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, WILLIAM LARSON

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II. The Thirteenth Circuit correctly overturned the District Court and upheld Mr. Larson's motion to suppress evidence found during the search of his home and cellphone. Each search was conducted pursuant to the consensual search exception to the Fourth Amendment. However, the government has failed to meet its burden of proving that the consenting party had the authority to consent to either search. Furthermore, based on all facts available to officers at the time of the searches, it would be unreasonable to conclude that the consenting party had the apparent authority to authorize the searches. Because of this, the Thirteenth Circuit correctly found the searches to be unreasonable and upheld Mr. Larson's motion to suppress evidence found during these searches.

STATEMENT OF FACTS

On May 5, 2015, the Victoria City Board of Supervisors ("Board") passed Local Ordinance 1923 ("L.O. 1923"). R. at 2. It authorized law enforcement officers to search "any individual obtaining a room in a hotel, motel, or other public lodging facility" when an officer has "reasonable suspicion to believe" that the individual is either a "minor engaging in a commercial sex act as defined by federal law" or "an adult or minor who is facilitating or attempting to facilitate the use of a minor for a commercial sex act as defined by federal law." R. at 2. The federal law under which officers were looking for evidence of a crime is the "Trafficking Victims Protection Act." R. at 18. The scope and duration of searches pursuant to L.O. 1923 were authorized for "that which is reasonably necessary to ascertain whether the individual searched" is in violation of federal law. R. at 2. Finally, the ordinance was limited to the Starwood Park neighborhood[1] and only in effect from July 11, 2015 through July 17, 2015. R. at 2.

L.O. 1923 was passed in response to Victoria City's hosting of the Professional Baseball Association All-Star game and an expected increase in sex trafficking due to the large number of people visiting the city. R. at 41. To support its opinion of an expected increase, the Board cited numerous studies conducted surrounding other major sporting events and the increase in sex trafficking that occurred at the same time. R. at 41. Based on this data, the Board approved L.O. 1923 in an effort to "protect children" by providing law enforcement the "tools they need to act" to remove victims "from dangerous situations before they can escalate." R. at 41.

With this release, the Board cited current Victoria City sex trafficking statistics, recognizing it to be a problem "every week of the year." R. at 41. This statistical analysis revealed

[1] This encompassed an area within three miles of the stadium in which the Professional Baseball All-Star game was to be held. R. at 40.

that there are 8,000 child sex trafficking victims in the city each year. R. at 40. Of these, only 1,500 (approximately 18%) come from the Starwood Park region of the city. R. at 40. This number is reported to be "nearly triple" that of any other region within the city.[2] R. at 40. Because of the possibly increased number of victims within this area of the city, the Board limited the expanse of L.O. 1923 to cover only the Starwood Park region.[3] R. at 41.

Pursuant to L.O. 1923, on July 12, 2015, William Larson ("Mr. Larson") was approached and searched by Officer Joseph Richols and Officer Zachary Nelson. R. at 27, 28. These officers were in place at the Stripes Motel to observe patrons checking in and to look for signs of human trafficking.[4] R. at 3, 27. Prior to the search, Officers observed Mr. Larson and W.M. enter the motel. R. at 3.

During their observation, Officer Nelson noted that his suspicion was aroused because W.M. appeared to be much younger than Mr. Larson, was wearing revealing clothing, and the pair were carrying no luggage. R. at 3, 28. Finally, Officer Nelson stated he was most concerned about Mr. Larson's suspected gang affiliations. R. at 28. He recognized Mr. Larson's tattoos as being associated with members of the Starwood Homeboyz, identifying two specific tattoos: (1) an "S" and "W" wrapped around a wizard hat; (2) the numbers "4-11-5-11." R. at 3, 28.

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[2] While the Board makes this claim, they fail to provide any population density numbers or information regarding the number of victims as either a percentage of the population or per capita. Therefore, this number is misleading because it provides no method of comparing it to other regions of the city.

[3] Starwood Park is also recognized as an area of high gang activity, with the "Starwood Homeboyz" and "707 Hermanos" conducting activities there. R. at 2. Each of these gangs is affiliated with sex trafficking and controls as many as 1,500 sex workers, many of whom are believed to be children. R. at 2.

[4] The Stripes Motel is within the area designated under L.O. 1923. R. at 3, 26.

After concluding they had authority under L.O. 1923, Officers Nelson and Richols searched Mr. Larson and W.M.[5] R. at 4, 28-29. Following Officer Nelson's search of W.M., he concluded that she was most likely the victim and did not place her under arrest. R. at 4, 29. He then asked if she had a safe place to spend the night; to which she replied that she lived in an apartment with Mr. Larson and could go there. R. at 4, 29. During this initial questioning, W.M. revealed that although she believed they shared everything, her name was not on the lease. R. at 29.

Officer Nelson then asked W.M. to clarify what she meant. R. at 29. She responded that Mr. Larson invited her to live with him after she became homeless. R. at 29, 30. Also she believed her and Mr. Larson to be business partners who shared everything; however, Mr. Larson held all of the money and only gave her what she needed to buy clothes and perfume. R. at 30. Officer Nelson was still unsure about their living arrangement and asked if she kept any belongings in the apartment. R. at 30. W.M. informed him that she received medical bills and other personal mail, but only kept a backpack and some spare clothes in the apartment. R. at 30, 31. W.M. also complained that she did almost of the chores around the house and informed him that they kept separate food in the apartment. R. at 33. Following these statements, Officer Nelson asked for W.M.'s consent to search the apartment, which she granted. R. at 31.

W.M. had no key to the apartment and upon arrival with Officer Nelson, was required to retrieve a spare from underneath a fake rock. R. at 31. Once in the apartment, Officer Nelson discovered a hand gun underneath the bed and a cell phone located on one of two night stands in the bedroom. R. at 4, 31, 37. The one on which the cell phone was found contained a pair of men's

[5] On Mr. Larson, officers found: nine condoms, a butterfly knife, lube, two oxycodone pills, $600 cash, and a list of names. R. at 4, 28. The search of W.M. produced only a valid State of Victoria Driver's License which showed officers that she was sixteen years old. R. at 29.

glasses, a gold men's watch, and condoms. R. at 35. The other contained only W.M.'s effects, including a sleeping mask and a copy of "Seventeen" magazine. R. at 37.

Prior to locating this phone, Officer Nelson was aware that Mr. Larson was paying for a phone strictly for W.M.'s use. R. at 30. He purchased this phone after discovering her texting another gentleman. R. at 30. This discovery led Mr. Nelson to slap W.M. and give her this phone so could monitor her activity. R. at 30. It was established that the searched cell phone was not the one belonging to W.M. when Officer Nelson asked that exact question and W.M. answered in the negative. R. at 31.

On the cell phone in question, Officer Nelson noticed a sticker depicting exactly the same image as Mr. Larson's tattoo.[6] R. at 34. This sticker was placed on the phone by Mr. Larson without having to gain W.M.'s consent to do so. R. at 32. The phone was also password protected and although W.M. knew the passcode, it was the same number combination as Mr. Larson's second tattoo.[7] R. at 34. W.M. further informed Officer Nelson that Mr. Larson paid the bill and allowed W.M. only limited personal access to send some texts, make some calls, and use her Instagram and Facebook accounts. R. at 32.

SUMMARY OF THE ARGUMENT

I. The United States Court of Appeals for the Thirteenth Circuit ("Thirteenth Circuit") correctly held that L.O. 1923 did not meet the requirements of the special needs doctrine and that any search pursuant to its authority violated the Fourth Amendment. While warrantless searches are presumed unreasonable, they may be constitutional under certain circumstances, including the special needs exception. First, the government did not meet its burden of showing that L.O. 1923

[6] The record does not define which of Mr. Larson's tattoos was recreated by the sticker. R. at 34.

[7] The passcode was the same as the numbers tattooed upon Mr. Larson's neck. R. at 34.

served a primary purpose other than ordinary law enforcement. While characterized as a device to protect victims of sex trafficking, L.O. 1923 did no more than allow law enforcement the tools necessary to find evidence of a crime. Nor did this ordinance provide any method of removing victims from the situation, or access to rehabilitation services once removed. Second, the government failed to show that their interests outweighed those of an individual to be free from unreasonable search and seizure, therefore making a warrant impracticable. Mr. Larson had a substantial right to be free from the search that occurred, and the nature and immediacy of the government's concern was not great enough to infringe on this right. For these reasons, the ordinance does not meet the requirements to be a special need and searches conducted pursuant to it are unconstitutional.

II. The Thirteenth Circuit correctly held that sufficient ambiguity surrounded W.M.'s authority, such that an officer could not reasonably believe she shared mutual use of either the apartment or cell phone. First, the court concluded that, while W.M. may have believed she and Mr. Larson shared the apartment, and kept clothes within, she: (1) was only sixteen, (2) forced into doing most of the chores, (3) kept separate food, (4) was not allowed to possess money except for what Mr. Larson gave her, (5) paid no rent, (6) was not on the lease, and (7) maintained no key to the apartment. Based on these factors, W.M. did not share mutual use of the apartment with Mr. Larson and, thus, only had limited access or control. Second, ambiguity surrounded the facts used by officers to determine if she had authority to consent to the cell phone search. Although W.M. stated that she had access to the phone, it was not mutual as Mr. Larson allowed her only limited access. This, along with the phone's location on Mr. Larson's nightstand, that he paid the phone's bill, and that he password protected the cellphone should have made Officer Nelson question W.M.'s authority over the phone. For these reasons, W.M.'s possessed no authority over the

apartment or cell phone; therefore, officers could not reasonably believe she had joint access or control, and should have conducted further inquiry to establish her mutual use prior to conducting the searches.

STANDARD OF REVIEW

This writ of certiorari was taken from the Thirteenth Circuit's reversal of a ruling by the Western District of Victoria denying Respondent's Motion to Suppress evidence. The standard of review for this Court on questions of law is *de novo* review. *See Ornelas v. United States*, 517 U.S. 690 (1996). *De novo* review will provide a clear standard for law enforcement officers to follow to determine beforehand whether there is sufficient justification for an invasion of privacy. *Id*.

ARGUMENT

I. THE APPELLATE COURT CORRECTLY CONCLUDED THAT LOCAL ORDINANCE 1923 DID NOT FALL UNDER THE SPECIAL NEEDS EXCEPTION TO THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT.

The Thirteenth Circuit correctly ruled that searches conducted pursuant to Victoria City's L.O. 1923 were not permitted under the special needs exception to the Fourth Amendment. The Fourth Amendment protects persons against "unreasonable searches and seizures." U.S. Const. amend IV. Whether a search meets the reasonableness standard "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Vernonia School District 47J v. Acton*, 515 U.S. 646, 652-53 (1995) (citing *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 619 (1989)). When a search is undertaken to discover evidence of criminal wrongdoing, "reasonableness generally requires the obtaining of a judicial warrant." *Id*. at 653. Therefore, any search conducted without a warrant is "presumed unreasonable." *Katz v. United States*, 389 U.S. 347, 357 (1967).

One exception to the warrant requirement is the special needs doctrine, which applies where "certain exceptional circumstances, justify a search policy designed to serve a non-law enforcement end." *Ferguson v. City of Charleston*, 532 U.S. 67, 74 (2001); *See New Jersey v. T.L.O*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). When attempting to justify a search under this doctrine, the burden rests with the government to prove the search to be reasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971). The search policy in question—established by L.O. 1923—must be justified by exceptional circumstances and designed to serve a non-law enforcement end. *Ferguson*, 532 U.S. at 74. If the policy serves a need beyond that of law enforcement, "it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impracticable to require a warrant." *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989). Therefore, the government must show the following: (1) the search served a purpose related to a special need separate from ordinary law enforcement, and (2) the special need makes the warrant requirement impracticable. *Id*. at 665. The Government has failed to meet this burden and therefore, the special needs exception to the warrant requirement does not apply to searches conducted pursuant to L.O. 1923.

A. L.O. 1923 served a purpose directly related to the ordinary interests of law enforcement and therefore, fails the threshold requirement of the special needs doctrine.

The primary purpose of L.O. 1923 was directly related to the interests of law enforcement and fails the threshold requirement of the special needs doctrine. Warrantless searches may be reasonable under the special needs doctrine only when the intrusion serves a special governmental need separate from those of ordinary law enforcement. *Id*. Therefore, courts must consider all available evidence to determine the primary or immediate purpose for the government's intrusion. *Ferguson*, 532 U.S. at 83. Allowing a search policy to be defined by the government's "ultimate,

rather than immediate, purpose" would allow nearly "any non-consensual warrantless search" to be "immunized" under the special needs doctrine. *Id*. at 84. Should the policy's primary purpose be "indistinguishable from the general interest of crime control," then it may not be categorized as a special need. *City of Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000). The government has failed to meet its burden of showing L.O. 1923 met a need separate from ordinary law enforcement.

Two Supreme Court cases provide significant guidance in this case, namely *Ferguson v. City of Charleston* and *City of Indianapolis v. Edmond*. Disputed in *Ferguson* was a state hospital policy authorizing staff to drug test expectant mothers and then to forward the results to local law enforcement. 532 U.S. at 67. The City argued its ultimate purpose for enacting the policy was the protection of the health of the mother and child. *Id*. at 81. Disregarding this ultimate purpose, the Court "consider[ed] all the available evidence" to determine the policy's "immediate" or "primary" purpose. *Id.* at 81, 83. To determine the policy's immediate purpose, the Court looked to both the document codifying the policy,[8] and the extensive involvement of the city prosecutor's office and police department.[9] *Id*. at 82. The Court defined this policy's immediate purpose as "generat[ing] evidence for law enforcement purposes" and ruled that it could not be categorized as special need. *Id*. at 85.

Similarly, in *Edmond*, the Court suppressed evidence obtained through a drug interdiction checkpoint which "unquestionably has the primary purpose of interdicting illegal narcotics." 531

[8] The document incorporated "police procedural guidelines" and paid "attention to the chain of custody, the range of possible charges, and the logistics of police notification and arrests." However, the document never discussed courses of medical treatment for either the mother or child. *Ferguson v. City of Charleston*, 532 U.S. 67, 82 (2001).

[9] While the Court recognized that actions of law enforcement always serve a "broader social purpose or objective," it was not enough to overcome the primary purpose of the enacted policy. *Id*. at 84.

U.S. at 40. This was easily determinable because the City itself labeled the checkpoints as "being operated . . . in an effort to interdict unlawful drugs in Indianapolis." *Id*. The City attempted to liken their roadblocks to those used to secure the border and detect drunk drivers,[10] however, the Court drew a line at "roadblocks designed primarily to serve the general interest in crime control." *Id*. at 42. Because the Court held the checkpoint's primary purpose was to "uncover evidence of ordinary criminal wrongdoing," it could not survive under the special needs doctrine. *Id*. The Court reasoned that if this type of search were permitted, the "Fourth Amendment would do little to prevent such intrusions from becoming a routine" part of life. *Id*.

Here, when all available evidence is considered, the primary and immediate purpose of L.O. 1923 was to further the means of law enforcement rather than the proposed, ultimate, goal of "protect[ing] children by removing them from dangerous situations." R. at 41. As in *Ferguson*, the wording of the ordinance is enough to show the Board's primary interest. Searches pursuant to L.O. 1923 were conducted to "ascertain whether the individual searched is engaged in conduct" that violates defined "Federal Law." R. at 2. The sole purpose of the ordinance was to discover criminal activity prohibited under the "Trafficking Victims Protection Act." R. at 18. The wording and purpose of the ordinance do not set it apart from the conduct targeted by law enforcement daily.

Furthermore, like L.O. 1923, the Board's press release does not distinguish the searches from serving a primarily non-law enforcement purpose. In it, the Board recognized that "human

[10] *See Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990) (holding brief seizures of motorists at DUI checkpoints to be constitutional); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (holding seizures of motorists conducted at border checkpoints to be constitutional). *Sitz* and *Martinez-Fuerte* were each decided using the balancing test of *Brown v. Texas*, 443 U.S. 47 (1979). *Sitz*, 496 U.S. at 450. The Court stated that "*Von Raab* . . . in no way . . . repudiate[d] our prior cases dealing with police stops of motorists" and that the balancing analysis used in *Martinez-Fuerte* and *Brown* was appropriate. *Id*.

trafficking remains a problem every week of the year." R. at 41. Specifically, its hope in creating this ordinance was that it would "allow law enforcement . . . the tools they need to act" when spotting signs of child trafficking. R. at 41. This is parallel to the primary purpose in *Edmond*—to uncover evidence of ordinary criminal wrongdoing—in that the primary purpose was to discover evidence of sex trafficking. Each of these policies were primarily targeted towards finding evidence of ordinary criminal wrongdoing and, therefore, does not separate itself from a general law enforcement need.

The board also included statistics showing the prevalence of sex trafficking in Victoria City, however, this does not show L.O. 1923 to serve a need separate from ordinary law enforcement. The cited statistics show sex trafficking to be a city-wide issue, affecting approximately 8,000 victims per year. R. at 40. Of these, only 1,500 come from the area covered under L.O. 1923, leaving 6,500—more than 81%—of victims unprotected. R. at 40. This data also fails to divulge any population density numbers indicating that the actual rate of trafficking is higher per citizen within the Starwood Park area of the city. What these numbers do explain, is that the city has failed to protect 81% of its sex-trafficking victims. Instead, the Board has chosen to give law enforcement the "tools" necessary to enforce already existing law in an area in which trafficking is highly controlled through gang activity. R. at 2. This does not create a purpose beyond that of ordinary law enforcement.

Finally, just as in *Ferguson*, L.O. 1923 provides no actual protection or resources for the children it purportedly attempts to protect. The ordinance only describes conduct for which a warrantless search would be justified, and the allowable scope and duration of such a search. R. at 2. The Board in no way devised a plan to "protect children by removing them from dangerous

situations." R. at 41. Both the ordinance and the issued press release are void of a showing of how the Board intended to assist these victims once separated from the situation.

Officer Nelson's actions following the initial search of W.M. further establish there to be a failure to plan for protecting victims. At this moment, Officer Nelson was aware that W.M. was only sixteen years old and, according to her, residing with Mr. Larson. R. at 29. By this point in his investigation, Officer Nelson had already concluded that W.M. was a victim of sex trafficking. R. at 29. Rather than separating W.M. from the trafficking scheme she was alleged to be in, or providing her any further assistance, Officer Nelson was prepared to release her under her own cognizance. R. at 29. Further, once aware of her current living situation, Officer Nelson immediately began questioning her regarding Mr. Larson's apartment in an attempt to gain entry. R. at 29-35.

Should the immediate purpose of L.O. 1923 truly have been to protect victims of sex trafficking, then it would have been unnecessary to conduct warrantless searches or seizures looking for evidence of the crime. The ordinance could have placed non-law enforcement personnel at these locations to detect and protect victims of this crime.[11] Once separated from the danger at hand, policies and procedures could have been set forth in the ordinance providing for the future safety of these victims.

L.O. 1923 was created and implemented with the primary purposes of assisting law enforcement in conducting their ordinary functions. The ordinance did no more than allow officers the authority to conduct warrantless searches in an attempt to uncover evidence of a crime. While

[11] This is not to say that there may be no need for law enforcement to be present. Placing personnel from other agencies into this situation could lead to tense situations and possible violence. Therefore, under Mr. Larson's proposed alteration to the ordinance, law enforcement personnel should be on scene, acting in conjunction with other agencies, but primarily as a safeguard should the situation escalate to violence.

the stated purpose was to protect victims, the Board failed to implement or define any policy or procedure to secure the future safety or rehabilitation of the children caught in sex trafficking. Because this ordinance did no more than assist officers in obtaining evidence of ordinary criminal wrongdoing, it fails the first prong of the test created for the existence of a special need; therefore, it is unconstitutional under the Fourth Amendment.

B. Even if the asserted government interest is considered a special need, that interest does not outweigh Mr. Larson's interest in being free from unreasonable searches and seizures.

Based on the second prong of the special needs analysis, even if a special need existed, it did not justify the warrantless search conducted by officers. This prong balances the interests of the government against the privacy interests of citizens in determining if the requirement of a warrant is impracticable. *Skinner*, 489 U.S. at 619. In balancing privacy interests against the government's concerns, courts should consider the: (1) nature of the privacy interest intruded upon; (2) character of the intrusion upon that interest; and (3) nature and the immediacy of the government concern. *Vernonia*, 515 U.S. at 654-61.

The privacy interest implicated by L.O. 1923 is that of remaining free from unreasonable searches and seizures. R. at 8. Even when in public, an individual shares the "inestimable right of personal security" granted "to the homeowner closeted in his study to dispose of his secret affairs." *Terry v. Ohio*, 392 U.S. 1, 9 (1968). When examined within the context of special needs inquiry, an individual's expectation of privacy must be objectively reasonable.[12] *Wilcher v. City of Wilmington*, 139 F.3d 366, 374 (3rd Cir. 1998); *see Vernonia*, 515 U.S. at 654 (quoting *T.L.O.*,

[12] This Court's decision in *Katz*, 389 U.S. 347, has provided the following two prong test for determining if an expectation of privacy exists: (1) is there a subjective expectation of privacy and (2) is that expectation objectively reasonable? In the context of the special needs doctrine, only the second prong of the test is under consideration. It has already been conceded that a search has taken place and, therefore, Mr. Larson's subjective expectation is not at issue.

469 U.S. at 338 (stating that the Fourth Amendment only protects subjective expectations of privacy that society recognizes as "legitimate").

This case is distinguishable from *Vernonia* and *Griffin v. Wisconsin*, 483 U.S. 868 (1987), two instances in which the Court determined that the individuals searched had a limited privacy interest. *Vernonia* centered around a school's policy of drug testing student athletes. The Court determined that because student athletes voluntarily subjected themselves to a higher degree of regulation than other students and the school had a "custodial and tutelary responsibility" for its students, these athletes had a lesser expectation of privacy. 515 U.S. at 656, 57. Similarly in *Griffin*, the Court determined that probationers, because of the states custodial relationship over them also maintain a lessened privacy interest. 483 U.S. at 874.

In Mr. Larson's case, no lessened expectation of privacy existed. He did not voluntarily subject himself to such, nor was he part of any custodial relationship with the government. His expectation of privacy was objectively reasonable, as society would recognize a "legitimate" interest in remaining free from searches when just entering a motel. Under this prong, the District Court correctly reasoned that Mr. Larson had a "substantial" interest in not being searched and a contradictory conclusion would "cut[] against a finding of reasonability." R. at 8, 9.

L.O. 1923 also fails under the second prong of this balancing test because the character of the intrusion authorized by L.O. 1923 greatly compromised Mr. Larson's privacy interests. First, it went beyond the constitutional bounds of an authorized warrantless search when an officer has only reasonable suspicion that a crime is afoot. *See Terry v. Ohio*, 392 U.S. 1 (1968); *Minnesota v. Dickerson*, 508 U.S. 366 (1993). Under *Terry*, if an officer has reasonable suspicion of criminal activity, he may "briefly stop the suspicious person and make 'reasonable inquiries' to confirm his suspicions." *Dickerson*, 508 U.S. at 373 (quoting *Terry* 392 U.S. at 20). If the officer has a

justifiable belief that the individual is armed and dangerous, he may conduct a frisk search of the individual's outer layer for items which may harm the officer. *Terry,* 392 U.S. at 24. The Court recognized that even this "limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security." *Id*. at 24, 25.

The policy in question, provides much greater latitude and authorizes searches beyond these limits. L.O. 1923 allows for searches of all "individual[s] obtaining a room in a hotel, motel, or other public lodging facility" if the officer has "reasonable suspicion to believe" the individual to be engaged in, or facilitating, sex trafficking. R. at 2. The scope of these searches was broadly phrased to allow officers "to ascertain whether the individual is engaging in [sex trafficking]." R. at 2. A search of this scope—looking for evidence of a crime—conducted with only reasonable suspicion, exceeds the constitutional limitations set by *Terry*. If that limited search has been deemed a "severe intrusion," then the intrusion authorized by L.O. 1923 must be categorized as even greater.

Second, in determining the character of the intrusion, courts have looked to the manner in which the search was conducted. In *Vernonia*, this meant the Court considered the manner "in which the production of urine was monitored." 515 U.S. at 658. There, because the observer was standing behind male students and outside the stall of female students, the intrusion was no more than would be expected during normal use of a public restroom; therefore, the Court held that the compromising of privacy interests was only "negligible." *Id*.

The Eighth Circuit, in the context of a special needs inquiry, has looked, not only to the manner in which the search was conducted, but also the "purpose for which the fruits of the search were used." *Doe ex rel. Doe v. Little Rock School District*, 380 F.3d 349, 355 (8th Cir. 2004). The policy challenged in Doe authorized school officials to conduct random searches of students and

their belongings. *Id*. at 351. The court concluded that the searches authorized invaded privacy interests in a "major way" and whatever privacy interest a student may have had is "wholly obliterated" by the search practice at issue. *Id*. at 354, 55. The court distinguished this case from *Vernonia*, where the "most serious" form of discipline authorized was the exclusion from extracurricular activities. *Id*. at 354. In *Doe*, fruits of the search were turned over to law enforcement for prosecution and the Eighth Circuit characterized the intrusion as "qualitatively more severe" than that in *Vernonia*. *Id*.

L.O. 1923 authorized intrusions distinguishable from those in *Vernonia* and just as those in *Doe*. Unlike *Vernonia*, the intrusion went well beyond that which would be normally expected when entering a hotel, motel, or other public lodging. Just as in *Doe,* the policy authorized searches of individuals looking for evidence of criminal wrongdoing. The fruits of these searches, both in *Doe* and the present instance, were then used to take criminal action. For these reasons, the nature of the intrusion authorized by L.O. 1923 was highly intrusive and a significant invasion of Mr. Larson's privacy.

Finally, the nature and immediacy of the governmental concern is not so great as to render the warrant requirement impracticable. The Board already conceded that the issue of trafficking is one which takes place "every week of the year." R. at 40. By this alone, the city should not be authorized to circumvent the warrant requirement solely because they expect a spike in trafficking. R. at 41. While it may be likely, based on the numerous studies involving other major sporting events, that sex trafficking will increase during this week long period, that increase does not automatically categorize trafficking as an immediate concern.

Considering the two-pronged analysis for determining when a special need exists, L.O. 1923 does not meet the requirements to create a special need, and thus, it does not meet the

exception to the Fourth Amendment's warrant requirement. L.O. 1923 fails the first prong—and the special needs analysis—because it fails to establish a primary purpose other than furthering ordinary law enforcement interests. While the Board's stated goal was to protect its citizenry from the horrors that befall young women engaged in sex trafficking, that is not enough to change the fact that L.O. 1923 had a purely law enforcement purpose: to give officers the tools necessary to seek out and arrest those engaged in trafficking.

This ordinance must also fail the second prong. The individual's privacy interest to be protected from unreasonable searches and seizures greatly outweighs the government's interests. The government has failed to meet its burden in showing that the nature of the intrusion was not too great of an infringement on Mr. Larson's expectation to be free from an unreasonable search. Further, the government further failed to show that the nature and immediacy of their concern was of a level to make the warrant requirement impracticable. For these reasons, L.O. 1923 must also fail the second prong of the special needs test.

II. THE APPELLATE COURT CORRECTLY RULED THAT W.M. POSSESSED NO AUTHORITY—ACTUAL OR APPARENT—TO CONSENT TO THE SEARCH OF MR. LARSON'S APARTMENT OR CELL PHONE.

The Thirteenth Circuit correctly held that W.M. possessed no authority—actual or apparent—to consent to the search of Mr. Larson's apartment or cell phone. The Fourth Amendment protects against "unreasonable searches and seizures," and generally requires a warrant to conduct either. U.S. Const. amend. IV. A warrantless search may be reasonable if officers obtain consent from a third party having actual or apparent authority over the premises or items to be searched. *See United States v. Matlock*, 145 U.S. 164, 171 (1974). Actual authority over the premises or item hinges on its "mutual use . . . by parties generally having joint access or control." *Id*. at n.7. Should actual authority be absent, apparent authority exists when officers

reasonably, but erroneously, believe the consenting party has actual authority. *Illinois v. Rodriguez,* 497 U.S. 177, 186 (1990). This inquiry focuses on the facts and surrounding circumstances known to the officer at the time of the search and whether they would "warrant a man of reasonable caution" to believe the consenting party had authority. *Id*. at 188 (quoting *Terry*, 392 U.S. at 21-22). However, if circumstances would cause a person of reasonable caution to question the third party's mutual use, then "warrantless entry without further inquiry is unlawful." *Id*. at 189; *see United States v. Kimoana*, 383 F.3d 1215, 122 (2004) ("[W]here an officer is presented with ambiguous facts related to authority, he or she has a duty to investigate further before relying on the consent."). Should officers know the third party has no authority, then they may not claim the search was consensual under apparent authority. *See United States v. James*, 353 F.3d 606, 615 (8th Cir. 2003).

Because officers could not reasonably believe W.M. had authority—based on her limited mutual use—over either the apartment or cell phone, the Thirteenth Circuit correctly found the searches to be unreasonable. First, the limited information known at the time of the search, the ambiguity relating to W.M.'s authority, and her suspected relationship to Mr. Larson could not have allowed an officer to reasonably conclude that W.M. shared joint use or access to the apartment. Second, the same conclusion is appropriate regarding Mr. Larson's cell phone. At the time of the search, Officer Nelson was aware that W.M. had only limited access and did not freely share control of the cell phone sufficient for Officer Nelson to reasonably believe she possessed authority to consent to the search.

A. An officer, based on the facts and circumstances known at the time of entry, could not reasonably believe W.M. shared mutual use of the apartment sufficient to establish her authority to consent to the search.

W.M.'s authority over the apartment was at best ambiguous, and therefore, an officer could not reasonably conclude that she possessed authority to consent to a search of Mr. Larson's apartment. Consent may only be granted by a third party when that party shares common authority over the premises to be searched. *See Matlock*, 145 U.S. at 171. The reasonable belief in the consenting party's authority is based on the government's knowledge of the third party's mutual use, shown by joint access or control, of the premises for most purposes. *See Rodriguez*, 497 U.S. at 186. Courts have considered several factors when determining whether authority exists over premises to be searched, including: (1) possession of a key; (2) admission of residence; (3) a driver's license listing the address as the legal residence; (4) receiving mail and bills; (5) keeping clothing at the residence; (6) having one's children reside there; (7) keeping personal belongings; (8) performing household chores; (9) being on the lease and/or paying rent; and (10) being allowed into the home when the owner is not present. *See United States v. Groves*, 530 F.3d 506, 509-10 (7th Cir. 2008). Even if the consenting party makes an "explicit assertion" that they live there, "the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry." *Rodriguez*, 497 U.S. at 188; *see United States v. Garcia*, 690 F.3d 860, 862 (7th Cir. 2012) (reasoning that "if anyone with a key can permit police to search a person's home, office, hotel room, or other place of occupancy, personal privacy would be considerably diminished").

Based on the factors above and the surrounding circumstances, it was not reasonable for Officer Nelson to rely on W.M.'s authority to consent to the search. Of these ten factors previously considered by courts, Mr. Larson concedes that only two—receiving mail and bills, and admission

of residence—weigh in favor of reasonably believing W.M. had authority over the apartment. R. at 30, 31. However, because a finding of authority is based on the facts known and surrounding circumstances, neither of these by itself is enough to reasonably believe that W.M. possessed authority to consent to the search.

Based upon the other factors, Officer Nelson could have not reasonably relied on W.M.'s authority to consent to the search. First, W.M possessed no key to the apartment and, instead, was required to retrieve a spare key kept under a fake rock. R. at 31. Second, while she possessed a valid State of Victoria Driver's License, the address listed as her place of primary residence was never revealed. R. at 29. Third, W.M. only kept some "spare clothing" and a backpack at the apartment. R. at 30. W.M. further qualified this statement to Officer Nelson by stating that she only owned "like a duffel bags worth of stuff." R. at 30. Officer Nelson never attempted to determine the location of her other possessions or where she kept the rest of her clothing. Further, W.M. was not listed on Mr. Larson's lease for the apartment, nor did she contribute to its rent. R. at 29, 33. The only indication that W.M. was allowed inside the apartment without Mr. Larson, was her telling Officer Nelson that she could spend the night there. R. at 29.

These known facts taken together with the surrounding circumstances should have led Officer Nelson to believe that W.M. did not share joint access or control. Because the circumstances would cause a person of reasonable caution to question W.M.'s authority, Officer Nelson should have inquired further before proceeding with the search. *United States v. Goins*, 437 F.3d 644 (7th Cir. 2006), displays the level of diligence expected of officers prior to relying on a consenting party's authority when the surrounding circumstances are unclear. Rather than "blindly accepting" the third party's claim of authority, multiple officers questioned the consenting party about her authority over the home. *Id*. at 649. Throughout these multiple rounds of

questioning, her answers remained consistent with regards to her authority to consent.[13] *Id*. Even still, prior to making entry into the home, officers phoned the district attorney's office to begin the process of obtaining a warrant but were advised that one was not needed because they had valid consent to enter the home. *Id*.

Here, Officer Nelson recognized this as an "abnormal situation" and, therefore, could not have reasonably believed that W.M. had any authority to consent to the search of the apartment. R. at 34. As the Appellate Court reasoned, "[a] reasonably cautious officer would have recognized that W.M. was likely being deceived about the nature of her relationship with [Mr. Larson]." R. at 21. While W.M. thought they were business partners, Mr. Larson kept all of the profits and only provided her with the funds needed to purchase essentials. R. at 29, 30. There was also at least one noted instance of physical violence imposed upon W.M. when she behaved in a manner inconsistent with Mr. Larson's wishes and was forced to do excessive housework. R. at 21, 30.[14] Finally, before questioning W.M., Officer Nelson concluded that she was the victim in this instance. R. at 29.[15] For these reasons, Officer Nelson should have inquired further into W.M.'s authority prior to entering Mr. Larson's apartment.

[13] The consenting party in *Goins* requested police escort to remove items from the home of her former boyfriend and offered to show police where he kept drugs in the home. *Goins*, 437 F.3d at 646. She informed officers that she had a key, stayed there off and on for five months, and did chores including cooking, cleaning, and laundry at the home. *Id*.

[14] Based on evidence in the record, the Appellate Court reasoned that Mr. Larson may have used physical violence to impose his will upon W.M. R. at 12.

[15] W.M.'s story and belief in her relationship to Mr. Larson is similar to that of Samantha, the victim of sex trafficking whose story was told in the Board's press release. At the age of sixteen, Samantha was forced from her home after befriending gang members and experimenting with drugs. She was taken in by a friend's father, whom she believed to be her "savior." However, he began to use violence against her and she was forced to work as a child sex slave. R. at 40.

Based on the facts and circumstances known to Officer Nelson when he entered Mr. Larson's apartment, his reliance on W.M.'s authority was unreasonable. She paid no rent, was not on the lease, and had no key to the apartment; facts which normally do not exist when a party claims to have shared mutual use of a dwelling for a year. Further, because she was only sixteen and thought to be a victim under Mr. Larson's control, a reasonable officer would have concluded that she did not share joint access or control over the apartment. Rather, this was a situation of convenience for Mr. Larson in which he allowed her limited access and use of the apartment. For these reasons, Officer Nelson's reliance on W.M.'s authority to enter the apartment should be held unreasonable and the search to have violated Mr. Larson's Fourth Amendment rights.

B. Based on the facts and circumstances known at the time of the search, an officer could not reasonably believe W.M. shared mutual use of the cell phone sufficient to establish her authority to consent to the search.

At the time of the search, Officer Nelson could not have reasonably believed W.M. had authority to consent to the search of the cell phone. The reasonable belief in the consenting party's authority is based on the government's knowledge of the third party's mutual use, established through joint access and control over the object to be searched. *United States v. Basinski*, 226 F.3d 829, 834 (7th Cir. 2000). Courts have considered several factors when determining if the consenting third party shared access and control, including: (1) the type and nature of the item; (2) the owner's precautions taken to protect the privacy of the item and its contents; (3) the location of the item; and (4) whether the third party disclaimed their mutual use. *See United States v. Salinas-Cano*, 959 F.2d 861, 862 (10th Cir. 1992); *United States v. Taylor*, 600 F.3d 678, 683 (6th Cir. 2010) (applying Tenth Circuit factors in determining the reasonableness of a container search

pursuant to apparent authority); *Basinski*, 226 F.3d at 834.[16] Under this final factor, if a party's actual authority is known to not exist, officers cannot reasonably rely on purported apparent authority. *James*, 353 F.3d at 615.

First, the item searched should have put officers on notice that a higher expectation of privacy existed and that it would be less reasonable to rely on a third party's consent. When examining the type or nature of the item to be searched, courts consider whether the item "historically command[s] a high degree of privacy." *Salinas-Cano*, 959 F.3d at 864. Distinctions have made between the expectations of privacy held in objects such as a brief case or open crate, such that it would be "less reasonable" to rely on a third party's access to a briefcase. *Basinski*, 226 F.3d at 834. A cell phone maintains a greater expectation of privacy then over items such as a shoe box or jacket pocket. *See Riley v. California*, 134 S. Ct. 2473, 2489 (2014). This expectation of privacy has been deemed so great that the Court in *Riley* held that a warrant was required to search a seized phone, even though the search was conducted pursuant to the search incident to arrest exception to the Fourth Amendment. *Id*. at 2493. Because the Supreme Court has found a heightened expectation of privacy to exist surrounding a cell phone, it is less reasonable for officers to rely on a third party's consent to a search.

Second, Mr. Larson demonstrated his expectation of privacy over the phone and its contents. In determining a third party's authority, courts examine whether the owner undertook any steps to "manifest his expectation of privacy." *United States v. Waller*, 426 F.3d 838, 848 (6th

[16] While these cases involve the search of typical storage containers—i.e., luggage, a shoebox, and a briefcase—they are directly related to establishing authority over an item and its contents. The Court in *Riley* noted that cell phones have immense storage capacity and it would require a trunk to allow an individual to carry all of the mail, pictures, and personal items stored in a phone. *Riley v. California*, 134 S. Ct. 2473, 2489 (2014). Therefore, for the purposes of establishing authority to search a cell phone's contents, Respondent analogizes a cell phone to a storage container.

Cir. 2005). Precautions taken to show intent could include the following actions: (1) locking the item, *United States v. Block*, 590 F.2d 535, 537 (4th Cir. 1978); *Salinas-Cano*, 959 F.2d at 864; (2) denying permission of third parties to look inside, *Taylor*, 600 F.3d at 683; or (3) labeling the item so as to notify other parties that it is within your exclusive control, *Basinski*, 226 F.3d at 834.

Mr. Larson undertook all of these acts in order to manifest his intention of privacy. First, Mr. Larson's phone was password protected. R. at 34. Although W.M. knew the password to Mr. Larson's phone, the code itself was easily associated to Mr. Larson because it was the same series of numbers located on one of his tattoos. R. at 34. Second, Mr. Larson granted W.M. only limited access by restricting her use to some texting and calling; however, her use was primarily limited to her Facebook and Instagram accounts. R. at 32. Therefore, she did not have joint access or control over the entirety of Mr. Larson's phone. Finally, Mr. Larson labeled his phone, on his own, with a sticker depicting his tattoo. R. at 34.

The location of the cell phone, on Mr. Larson's nightstand, makes it less reasonable to rely on W.M.'s authority to consent to its search. Where, or how, the owner placed, or located, an item is another factor in determining the owner's level of interest in keeping it and its contents secure. *Taylor*, 600 F.3d at 683. This could be a determinative factor if the item was located in a room or area, in which the individual with actual authority "manifested an expectation of exclusivity." *United States v. Clutter*, 914 F.2d 775, 778 (6th Cir. 1990). If this expectation exists, it may be breached with the consent of a third party whom shares, or officers reasonably believe shares, access and control over the area. *See United States v. Aghedo*, 159 F.3d 308, 310 (7th Cir. 1998).

Mr. Larson's cell phone was placed on his nightstand, and therefore, makes Officer Nelson's belief that W.M. had authority to consent unreasonable. Within the bedroom where the cell phone was found were located two nightstands. R. at 37. The nightstand on which the phone

was found contained men's glasses and a man's watch; the other, a sleeping mask and an issue of Seventeen magazine. R. at 35, 37. This clearly identified the nightstand as most likely belonging to a male. Thus, Officer Nelson's should have established that W.M. had authority over the area in which the phone was located. His failure to question her regarding her access to this nightstand or area of the bedroom, further reduces the reasonability of Officer Nelson's search.

Although W.M. did not explicitly deny her mutual use of the phone, the surrounding circumstances would lead a reasonable officer to believe that she had no authority over the cell phone. If a consenting party denies their access to an item, they could have no form of authority, actual or apparent, sufficient to show consent. *See United States v. Fultz*, 146 F.3d 1102, 1106 (9th Cir. 1998). This manifests a requirement that officers, at minimum, inquire into the consenting parties joint access or control over the item. *Taylor,* 600 F.3d at 683 (citing *Salinas-Cano,* 959 F.2d at 866). Even if a party does not explicitly deny their access, when the surrounding circumstances would lead a reasonable officer to believe that the consenting party has no authority, officers may not then rely upon apparent authority to conduct the search. *James*, 353 F.3d at 615.

Based on the facts known to Officer Nelson at the time of the search, he was aware that W.M. did not have joint access or control over Mr. Larson's cell phone. In particular, W.M. did not have access to the photo's located within Mr. Larson's phone. At the time of the search, it was clear to Officer Nelson that W.M. only had access to do a limited number of things on the phone including making "some calls," sending "some texts," and accessing her Facebook and Instagram accounts. R. at 32. She did not have full access to all functions of the cell phone. This, together with the relationship of the parties described earlier, would lead a reasonable officer to conclude that W.M. had no authority over the cell phone.

Officer Nelson's search of Mr. Larson's cell phone was unreasonable and violated the Fourth Amendment. Based on court considered factors, Officer Nelson could not reasonably believe that W.M. had authority over the cell phone. Mr. Larson made phone payments, personalized the phone, allowed W.M. only limited access, and purchased her a separate phone which she may have had authority over. Therefore, the Appellate Court did not err in overturning the District Court's denial of the motion to suppress evidence.

CONCLUSION AND PRAYER FOR RELIEF

For these reasons, Respondent respectfully requests that this Court uphold the Thirteenth Circuits overturning of the District Courts denial of Respondent's motion to suppress evidence. First, Respondent specifically requests this Court hold that the search of Mr. Larson conducted pursuant to Local Ordinance 1923 was unconstitutional because the ordinance does not meet the requirements of the special needs doctrine. Second, Respondent requests that the search of his apartment and cell phone be held to violate the Fourth Amendment because officers failed to establish W.M.'s mutual use of either. Therefore, their reliance on her authority to consent was unreasonable and the search was conducted violated Mr. Larson's right to be free from unreasonable searches and seizures.