative interest in preventing and investigating catastrophic railway accidents, which place both lives and property in significant, immediate danger. *See id.* at 608–09 (noting that such accidents have caused numerous fatalities, "resulted in the release of hazardous materials, and, in one case . . . required the evacuation of an entire Louisiana community"). The Court again rested its holding on the fact that the program of drug testing was not a pretext for law enforcement investigations. *Id.* at 621 n.5.

In *Sanchez v. Cty. of San Diego*, the Ninth Circuit upheld a program of visits by county fraud investigators to homes of welfare recipients on the grounds of the County's "strong interest in insuring that aid provided from tax dollars reaches its proper and intended recipients." 464 F.3d 916, 923 (9th Cir. 2006). "Although the investigators will report any evidence of criminal activity for potential prosecution, this is not the underlying purpose of the visit," and no such prosecutions had actually resulted from the program. *Id.* at 924. The court noted that the program "[did] not *affirmatively* require that D.A. investigators look for evidence of welfare fraud or other crimes," and the fact that a sworn peace officer would follow their duty to report evidence of criminal activity in plain view did not disqualify the program from qualifying under the special needs exception. *Id.* at 921 n.7 (emphasis in original).

L.O. 1923 plainly serves a normal law enforcement purpose. It provides that an individual "shall be subject to search by an authorized law enforcement officer if that officer has

a reasonable suspicion to believe" that the individual is violating particular federal criminal statutes. R. at 2. A police officer decides whether an individual is to be searched, makes that decision based on criteria established in a criminal statute, and then conducts the search itself. This level of involvement goes beyond the "extensive entanglement with law enforcement" which the Court in *Ferguson* held "cannot be justified by reference to legitimate needs." 532 U.S. at 83 n.20. Rather, it is an outright employment of law enforcement from start to finish. Furthermore, like the program in *Ferguson*, L.O. 1923 references statutes describing the particular crimes with which an individual may be charged, and the punishments they may receive. R. at 2. Although L.O. 1923 certainly would lead to the identification of victims of child sex trafficking, its primary and immediate purpose is to both identify violations of criminal statutes, and gather evidence so that such violations may be punished. Searching individuals for the purpose of gathering evidence of criminal activity is a normal law enforcement need. Therefore, the special needs exception does not apply, and Petitioner's search of Mr. Larson was unconstitutional.

B. Even if the special needs exception applies to searches performed pursuant to L.O. 1923, Mr. Larson's personal privacy interest substantially outweighs Petitioner's interest in performing such searches, and L.O. 1923 is therefore unconstitutional.

If this Court determines that L.O. 1923 does not primarily serve a normal law enforcement purpose, the Court should still hold that Petitioner's search violated Mr. Larson's Fourth Amendment rights because Petitioner's interest in conducting warrantless searches without probable cause as authorized by L.O. 1923 is outweighed by privacy interest of citizens in being free from such searches. Furthermore, Petitioner cannot show that normal Fourth Amendment procedures are impractical under the circumstances, or would frustrate L.O. 1923's law enforcement purpose.

1. Searches authorized by L.O. 1923 invade citizens' undiminished reasonable expectations of privacy to an extent that renders Fourth Amendment protections effectively meaningless.

The Fourth Amendment "guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive act by officers of the Government or those acting at their direction." *Skinner*, 489 U.S. at 613–14; *see also Florida v. Royer*, 460 U.S. 491, 497–98 (1983) (discussing the rule that, in the absence of probable cause, a person approached by a police officer "may decline to listen to the questions at all and may go on his way"). "In the name of investigating a person who is no more than suspected of criminal activity, the police may not carry out a full search of the person or of his automobile or other effects. Nor may the police seek to verify their suspicions by means that approach the conditions of arrest." *Id.* at 500.

In *Terry v. Ohio*, the Court recognized a rule allowing police officers to stop and frisk an individual who the police reasonably suspect is armed and engaged in crime, based on specific and articulable facts, in order to protect the officer and the public. 392 U.S. 1, 30. A *Terry* stop is restricted to "a carefully limited search of the outer clothing of such persons in an attempt to discover weapons . . .." *Id.*; *see Sibron v. New York*, 392 U.S. 40, 65–66 (1968) (*Terry* frisks which go beyond determining whether a person is armed violate the Fourth Amendment). Nonthreatening contraband discovered during a *Terry* frisk may be lawfully seized through the so-called "plain touch" doctrine, but only if the frisk itself remains within the narrow limitations of *Terry*. *See Minnesota v. Dickerson*, 508 U.S. 366, 373–79 (1993) (evidence discovered during *Terry* frisk which was obviously neither a weapon nor contraband must be suppressed). These cases recognize a fundamental privacy interest in one's person by limiting police intrusion when the Fourth Amendment is not satisfied.

When this Court has found searches reasonable under the special needs doctrine, it has focused on the reduced expectation of privacy reasonably enjoyed by the person to be searched. In *Skinner*, the Court held that the reasonable expectations of privacy enjoyed by railway employees were "diminished by reason of their participation in an industry that is regulated pervasively to ensure safety . . .." 489 U.S. at 627; *see also New York v. Burger*, 482 U.S. 691, 700 (1987) (expectation of privacy "particularly attenuated" in heavily-regulated commercial industry). In *Von Raab*, the Court similarly found that agents of the Customs Service enjoy reduced expectations of privacy because of the "operational realities of the workplace." 489 U.S. at 671 (citing *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987)). Courts have also found reduced expecations of privacy in other special needs cases. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. at 656–57 (student athletes); *United States v. Sczubelek*, 255 F. Supp. 2d 315, 323 (D. Del. 2003) (probationers) (citing *Griffin*, 483 U.S. 868 (1987)); *c.f. United States v. Scott*, 450 F.3d 863, 866–69 (9th Cir. 2005) *as amended* (June 9, 2006) (reducing privacy rights of individual on pretrial release to remove probable cause requirement would violate doctrine of unconstitutional conditions).

In this case, Mr. Larson's reasonable expectation of privacy is identical to that of any other individual in a public place. Mr. Larson was not searched at work, at school, or pursuant to a condition of supervised release, but rather while walking through a hotel lobby. R. at 3. L.O. 1923 is not a constitutionally permissible "stop-and-frisk" policy, it is an unconstitutional "stop-and-confirmatory-search" policy. L.O. 1923 does require reasonable suspicion, but only that the individual is engaged in crime, not that they are armed, and proceeds to authorize a full, speculative search for evidence rather than a narrow *Terry* frisk. R. at 2; *c.f. Royer*, 460 U.S. at 500. If the searched individual has a cell phone in their pocket, it is unclear whether L.O. 1923

would also authorize a search of that phone. *C.f. Riley v. California*, 134 S. Ct. 2473, 2845 (2014) (police "must *generally* secure a warrant" before searching a cell phone (emphasis added)). L.O. 1923 invades fundamental expectations of privacy to their very core.

2. The government's significant interest in punishing child sex trafficking is distinguishable from other government interests that have been held to constitute special needs for Fourth Amendment purposes.

While Petitioner's interest in punishing the conduct targeted by L.O. 1923 is unquestionably substantial, "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose." *Edmond*, 531 U.S. at 42–43. This Court has found sufficient the weighty dangers of railroad crashes, with their attendant risks of death, property damage, and release of hazardous materials, *Skinner*, 489 U.S. at 608–09; the potential frustration of critical federal programs by corrupt agents, *Von Raab*, 489 U.S. at 670; and preventing drug use by schoolchildren, *Vernonia Sch. Dist. 47J*, 515 U.S. at 647. By contrast, the immediate social harm of child sex trafficking is focused on the particular victim. Although the trauma and damage to victims of child sex trafficking is severe beyond question, this criminal conduct does not directly cause the kind of social harm identified by this Court's precedent—even though it may contribute to the chain of causation for such harm. *See* R. at 3, 9–10 (discussing harm inflicted by child sex trafficking).

3. Nothing about the searches authorized by L.O. 1923 renders normal Fourth Amendment procedure impractical.

This Court's decisions reflect the principle that a mere need for information is not sufficient to justify a search under the special needs exception without some indication that use of normal procedure would frustrate the government interest in question. *See Griffin*, 483 U.S. at 873 (special needs exception applies only when the Fourth Amendment's requirements are

impracticable). One such practical barrier is the destruction of evidence. *See Skinner*, 489 U.S. at 608–10. Suspicionless searches are often justified by the impossibility of satisfying the warrant requirement under any facts the government is likely to encounter. *See id.* at 622 (noting that, although mandatory drug testing is the only effective enforcement measure, "there are virtually no facts for a neutral magistrate to evaluate"); *Von Raab*, 489 U.S. at 667 (same).

In this case, there is no suggestion anywhere in the Record that the police could not have followed normal police procedures. Indeed, the only reason for police to not use normal procedures was the fact that the police lacked probable cause to search Mr. Larson, and would not have been able to obtain a search warrant. R. at 3. Petitioner's argument is not that the Fourth Amendment's procedures would, if followed, frustrate the law enforcement goal or lead to destruction of evidence not otherwise obtainable; but rather that the rights guaranteed to Mr. Larson by the Fourth Amendment were an inconvenience which prevented Petitioner from accessing information to support a possible criminal case against him.

This Court should affirm because L.O. 1923 is not within the ambit of the special needs exception. If this Court nonetheless finds that the special needs exception does apply, this Court should find that L.O. 1923 invades fundamental privacy interests to a significant degree.

II. THIS COURT SHOULD AFFIRM BECAUSE W.M. DID NOT POSSESS APPARENT AUTHORITY TO CONSENT TO A SEARCH OF MR. LARSON'S HOME OR PHONE.

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. A search conducted without a warrant is per se unreasonable unless one of the well-delineated exceptions apply. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (citing *Katz*, 389 U.S. at 357). One exception to the warrant requirement is a search conducted pursuant to

consent. *Schneckloth*, 512 U.S. at 219 (citing *Davis v. United States*, 328 U.S. 582, 593-94 (1946)).

Consent for a search may be provided by a "third party who possessed common authority over or other sufficient relationship to the premises [to be searched or seized]" *United States v. Matlock*, 415 U.S. 164, 171 (1974). Even when actual authority is lacking, a third party has apparent authority to consent to a search if a police officer reasonably, but erroneously, believes that the third party has actual authority to consent. *Georgia v. Randolph*, 547 U.S. 103, 109 (2006) (citing *Illinois v. Rodriguez*, 497 U.S. 177 (1990)). A third party's apparent authority to consent is judged by an objective standard – whether the police conducting the search "reasonably could conclude from the facts available that the third party had authority to consent to the search. *Id.* (quoting *United States v. Gillis*, 358 F.3d 386, 390-91 (6th Cir. 2004)).

The Fourth Amendment generally prohibits the warrantless entry of a person's home whether to make an arrest or to search for specific objects. *Rodriguez*, 497 U.S. 177 (1990) (citing *Payton v. New York*, 445 U.S. 573 (1980); *Johnson v. United States*, 333 U.S. 10 (1948)). The prohibition exists unless the search can be justified by one of the narrowly drawn exceptions to the warrant requirement, including the third-party consent doctrine. However, the doctrine is intended to function as a "jealously and carefully drawn exception" to the warrant requirement. *Georgia v. Randolph*, 547 U.S. 103, 109 (2006) (internal quotation marks and citation omitted).

A. W.M. Lacked Apparent Authority To Consent To A Search Of Mr. Larson's Home.

This Court should find that Mr. Larson's home was unreasonably searched because W.M. did not possess apparent authority to consent to a search of Mr. Larson's home because she lacked common authority over the premises. Third-party consent to search a home is reasonable

if the third party possesses common authority over, or other sufficient relationship to the premises or effects sought to be inspected. *Matlock*, 415 U.S. at 171. Common authority rests "on the mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *Id*. at 172 n.7.

In *Matlock*, Matlock was arrested in the front yard of a home he jointly occupied with Mrs. Graff. *Id.* at 164-66. Instead of requesting consent from Matlock to search the home, the arresting officers were admitted into the home by Graff, who opened the door with her three-year old son in her arms and said she jointly occupied the home with Matlock. *Id.* at 164. The officers searched a bedroom, which Graff also said she jointly occupied with Matlock, and found incriminating evidence in a closet. *Id.* at 166-67. The sole issue before this Court was whether Graff's relationship with the bedroom was sufficient to make her consent to the search valid against Matlock. *Id.* at 167. This Court held that the government met its burden of proving that Graff's consent to search the bedroom was legally sufficient but remanded to the district court to reconsider the sufficiency of the evidence in light of its opinion. *Id.* at 177-78.

When an individual consents to a search of property owned by another, the consent is valid if the facts available to the officer warrant a man of reasonable caution in the belief that the consenting party had authority over the premises. *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990). In *Rodriguez*, Gail Fischer showed signs of severe beating and told police that Rodriguez had assaulted her earlier in the day in *their* apartment. *Id.* at 179 (emphasis added). Fischer repeatedly referred to the apartment as "our" apartment as she had been living with the defendant for several months and said that she had clothes and furniture there. *Id.* Upon arrival,

Fischer unlocked the door with *her key* (that she carried on her) and gave the officers permission to enter the home without a warrant. *Id.* at 180 (emphasis added). The officers found drugs in plain view, seized them, and arrested Rodriguez. *Id.*

After the search, the evidence showed that although Fischer and her two small children had lived with Rodriguez for some time, they moved out a month before the search. *Id.* at 181. Subsequently, Fischer took her and her children's clothing but left behind some furniture and household effects. *Id.* However, she occasionally spent the night at Rodriguez's apartment after moving out. *Id.* Fischer had a key to the apartment but her name was not on the lease and she did not contribute to the rent. *Id.* This Court found that on these facts, the government had not proven that Fischer had "joint access or control for most purposes," and therefore had no common authority. *Id.* at 181-82. This Court noted that although she had a key and could not invite others to the apartment on her own, her name not being on the lease and not contributing to the rent were sufficient to find that she did not have "joint access or control for most purposes." *Id.*

W.M. did not possess apparent authority to consent to a search of Mr. Larson's home because she lacked common authority over the premises. In *Matlock*, the third-party consented after opening the door to police with a child in her arms. 415 U.S. at 164. Moreover, the third party told the police that she jointly occupied the home and bedroom with Matlock. *Id.* W.M. was not inside the home at the time of consent. R. at 31. Instead of being present inside the home, which would demonstrate common authority, W.M. conspicuously overturned a fake rock in front of the home, grabbed a spare key, and opened the door. *Id.* In addition, Officer Nelson, knew that the lease was in Larson's name and that W.M. and Larson were doing business

together. R. at 29. Instead of probing further to evaluate the relationship, Officer Nelson chose not to because "[W.M.] was answering so many questions." R. at 30.

The Fourth Amendment does not restrict police from probing into the details of a relationship to determine authority; it encourages it. *See Kentucky v. King*, 563 U.S. 452 (2011) (holding that police officers do not engage in a search when they approach the front door of a residence and seek to engage in conversation, even if it is to gather evidence). Officer Nelson was objectively unreasonable in choosing not to ask additional questions of W.M because she had "answer[ed] so many." R. at 30.

W.M. did not possess "joint access or control for most purposes." In *Rodriguez*, Fischer had repeatedly described Rodriguez' apartment as "our apartment" and even had the apartment key in her pocket. 497 U.S. at 179. W.M. did admit she lived with Mr. Larson, R. at 29, but added that she met Mr. Larson while she was homeless. R. at 30. Moreover, her key was not on her person but under a rock. R. at 31. Despite being able to host friends at Mr. Larson's home, R. at 38, W.M.'s name was not on the lease, did not pay rent, and W.M. kept a backpack and spare clothes at Mr. Larson's like in *Rodriguez* where Fischer was not on the lease, did not pay rent, and kept furniture and household effects. R. at 30. Hence, this Court should find that W.M. did not possess joint access or control for most purposes because W.M. had comparable limited control like Fischer did in *Rodriguez*.

1. Officer Nelson unreasonably relied on the consent of a minor.

An officer must take additional precautions when relying on the consent of a minor to enter a home. *United States v. Belt*, 609 F. App'x 745, 751 (4th Cir. 2015), *cert. denied*, 136 S. Ct. 274 (2015). In *Belt*, police officers approached a home to conduct a "knock and talk" based on an anonymous tip that there was methamphetamine being produced in the home and a child

was present. *Id.* at 747. Upon approaching the home, they noticed a boy who appeared to be ten to twelve years old in the front yard. *Id.* The officers asked the boy whether someone was inside; the boy told the officers that his father was and proceeded to invite the troopers into the home. *Id.* The officers followed the boy into the home, made contact with the father, and – after obtaining a warrant –found drug paraphernalia and firearms. *Id.* at 747-48. The father argued that the search was unconstitutional because his son did not have apparent authority to consent to the officers' entry of the home. *Id.* at 748. Ultimately, the court held the search was reasonable based on another exception to the Fourth Amendment's warrant requirement – the doctrine of attenuation. *Id.* at 750. However, the court cautioned, in dicta, against the officers' reliance on a minor's consent to search the home. *Id.* at 751.

Officer Nelson's reliance on W.M.'s consent was unreasonable because Officer Nelson knew W.M. was a minor. In *Belt*, police relied on a ten to twelve year olds' consent of a home. 609 F. App'x at 747. The court noted in dicta that it was concerned with allowing police officers to rely on the consent of a minor. Officer Nelson knew that W.M. was a minor because she produced a valid State of Victoria driver's license. R. at 29. Moreover, Officer Nelson was obviously concerned with the situation because when asked, "In [his] training or experience, how many 16 year olds have control of their own apartment?" R. at 34. He replied, "Not a lot. But this was clearly a pretty abnormal situation." *Id.* Officer Nelson should have undertaken additional precautions to ensure that a minor such as W.M., had the authority to consent.

At the time W.M. consented to a search of the home, all Officer Nelson knew was that Mr. Larson invited W.M. into his home because she was homeless, R. at 30, the two were dating, R. at 29, the lease was under Mr. Larson's name, and they had a business together. *Id.* An officer who thinks that W.M. could potentially be the victim of human trafficking would be

unreasonable to believe that the victim has authority to consent to a search of their "pimp's" home because the relationship is one of business, rather than of love as W.M. described. *Id.* Officer Nelson's negligent actions do not excuse his violation of Mr. Larson's constitutional right to be free from unreasonable searches.

B. W.M. lacked apparent authority to consent to a search of Mr. Larson's phone.

W.M. lacked apparent authority to consent to a search of Mr. Larson's phone because W.M. did not have common authority over the phone. The third-party consent exception is based on the understanding that a "third-party who possesse[s] common authority over or other sufficient relationship to the premises or *effects* sought to be inspected" can consent to a warrantless search. *United States v. Yudong Zhu*, 41 F. Supp. 3d 341, 343 (S.D.N.Y. 2014) (quoting *Matlock*, 415 U.S. at 171) (emphasis added).

1. W.M. did not exercise common authority over the phone.

The joint user of an item has authority to consent to its search. *Frazier v. Cupp*, 394 U.S. 731, 740 (1969). In *Frazier*, Frazier left a duffel bag that he jointly used with his cousin at his cousin's home. *Id.* The police obtained Frazier's cousin's consent to search the bag. *Id.* Next, the police came across Frazier's clothing and found evidence incriminating him. *Id.* Frazier contended that his cousin only had authority to use one compartment of the bag. *Id.* This Court found that the Frazier and his cousin were joint users, and therefore, the cousin had authority to consent to a search of the bag because this Court did not want to engage in "such metaphysical subtleties in judging the efficacy of [the cousin's] consent." *Id.*

An individual requires complete access to a computer to exercise common authority over it. In *United States v. Morgan*, Morgan's wife consented to a search of their joint computer. 435 F.3d 660, 663-64 (6th Cir. 2006). The wife had complete access to the computer and indicated

to the officers that she and the defendant did not have individual usernames or passwords. *Id.* at 663. The wife also told the police officer that she installed software on the computer, which further supported the officer's conclusion that the wife had access to the computer. *Id.* at 664. The court found that "the officer's reasonably could conclude from the facts available that [the wife] had [apparent] authority to consent to the search." *Id.*

W.M. did not have apparent authority to consent to a search of Mr. Larson's phone because she was not a joint user of the phone. In *Frazier*, this Court held that Frazier's cousin could consent to a search of a bag that included some of Frazier's belongings, because they were joint users. 394 U.S. at 740. Our case is distinguishable in that Mr. Larson and W.M. were not joint users of the phone. Although they "shared" the phone according to W.M., they did not share it enough to become joint users. R. at 31. First, the phone had Mr. Larson's sticker on it (a sticker that identically matched his tattoo). R. at 32. Second, Mr. Larson paid the bill and was the primary user over the phone. R. at 32. Lastly, Mr. Larson revoked her previous phone and only permitted W.M. to use the phone he provided her so he could check her usage. R. at 30. Together, these facts demonstrate a lack of joint occupancy in the phone as W.M. did not store personal information on the phone like Frazier stored in his cousin's duffel bag.

Similarly, W.M. did not exercise common authority over the phone because she was not given complete access to it. In *Morgan*, the wife had apparent authority to consent to a search of a computer because she installed software on it. 435 F.3d at 664. Moreover, the couple did not have individual usernames and passwords. *Id.* at 663. Unlike *Morgan*, W.M. did not convey to Officer Nelson that she had the ability to install applications or programs on Mr. Larson's phone. Rather, W.M. said she was able to access her social media accounts, which could be accessed

from a webpage, rather than as a downloaded application. R. at 32. Merely accessing social media accounts is not sufficient for a showing of common authority over a phone.

2. Mr. Larson had a heightened expectation of privacy in his bedroom.

An individual has a heightened expectation of privacy in effects located in a bedroom, rather than a common area. *See United States v. Stabile*, 633 F.3d 219 (3rd Cir. 2011); *United States v. Buckner*, 473 F.3d 551, 555 (4th Cir. 2007). In *Stabile*, Stabile's purported wife had apparent authority to consent to a search of the computers and hard drives because they were located in common areas of the home, such as the main floor and the basement, *rather than in a private bedroom*. 633 F.3d at 233 (emphasis added). As a result, the wife had unfettered access to the hard drives and had authority to consent to their seizure. *Id.*

In *Buckner*, Buckner's wife consented to the search of password-protected files. 473 F.3d. at 552. The wife had apparent authority to consent to the search of the computer because the computer was located in a common living area of the marital home, the computer was on, fraudulent activity had been conducted from the computer using the wife's name, and the wife leased the computer herself and could return it to the rental agency at any time without Buckner's consent. *Id.* at 555-56.

Mr. Larson had a higher expectation of privacy in effects located in his bedroom, rather than a common area. In *Stabile*, the wife had apparent authority to consent to a search of the computer and hard drive because they were located in common areas of the home – the main floor and the basement. 633 F.3d at 233. Although computers and phones are different in appearance, they are nearly identical in purpose. If anything, computers deserve a higher expectation of privacy because they can store more information than a phone. The rationale behind a lower expectation of privacy in common areas is due to the greater potential for

exposure of personal information to others. In comparison, Mr. Larson's phone was in his bedroom, the most private part of his home. R. at 31. While the wife's access to the common areas in *Stabile* was "unfettered," 633 F.3d at 233, W.M.'s access to Mr. Larson's bedroom was sketchy, at best, based on the information she provided to Officer Larson.

In *Buckner*, the wife had apparent authority to consent to a search of a computer because the computer was in a common area and she leased the computer herself and could return it any time without Buckner's consent. 473 F.3d. at 555-56. There is no evidence that W.M. had any ownership interest or sufficient control over the phone whereby she could return the phone or cancel the phone's service. To the contrary, the phone was located on one of the two nightstands in the bedroom. R. at 37. On the nightstand opposite where the phone was found was a "Seventeen" magazine and a pink eye cover. *Id.* The nightstand where the phone was on also had men's glasses, a gold fake Rolex men's watch, and some condoms. R. at 35. Officer Nelson was unreasonable in believing that W.M. had apparent authority to consent to a search of an effect on top of what clearly seemed like a men's nightstand.

4. Mr. Larson exhibited a heightened expectation of privacy by password protecting his phone.

A password limits a third-party's apparent authority to consent to a search of electronics. *United States v. Trejo*, 471 F. App'x 442, 448 (6th Cir. 2012); *Stabile*, 633 F.3d 219 (3rd Cir. 2011); *United States v. King*, 604 F.3d 125 (3rd Cir. 2010); *Trulock v. Freeh*, 275 F.3d 391, 403 (4th Cir. 2001). In *Trejo*, Trejo's parents had apparent authority to consent to a search of a shared computer, even though Trejo had an individual user profile, because the profile was not password protected. 471 F. App'x at 448. Similarly, in *Stabile*, the purported wife had apparent authority to consent to a search of their shared hard drive because "the failure to use password

protection indicates that Stabile relinquished his privacy in the contents of the computer." 633 F.3d at 233.

In *Trulock*, joint occupants of a home had equal access to the same computer located in one of the occupants' bedrooms. 275 F.3d at 403. The occupants protected their personal files with passwords. *Id.* The court held that each occupant could consent to a general search of the computer but not to the other's password-protected files. *Id.* *See also King*, 604 F.3d at 137 (holding that the defendant's joint occupant had apparent authority to consent to a search of a shared computer because it was not password protected).

W.M. did not have apparent authority to consent to a search of Mr. Larson's phone because his phone was password protected. R. at 34. The Petitioner may argue that W.M.'s knowledge of the password is sufficient to establish common authority. However, Mr. Larson password protecting his phone should have been enough to demonstrate to Officer Nelson that he did no intend to relinquish his expectation of privacy. Moreover, Mr. Larson's password was identical to the numbers tattooed on his neck and Officer Nelson was fully aware of that. *Id.* By password protecting his phone, Mr. Larson's intent was to keep the information on his phone private.

4. This Court has recognized the increased expectation of privacy in cell phones.

Officers must generally secure a warrant before conducting a search of a cell phone. *Riley*, 134 S. Ct. at 2485. In *Riley*, this Court held that officers must generally secure a warrant before conducting a search of a cell phone. *Id.* Riley was lawfully stopped by an officer for driving with expired registration. *Id.* at 2480. Subsequently, Riley was searched incident to arrest and police found a "smart phone" on him. *Id.* Officers searched the phone and found incriminating evidence, including photos and videos. *Id.* This Court held that police must

generally secure a warrant before searching a cell phone because "cell phones are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Id.* at 2484-85.

The warrantless search of Mr. Larson's cell phone was categorically unreasonable according to *Riley's* reasoning. Although the search of Mr. Larson's cell phone was not in the context of a search incident to arrest, this Court's driving concern in *Riley* was ubiquity of cell phones in the modern age and the pervasive nature of the information stored on them. Although the facts in *Riley* were limited to a search incident to arrest, this Court did not concern itself with the longstanding policy rationales behind the search incident to arrest – officer safety and preventing destruction of evidence – in arriving at its decision. *See Arizona v. Gant*, 556 U.S. 332 (2009); *United States v. Robinson*, 414 U.S. 218 (1973); *Chimel v. California*, 395 U.S. 752 (1969). As such, this Court should not limit its holding in *Riley* to the narrow search incident to arrest exception, because it would undermine this Court's intent to track its Fourth Amendment jurisprudence with the technological advances of the modern age.

CONCLUSION

This Court should affirm because L.O. 1923 primarily serves a law enforcement purpose, and is therefore unreasonable under the Fourth Amendment. Even if the special needs exception applies, this Court should still affirm, because the government interest in such searches is outweighed by significant personal privacy interests. Furthermore, this Court should affirm because W.M. did not have apparent authority to consent to a search of Mr. Larson's home or phone. Officer Nelson's witch-hunt into the most private confines of Mr. Larson's life was unreasonable and unfounded.