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

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BRIEF FOR RESPONDENTS

_____

October Term 2016

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1. WHETHER SEARCHES CONDUCTED PURSUANT TO L.O. 1923 ARE PERMITTED UNDER THE SPECIAL NEEDS EXCEPTION TO THE FOURTH AMENDMENT

2. WHETHER W.M. POSSESSED AUTHORITY TO CONSENT TO OFFICER NELSON'S SEARCH OF THE APARTMENT AT 621 SASHA LANE AND THE CELL PHONE FOUND THEREIN.

STANDARD OF REVIEW

The question of reasonable suspicion and probable cause to make a warrantless search and questions pertaining to the application of constitutional law are reviewed de novo. *See Ornelas v. United States*, 517 U.S. 690 (1996); *Pierce v. Underwood*, 487 U.S. 552(1988).

STATEMENT OF THE CASE

I. Introduction

In March 2013, Victoria City was selected as the host city for the 2015 Professional Baseball Association All-Star Game. (R. at 2). The game would be held on July 14, 2015 at Cadbury Park, in the Starwood Park neighborhood. (Id.) Due to the gang presence in the Starwood Park neighborhood, citizens raised concern about possible trafficking activity surrounding the Game. (Id.) While the City had two years to respond to the concern, it was not until two months prior to the game, that the City passed Local Ordinance 1923 ("L.O. 1923"), allowing officers the ability to search anyone based on reasonable suspicion entering a motel on reasonable suspicion that person was involved in the crime of sex trafficking. (Id.)

The ultimate goal of L.O. 1923, as stated in a press release, was to "allow law enforcement to protect children . . . by giving Victoria City's finest *the tools they need to act*." (Id.) (emphasis added). In the statement, the City presented rough statistics regarding the yearly problem of sex trafficking within the Starwood Park neighborhood. (R. at 41-42). However, the City did not present any empirical data on how to fix the problem.

II. Search of Mr. Larson at the Motel

On July 12, 2015, the City implemented L.O. 1923 officers were pulled from normal duty and position at the front desk of the Stripes Motel. (R. at 3.) Officers Joseph Nichols and Zachary Nelson were placed at the Stripes Motel, with the goal of looking for any evidence of human

trafficking. (R. at 27.) At 11:22 p.m., Officers Nichols and Nelson spotted William Larson ("Mr. Larson") and his girlfriend W.M., entering the Stripes Motel. (R. at 3.) The officers thought the couples' appearance was suspicious; W.M. appeared to be younger than Mr. Larson, she was wearing a low-cut top and tight fitting shorts, and neither person was carrying luggage. (Id.)

The officers were concerned about Mr. Larson's tattoos as well; they believed he was associated with a local Starwood gang. (Id.) Based on these observations alone, Mr. Larson became the first and only person searched that night. (R. at 3, 27). The Government conceded there was not probable cause to initiate a search. (R. at 3.) At the time of the search he officers were unsure of W.M.'s age, and only learned she was sixteen years old after she was searched. (R. at 4). The search of Mr. Larson's jacket produced several incriminating items, which included a list of names and $600 cash. (R. at 4.) Based upon the products of the search, Mr. Larson was arrest for sex trafficking of a child. (Id.)

III. Search of Mr. Larson's Apartment

Officer Nelson believed W.M. to be the victim and declined to place her under arrest. (R. at 4.) Officer Nelson asked W.M. if she had a place to stay for the night and W.M. said she lived at Mr. Larson's apartment. (Id.) She further explained that they "shared everything," including the money made from their business. (R. at 29.) Officer Nelson did not inquire further regarding their business. (R. at 29-30.) W.M was homeless for about a year and a half until Mr. Larson, offered her a place to stay. (R. at 30.) W.M. initially accepted so she would have a place to stay, but she eventually stayed with Mr. Larson because he treated her well. (Id.)

Officer Nelson testified that W.M.'s possessions equated to only a duffel bag's worth of belongings. (Id.) W.M., did not have her own room, performed various chores around the house, and kept her own food in the apartment and had some personal mail delivered to the apartment.

(R. at 30-31, 33.) Officer Nelson knew that W.M. was sixteen years old, and even admitted that it would be an abnormal situation for a sixteen year old to have any control over an apartment. (R. at 33-34.)

After learning this information, Officer Nelson asked W.M. if she would consent to a search of Mr. Larson's apartment and W.M. gave her consent. (R. at 4.) While searching Mr. Larson's apartment, the search yielded a handgun with an obliterated serial number and a smartphone a sticker matching Mr. Larson's forearm tattoo. (R. at 4.) The phone was found on the nightstand that contained a pair of men's glasses, a men's watch, and some condoms. (R. at 34-35.) W.M. indicated that the other nightstand contained some of her belongings. (R. at 37.)

W.M. stated that she shared the phone with Mr. Larson, who paid the bill and placed the sticker on the cover. (R. at 31-32.) W.M. used the phone to access her social media, but Mr. Larson used it primarily to conduct their business. (R. at 32.) W.M. consented to a search of Mr. Larson's cell phone and provided the password of 4-11-5-11, the same combination of numbers tattooed on Mr. Larson's neck. R. at 3, 4, 32.) Officer Nelson knew that the sticker on the phone and the password matched Mr. Larson's tattoos. (R. at 34.) When searching the phone, Officer found several photos of Mr. Larson holding the gun found under the bed, suggestive photos of W.M., and a video of Mr. Larson rapping about pimping. (R. at 4.)

IV. Procedural History

Mr. Larson was indicted on one count of sex trafficking of children in violation of 18 U.S.C. § 1591(a)(1) and one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). (R. at 5.) Mr. Larson sought to suppress the evidence against him contending, the evidence obtained in the initial search was obtained pursuant to a facially unconstitutional ordinance. (Id.) Mr. Larson argued further that the search of his apartment and

cell phone was a violation of his Fourth Amendment rights. (Id.) The district court found that searches pursuant to L.O. 1923 were not facially unconstitutional as such searches are justified by the special needs exception. (Id.) The course also held that W.M., had at least apparent authority to consent to both search at the apartment. (Id.)

The United States Court of Appeals for the Thirteenth Circuit overturned the district court's ruling and reversed the guilty verdicts entered against Mr. Larson. (R. at 15.) The court of appeals found that L.O. 1923 did not serve a purpose that was separate from the general interest in law enforcement, and therefore could not be justified under the special needs exception. (Id.) As there was no special need that could justify searches pursuant to L.O. 1923, it would be unnecessary to engage in the balancing test proscribed for a special needs assessment. (R. at 16.) The court of appeals also suppressed the evidence obtained at Mr. Larson's apartment, holding that neither search was permitted under the Fourth Amendment. (R. at 19.) The court of appeals reasoned that W.M. did not have adequate authority to authorize either search at the apartment, and found that Officer Nelson should have doubted W.M.'s authority to consent to the each search. (R. at 22.) As a result, the decision of the district court was reversed and remanded. (R. at 23.) This Court granted certiorari. (R. at 24.)

SUMMARY OF THE ARGUMENT

The Court of Appeals correctly held that L.O. 1923 does not serve a purpose that is separate from the general interest in law enforcement. The only question that remains is whether searches conducted pursuant to L.O. 1923 are permitted under the special needs exception to the Fourth Amendment. There is no logical or precedential reason that a search authorized by L.O. 1923 should be allowed to proceed under any exception, let alone the special needs exception. The special needs exception is not a large umbrella designed to protect facially

unconstitutional ordinances or statutes; it is a *limited* exception that applies only when the primary goal is outside of general interest in law enforcement. Without an exception, any search authorized by L.O. 1923 is inherently unreasonable and thereby, invalid. While the Court has created avenues in which law enforcement may evade the strictures of Fourth Amendment requirements, surely the Court did not intend to open the floodgates for a government to ignore basic constitutional procedure, when the Court created such exceptions. Even more, application of the special needs exception here would not only be unprecedented, but would destroy the very confines of the Fourth Amendment.

Additionally, the Government has failed its burden to establish that W.M. had the authority to consent to a search of Mr. Larson's apartment and his cell phone. Officer Nelson was confronted with an ambiguous assertion of authority that required him to inquire further before relying on W.M.'s consent. However, Officer Nelson failed to dispel this ambiguity. The facts presented show that Officer Nelson could not have reasonably believed that W.M. possessed any authority to give consent to search of Mr. Larson's apartment and cell phone. Therefore, W.M.'s consent is invalid and the warrantless searches conducted by Officer Nelson are unconstitutional under the Fourth Amendment.

ARGUMENT

V. IF THE COURT WERE TO FIND THAT NO SPECIAL NEEDS EXCEPTION EXISTS TO JUSTIFY L.O. 1923, THE SEARCH OF MR. LARSON WOULD UNDOUBTEDLY EXCEED ANY REASONABLE CONSTITUTIONAL BOUNDARIES AND GO BEYOND THE VERY ESSENCE OF FOURTH AMENDMENT PROTECTION.

If the Court were to allow this scheme to pass under the special needs exception, such an exception here would swallow the Fourth Amendment whole. *City of Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000). Absent an exception, reasonable suspicion must be based on objective

facts that lead an officer to believe that an individual is engaged in, about to engage in, or has engaged in, criminal activity. *Brown v. Texas*, 443 U.S. 47, 51 (1979). To determine the reasonableness of a seizure the court looks at three factors: (1) the gravity of the public concerns served by the seizure; (2) the degree to which the seizure advances the public interests i.e., the effectiveness in achieving that goal; and (3) the severity of the interference with individual liberty. *Id*. at 50. The core concern of the Court's test is "to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions *solely at the unfettered discretion* of officers in the field. *Id*. at 51 (citing *Delaware v. Prouse*, 440 U.S. 648) (emphasis added).

To address the central concern of this test, "the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Id*. Although an officer may stop and question a person based on reasonable suspicion of criminal activity, that officer cannot conduct a search of the person, without probable cause. *Id*.; *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987). Further, reasonable suspicion must be supported by objective facts to be reasonable. *Brown*, 443 U.S. at 51. The government fails here; first the stop and search of Mr. Larson was based on subjective facts; second, L.O. 1923 did not embody explicit, neutral limitations on the individual officers, in fact it can be argued that L.O. 1923 actually eliminated any limitations on the officers. Because there is no "special need" that can justify a search under L.O. 1923, as will be explained, the Court must find that this type of search is unreasonable and unconstitutional, and cannot be allowed.

There is no doubt that a seizure took place the minute Mr. Larson was stopped and immediately searched. "Whenever a police officer accosts an individual and restrains his

freedom to walk away, he has 'seized' that person." *Terry v. Ohio*, 392 U.S. 1, 16 (1968). However it has long been held that an officer's reasonable suspicion, must be based on objective facts, that criminal activity is afoot. *Brown*, 443 U.S. at 51. The Court has only considered an officer's subjective intentions and observations irrelevant, when a stop is justified objectively by probable cause that a violation has occurred, which as the government has conceded, was not the case here. *Edmond*, 531 U.S. at 45 (citing *Whren v. United States*, 517 U.S. 806, 810-813 (1996)).[1] In this case, Officer Nelson effectuated a seizure when he searched Mr. Larson. However, because Officer Nelson's reasonable suspicion was based upon subjective facts, the seizure was unreasonable. The observations based solely on Mr. Larson's appearance did not justify reasonable suspicion that he was involved in criminal activity. The facts that lead officer Nelson to stop Mr. Larson were purely and unequivocally subjective. Not once did officer Nelson testify about any specific activity that would suggest Mr. Larson was engaged in, about to engage in, or had engaged in the act of human trafficking.

In the absence of any basis for suspecting a person of misconduct, the public interest is surely outweighed by the right to privacy from police interference. *Brown*, 443 U.S. at 52. When a stop is based on subjective criteria, the risk of arbitrary and abusive police practices exceeds the tolerable limits. *Id*. Further, even in a neighborhood of high criminal activity, a person that looks suspicious, *standing alone*, is not a basis for concluding that, that individual, is engaged in criminal conduct. *Id*. A couple walking into a hotel without luggage is not indicative of someone engaged in human trafficking. Further, a female wearing a similar outfit to W.M. surely is not uncommon during the summer months. There is no dispute that Mr. Larson's tattoos indicate that

[1] "*Whren* therefore reinforces the principle that, while 'subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis,' programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme.

he may be affiliated with a gang, however, Officer Nelson's testimony that he knew that the tattoos meant Mr. Larson was in a gang is purely subjective. Mr. Larson's activity was no different than any other guest or patron entering the motel at that time. It would be unreasonable to assume, based solely on the couple's appearance, that either one was engaged in criminal activity.

"This kind of standard less and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." *Prouse*, 440 U.S. at 659-60. This search clearly cuts against the established precedent of the Court, This Court has never allowed a search that is this intrusive to proceed under any exception, let alone pursuant to a special need, and it should not do so here.

VI. L.O. 1923 IS UNCONSTITUTIONAL AND SERVES NO SPECIAL NEED OUTSIDE THAT OF GENERAL LAW ENFORCEMENT BECAUSE THE SOLE PURPOSE WAS TO ADVANCE THE CRIMINAL INVESTIGATORY INTERST OF LAW ENFORCEMENT.

The Fourth Amendment provides that "the right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. A search unsupported by a warrant or probable cause is unconstitutional unless the Court finds a special need beyond the normal need for law enforcement. *Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001). However, even when there is law enforcement involvement, the Court will only find a scheme valid if the interest in ordinary crime control is exigent. *Edmond*, 531 U.S. at 44; *see also Illinois v. Lidster*, 540 U.S. 419 (2004). Although governments may pass laws in order to better serve the needs of law enforcement, they cannot authorize police officers to conduct searches in a way that infringes upon the foundations of the Fourth Amendment for the purpose of criminal investigation. *Sibron v. New York*, 392 U.S. 40, 61

(1968). To be clear, there is no power granted to governments that would allow a regulation to diminish the constraints placed on it by the Fourth Amendment. *Chandler v. Miller*, 520 U.S. 305, 317 (1997). Only when the primary purpose, is outside the evidence gather aspect of law enforcement, will a search, without probable cause, be acceptable. *Ferguson*, 532 U.S. at 82-83.

This Court has repeatedly held that searches conducted without a warrant a *per se* unreasonable, subject to very few specifically established exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967). "This rule 'applies to commercial premises as well as homes.'" *City of Los Angeles v. Patel*, 135 S.Ct. 2443, 2452 (2016) (quoting *Marshall v. Barlow's Inc.*, 436 U.S. 307, 312 (1978)). The ultimate measure of Fourth Amendment constitutionality is that of reasonableness, *Riley v. California*, 134 S.Ct. 2473, 2482 (2014), and it is unreasonable to conduct a warrantless search, absent probable cause, unless there is a justification that makes obtaining a warrant *impracticable*. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989) (emphasis added); *see also New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985). The Court has only engaged in a special needs balance for a few narrowly delineated categories. See, *e.g.*, *Camara v. Municpal Court of City and County of San Francisco*, 387 U.S. 523, 534 (1967) (administrative regulatory searches); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (special need drug testing); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (immigration checkpoints); and *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990) (sobriety checkpoints). Not one of the schemes set forth above had a primary purpose of investigating criminal activity. Because this search only served the interest of general law enforcement to aid in obtaining evidence of a crime, the government cannot put forth a sufficient justification worthy of the special needs exception.

A. There Is Not One Appropriate Special Needs Category That Would Allow L.O. 1923 To Supersede The Requirement Of A Warrant Or Probable Cause.

If the Court does not draw a line here, "the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life." *Edmond*, 531 U.S. at 42. Further, this Court has only allowed *per se* unreasonable searches under limited circumstances. *Birchfield v. North Dakota*, 136 S.Ct. 2160, 2173 (2016); *see also Griffin*, 483 U.S. at 873 (1987). A search that is designed for the purpose of investigating and exposing criminal activity must be supported by either a warrant or probable cause, or the search is invalid. *Ferguson*, 532 U.S. at 79.

The search here had no justification outside of a criminal investigation as "the central and indispensable feature of the policy from its inception was the use of law enforcement," to "ascertain whether an individual is engaged" in, *id*., or facilitating a commercial sex act, L.O. 1923, which in itself has been codified as criminal activity under 18 U.S.C. § 1591(a)(1). Allowing this search to proceed under a special need would be a blatant contraception of Fourth Amendment procedure. As the Court of Appeals stated, tasks forces all over are set up to combat human trafficking every day. (R. at 18.) The fact that multiple task forces are set up to aid in the effort to fight human trafficking is even more evidence that L.O. 1923 cannot be justified as a special need.

1. Administrative Regulatory Searches

In order for an administrative search to be constitutional, whomever is subjected to the search, must at least "be afforded an opportunity to obtain precompliance review before a neutral decision maker. *Patel*, 135 S.Ct. at 2452. Absent the opportunity for precompliance review, there is "an intolerable risk that searches authorized by" a city ordinance "will exceed statutory limits, or *be used as a pretext to harass hotel operators and their guests*. *Id*. (emphasis added). If

evidence of a crime is found in the course of an administrative search, a warrant based on probable cause is required to search further. *Michigan v. Clifford*, 464 U.S. 287 (1984). At a minimum an administrative warrant is required when conducting a search that is not investigating criminal activity. *See Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967).

In *Camara*, the Court allowed an administrative inspection to proceed without cause because officials had obtained an administrative warrant. *Camara*, 387 U.S. at 534-39. Although the Court in *Camara* recognized that administrative inspections could result in the discovery of criminal violations, the primary purpose was to ensure that hazardous conditions of private property were being monitored. *Id*. at 538-39. Likewise in, *Michigan v. Tyler*, 436 U.S. 499 (1978), once officials became aware that the cause of the fire was due to a criminal act, a warrant based on probable cause was required to proceed further. *Id*. In this case officers did not possess and exigent reason to search Mr. Larson without at least having probable cause to do so. The Court was clear, if the object of the search is to obtain evidence of a crime, a warrant based on probable cause is required. Id.

In *Clifford,* the Court held that "the object of the search determines the type of warrant required." *Id*. at 294. When a search is conducted to determine the cause of a fire, all that is required is an administrative warrant. *Id*. However, if the primary object of the search is to gather evidence of criminal activity, a criminal search warrant must be obtained, but may be done only upon a showing of probable cause. *Id*. Further, the scope of the search may be no broader than what is reasonable necessary to accomplish its necessary goal. *Id*. at 294-295.

Clifford further supports the notion that a criminal warrant, or at a minimum probable cause, was required to search Mr. Larson. In this case, the evidence collected from Mr. Larson's

jacket pockets was the sole reason he was arrested. If the goal truly was to secure W.M.'s safety, and the officers truly believed this was the goal, searching Mr. Larson's jacket pockets would do nothing to aid in the so-called goal set forth. The only possible justification for searching Mr. Larson's person was to secure evidence of criminal activity to aid in his prosecution.

2. Searches Conducted Under Drug Testing Schemes.

The Court will find a special need in other limited circumstances in which the subject of the search has a diminished expectation of privacy, or the nature of the subject's employment requires. *T.L.O.*, 469 U.S. 325; *Skinner*, 489 U.S. 602. For example, the Court has found an exception when a public school drug tests student athletes. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (searches of students and student athletes qualifies as a special need because, students at public schools have a diminished expectation of privacy). Even more, even when a search may be performed without a warrant, the search must be based on probable cause that the subject of the search has violated law. *Acton*, 515 U.S. at 340.

In *Skinner*, the Court upheld a federal regulation requiring blood and urine tests of railroad employees following major train accidents. *Skinner*, 489 U.S. at 634. The Court found the need to protect public safety by ensuring that employees were not impaired while operating trains was beyond the normal need for law enforcement. *Id*. at 620. Further, the expectations of privacy for railroad employees were considered diminished by reason of being in an industry that is already pervasively regulated by federal regulations. *Id*. at 627. The Court has also allowed an exception for drug testing U.S. Customs employees, based on the nature of their employment. *Von Raab*, 489 U.S. 656. The Court held it was "clear that the . . . program [was] not designed to serve the ordinary needs of law enforcement," therefore no warrant was required. *Id*. at 665-66.

Further, because of the duties of a Customs official, it would be necessary to ensure that an employee's judgment was not compromised. *Id*. at 660.

A search that is otherwise illegal can only be justified for a health and safety rationale, if securing the safety of a person is the immediate objective. *Ferguson*, 532 U.S. at 79. In *Ferguson*, although the ultimate goal of a program was to secure the health and safety of a mother and child, the immediate objective was to prosecute drug users. *Id*. at 82. "Because law enforcement involvement always serves some broader social purpose or objective . . . virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate purpose. *Id*. at 84.

The program in *Ferguson* is comparable to L.O. 1923 in that, "[n]owhere, however, does the document discuss different courses of medical treatment" for the vulnerable youth secured as a result of intrusive search. *Id*. Neither L.O. 1923 nor the City's press release, codified any procedure for the treatment and medical assistance for the vulnerable youth the City was seeking to protect. While the City may have had the ultimate goal of protecting vulnerable youth, "the immediate objective of the search was to generate evidence for law enforcement purposes to reach that goal." *See Id.* at 83.

3. Checkpoint Searches and Seizures.

The Court has never allowed a policy or checkpoint program whose primary purpose was to detect evidence of criminal activity. *See Edmond*, 531 U.S. 32, 41 (rejecting a highway checkpoint program whose primary purpose was to discover illegal narcotics). When a stop exceeds brief questioning and visual inspection, and becomes a full search, the Fourth Amendment has been violated. *See Martinez-Fuerte,* 428 U.S. at 558. In *Martinez-Fuerte*, a checkpoint was set up to look for illegal aliens, however the stops consisted of brief question and

visual inspection; although an investigatory goal was present, the Court found protecting the nation's borders was a valid justification. *Id*. The difference between the current case and *Martinez-Fuerte*, however, is significant. In *Martinez-Fuerte*, the agents encountered 146,000 vehicles and found 725 illegal aliens. *Id*. at 554. However, "in all but two cases, the aliens were discovered without a conventional search of the vehicle." *Id*. In this case, there were no questions asked, only subjective observations made, and the only person ever searched was Mr. Larson. This program surely presents a vastly different scenario than the one the Court allowed in *Martinez-Fuerte*.

Further, when a roving-patrol stops and searches a vehicle simply for being in an area where illegal aliens may be present, there is no exception that will allow such an intrusion. *See Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). An action such as this would "impinge[] so significantly on Fourth Amendment privacy interests that [the] search could be conducted without consent *only* if there was probable cause to believe that [the] car contained illegal aliens." *Id*. at 273. Even more, in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), the Court again struck down an immigration checkpoint in which a roving-patrol stopped a car because the passengers were near the border and appeared to be of Mexican descent. *Id*. at 875. Although the Court found that the interference in that case was modest, the inquiry into the passengers' resident status served significant law enforcement needs. *Id*. at 877. The Court stated, although the stop need not be justified by probable cause, basing the stop merely on the appearance of the passengers was not sufficient to qualify as "articulable facts . . . that reasonably warrant suspicion." *Id*. at 884.

The key difference that separates the current case from the aforementioned is the justification for the search. Mr. Larson was not asked a single question about who he was,

possible suspicious circumstances, his possible gang affiliation, or why he was not carrying luggage; Officer Nelson bypassed those "formalities" under the auspice of L.O. 1923 and went straight into the pockets of Mr. Larson's jacket. Similar to *Brignoni-Ponce*, the suspicion here was based solely on appearance.

It is clear that the search of Mr. Larson's person was a severe interference on his guaranteed interest in privacy. Because the search did not rely on probable cause and cannot proceed under a "special needs" justification, it far exceeds the boundaries of reasonableness and must be struck down. To allow the admissibility of this search under a "special need" would place the Fourth Amendment in grave danger of being obliterated from the Constitution.

VII. THIS COURT SHOULD SUPPRESS THE HANDGUN FOUND AS A RESULT OF THE SEARCH OF THE APARTMENT BECAUSE OFFICER NELSON COULD NOT REASONABLY RELY ON W.M.'S APPARENT AUTHORITY TO CONSENT TO ITS SEARCH.

The government has failed to prove that W.M. had common or apparent authority to consent to a search of Mr. Larson's apartment. To establish apparent authority, it has to be shown that Officer Nelson reasonably believed W.M. had mutual use or control for most purposes over Mr. Larson's apartment. However, the facts show that Officer Nelson could not reasonably rely on W.M.'s apparent authority when she consented to a search of the apartment. Because W.M. had no apparent authority, her consent is invalid under the Fourth Amendment, making the warrantless search of the apartment unconstitutional.

The Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or search for specific objects. *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). However, the search of property, without warrant and without probable cause, but with proper consent voluntarily given, is valid under the Fourth Amendment. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Common authority to consent to a search rests on the mutual

use of the property by persons generally having joint access or control for most purposes. *Rodriguez,* 497 at 181 (citing *United States v. Matlock*, 415 U.S. 164, 171 (1974)).

In *United States v. Matlock*, this Court held that the government's justification of a warrantless search is not limited to consent given by the defendant, but extends to third parties who possess common authority over the premises (holding that a woman who shared the bedroom searched and her claim to being married to Defendant was sufficient to show she had common authority to consent to the search). *Matlock*, 415 U.S. at 171. In *Illinois v. Rodriguez*, this Court held that law enforcement officers may not always accept a person's invitation to enter a premises, even if it is accompanied by an explicit assertion that the person lives there (holding that a former co-tenant who vacated Defendant's apartment a month before the search, taking all her personal belongings with her, did not have common authority to consent to a search of the apartment). *Rodriguez*, 497 U.S. 177 at 188.

In this case, it is reasonable to conclude W.M. lacks common authority as the facts of this case fall directly between *Rodriguez* and *Matlock*. Although W.M. was not married, which would reasonably show common authority, she was still living as a co-tenant in the apartment and enjoyed some access to the apartment. Nor had she vacated the property at any time before giving consent to search. Without clear facts showing W.M. had common authority, the government must show that Officer Nelson reasonably relied on W.M.'s apparent authority when she consented to the search of Mr. Larson's apartment.

The Tenth Circuit expanded on *Matlock*'s holding of common authority, holding that it can be satisfied by showing either "mutual use of the property" or "control for most purposes" over the property. *United States v. Cos*, 498 F.3d 1115, 1125 (10th Cir. 2007) (citing *Rith*, 164 F.3d at 1329). "Mutual use of the property by persons generally having joint access" is a fact

intensive inquiry that requires the government to show that the third party entered the premises or room at will, without the consent of the subject of the search. *Id.* at 1125. "Control for most purposes" is a normative inquiry dependent upon whether the relationship between the defendant and the third party is one that creates a presumption of control for most purposes over the property by the third party. *Id.* 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. *Id.* at 1128. This inquiry is an objective one: [the court] must determine whether the facts available to the officer at the moment…warrant a man of reasonable caution [to believe] that the consenting authority had authority over the premises[.] *Rodriguez*, 497 U.S. at 188.

In *United States v. Cos*, the Tenth Circuit correctly affirmed a motion to suppress, holding that the defendant's girlfriend lacked the joint access or control necessary to consent to a search of the defendant's apartment. *Cos*, 498 F.3d at 1131. Officers visited Defendant's ("Cos") apartment to execute an arrest warrant against him and were greeted at the door by Feather Ricker ("Ricker"). *Id.* at 1117. Without further inquiry, the officers asked for permission to enter the apartment to look for Cos, and Ricker consented. *Id.* at 1118. The officer's search of Cos lead to his bedroom, where a gun and holster were found under the bed. *Id.* Detectives came to the apartment with a search warrant, arrested Cos, and retrieved the incriminating evidence. *Id.*

The court denied the government's argument that Ricker had either common or apparent authority over Cos's apartment by mutual access or by control through an "established relationship. *Id.* at 1131. Although Ricker enjoyed some access to Cos's apartment, she did not live there and did not have a key to gain access to the apartment. *Id.* at 1117. She had only been left alone a few times, slept over on two or three occasions, but never kept her personal

belongings at the apartment. *Id.* at 1117-1118. Further, on the day of the search, Ricker asked Cos for permission to bring her children to his apartment to use the pool. *Id.* at 1118. These facts were sufficient for the court to conclude that Ricker could not enter Cos's apartment without his consent, invalidating any claims to mutual use by virtue of joint access. *Id.* at 1127. Additionally, the court was not willing to extend a presumption to the "established relationship" the government spoke of[2]. *Id* at 1128. Officers were dispatched to Cos's apartment with no information about his living arrangements. *Id.* at 1130. When confronted by Ricker, the officers did not make an inquiry as to her relationship with Cos or the apartment but proceeded with their search. *Id.* The government cannot meet its burden of demonstrating…apparent authority if agents, when faced with an ambiguous situation, nevertheless proceed without making further inquiry. *United States v. Kimoana*, 383 F.3d 1215, 1222 (10th Cir. 2004). The court reasoned it was possible that Ricker lived there, but acknowledged there were many other plausible scenarios that support the conclusion she did not have authority over the apartment. *Cos*, 498 F.3d at 1130. Without further inquiry, the court concluded that Ricker's mere presence at Cos's apartment was not sufficient to establish that she had "mutual use of the property by virtue of joint access, or control for most purposes over it." *Id.* at 1128-29.

This Court has made clear that the rights protected by the Fourth Amendment are not to be eroded…by unrealistic doctrines of "apparent authority." *Stoner v. California*, 376 U.S. 483, 488 (1964). Where an officer is presented with ambiguous facts related to authority, he or she has a duty to investigate further before relying on the consent of a third party. *Kimoana*, 383 F.3d at 1222. If the agents do not learn enough, if the circumstances make it unclear whether the

[2] Parent-child and husband-wife relationships trigger this presumption, but "a simple co-tenant relationship does not create a presumption of control and actual access would have to be shown." *Id.* at 1125.

property about to be searched is subject to mutual use by the person giving consent, then warrantless entry is unlawful without further inquiry. *United States v. Waller*, 426 F.3d 838, 846 (6th Cir. 2005).

Like Ricker in *Cos*, it is difficult to conclude that W.M. had joint access over Mr. Larson's apartment. Additionally, because W.M. doesn't enjoy a presumption of control for most purposes, the facts must clearly show that her relationship with Mr. Larson gave her a control of the apartment for most purposes. W.M. was homeless until Mr. Larson allowed her to stay with him, lasting about a year. Further, her presence in Mr. Larson's apartment was minimal. She was a minor, had no key to the apartment, kept very few belongings there, and had no space of her own. These facts indicate that W.M. had access to the apartment, but does little to definitively show that she had mutual use of the apartment by virtue of joint access. Officer Nelson had reason to believe that W.M. was confused about the true nature of her relationship. Officer Nelson and Richols were at the Stripes Motel to enact searches under L.O. 1923. Officer Nelson testified that Officer Richols and he "wanted to take advantage of it to see if we could help additional potential victims." After arresting Mr. Larson, Officer Nelson was confronted with ambiguous facts that challenged W.M.'s authority to consent to a search of Mr. Larson's apartment.

It is not reasonable for police to proceed on the theory that ignorance is bliss. *Cos*, 498 F.3d at 1128. It is true that Officer Nelson inquired further about W.M.'s relationship with Mr. Larson, but this inquiry did nothing but create more ambiguity and further diminish any apparent authority W.M. seemingly had. Although officers suspected Mr. Larson of human trafficking, they believed W.M. was the victim. W.M. believed that Mr. Larson and she were business associates and romantic partners, even though Mr. Larson controlled of all the money and many

facets of the relationship, such as her use of his cell phone. Facts such as these show that W.M. was not in a legitimate relationship with Mr. Larson at all and based on Officer Nelson's suspicions, it is not reasonable to assume that W.M., the assumed victim, would have any authority over Mr. Larson's apartment. Therefore, the government cannot rely on the "relationship" of Mr. Larson and W.M. to establish apparent authority over the apartment.

Officer Nelson had every reason to doubt W.M.'s apparent authority to consent to a search of Mr. Larson's apartment. Her presence in the apartment was minimal and she only enjoyed simple access to the apartment by virtue of Mr. Larson's invitation to stay with him. Further, it is clear that Officer Nelson could not rely on W.M.'s ambiguous statements about her relationship with Mr. Larson as a means of gaining consent. If Officer Nelson believed she was a victim, he could have easily dispelled the ambiguity of the "relationship." Further, the living arrangement that they shared does not provide a presumption that W.M. had the authority to consent to a search. Ultimately, Officer Nelson could not have reasonably concluded that W.M had common or apparent authority to consent to a search of Mr. Larson's apartment, making the warrantless search of the apartment unconstitutional under the Fourth Amendment.

VIII. THIS COURT SHOULD SUPPRESS ALL EVIDENCE FOUND AS A RESULT OF THE SEARCH OF MR. LARSON'S CELL PHONE BECAUSE OFFICER NELSON COULD NOT HAVE REASONABLY BELIEVED THAT W.M. HAD THE APPARENT AUTHORITY TO CONSENT TO A SEARCH OF MR. LARSON'S CELL PHONE.

The government has failed to prove that Officer Nelson reasonably believed W.M. had the apparent authority to consent to a search of Mr. Larson's cell phone. The facts available to Officer Nelson at the time W.M. consented to a search of the cell phone were so ambiguous that it triggered a duty to inquire further before Officer Nelson could reasonably rely on her consent. W.M.'s statements given to Officer Nelson coupled with the surrounding circumstances are too

ambiguous to show that W.M. had actual or apparent authority over Mr. Larson's cell phone. Because of this, Officer Nelson's warrantless search of Mr. Larson's cell phone is unconstitutional under the Fourth Amendment.

Modern cell phones are not just another technological convenience. *Riley v. California*, 134 S. Ct. 2473, 2494-95 (2014). With all they contain and all they may reveal, they hold…"the privacies of life." *Id*. When property to be searched is an object or container, the relevant inquiry must address the third party's relationship to the object. *United States v. Andrus*, 483 F.3d 711, 717 (10th Cir. 2007). The court must determine whether the consenting party had joint access to or control over the object searched. *United States v. Ruiz*, 428, F.3d 877, 880 (9th Cir. 2005). 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. *Cos*, 498 F.3d at 1128. Where an officer is presented with ambiguous facts related to authority, he or she has a duty to investigate further before relying on the consent of a third party. *Kimoana*, 383 F.3d at 1222; *United States v. Purcell*, 526 F.3d, 953, 963 (6th Cir. 2008); *Waller*, 426 F.3d 838, 849 (6th Cir. 2005).

In *United States v. Purcell*, the Sixth Circuit correctly affirmed the district court's holding that a girlfriend did not have actual or apparent authority to consent to the search of Defendant's bags, which produced a firearm. *Purcell*, 526 F.3d at 959, 965. After placing Defendant under arrest outside a hotel, officers knocked on the door to his hotel room, and his girlfriend ("Crist") answered. *Id.* After allowing a cursory search, the agents asked Crist for consent to conduct a more complete search and Crist agreed. *Id.* Crist claimed ownership of the bags and explained that there was a firearm in one of the bags in the room. *Id.* at 958. The agents searched a "green-brown" bag which revealed Purcell's clothing, but no firearm. *Id.* The agents

found a firearm in another "brown-green" backpack that was not near the other bags initially searched. *Id.* It was later discovered that Purcell was the sole user of the two bags searched and he did not give Crist permission to go through the bags. *Id.*

Relying on *Matlock*, the court held that Crist could not have actual authority to consent to a search of Purcell's bag because she did not have "joint access or control for most purpose." *Matlock*, 415 U.S. at 171. Further, Crist did not have apparent authority because "apparent authority cannot exist if there is ambiguity as to the asserted authority and the searching officers do not take steps to resolve the ambiguity." *Purcell*, 526 F.3d at 963. Although the consent given was without ambiguity, the discovery of Purcell's clothing made Crist's consent ambiguous, evaporating any apparent authority she had. *Id.* at 964. Because the agents continued their search without reestablishing Crist's apparent authority, the firearm was held to have discovered as part of an illegal search. *Id.* at 965. *E.g. Waller*, 426 F.3d at 849 (where an officer's failure to establish apparent authority in the midst of ambiguous circumstances led to the suppression of two handguns found in a closed luggage case defendant left in an apartment with three others); *United States v. Taylor*, 600 F.3d at 681-682 (where the court held a sole female tenant's apparent authority did not extend to a search of the closet with men's clothes and a men's shoebox, which contained incriminating evidence of defendant's crime.)

In this case, Officer Nelson was given consent to search Mr. Larson's cell phone, but this consent was so clouded by ambiguity that any apparent authority W.M. may have had was diminished. Presented with this ambiguity, Officer Nelson had a duty to inquire further before he could reasonably rely on W.M.'s consent. *Kimoana*, 383 F.3d at 1222. W.M.'s statements made to Officer Nelson show that she did not have joint control or access *for most purposes* over Mr. Larson's phone. W.M. admitted that Mr. Larson paid the phone bill, and was the primary user of

the cell phone when conducting his business, while W.M. only used the phone with Mr. Larson's permission to access social media. Additionally, the cell phone was found on one of two nightstands in the bedroom, which also contained men's accessories, specifically a men's watch and men's reading glasses. When Officer Nelson examined the phone, he recognized that the sticker depicting an "S" and "W" wrapped around a wizard's hat and the password were identical to the tattoos on Mr. Larson's left forearm and neck. These facts should have alerted Officer Nelson that W.M.'s apparent authority was ambiguous and required further inquiry.

Mr. Larson's case presents a clear contrast to the issue of apparent authority the Seventh Circuit addressed in *United States v. Melgar*. In *Melgar*, the court held that a co-defendant's apparent authority was sufficient to consent to a search of all containers in a hotel room that were not clearly possessed by someone else, including the defendant's purse. *United States v. Melgar*, 227 F.3d 1038, 1042 (7th Cir. 2000). Defendant ("Melgar") was one of seven individuals who were present in a hotel room searched by officers in connection to a conspiracy to commit bank fraud. *Id.* at 1039. Officers asked co-defendant Velasquez, who rented the hotel room, for consent to search the room and she agreed. *Id.* Officers found Melgar's floral purse, which contained a fraudulent identification form and check. *Id.* at 1039-40. Upholding the validity of the search, the court reasoned that as a general rule, consent to search a space includes consent to search containers within that space…where a reasonable officer would construe the consent to extend to the container. *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). Following this reasoning, the court concluded that the officers' search was valid because they had no reason to believe that Melgar's purse did not belong to another person. *Melgar*, 227 F.3d at 1041-42. Velasquez was the one who rented the room, at least one of the women present had more than one purse, and

there were no exterior markings on the purse that would have notified officers that the purse belonged to Melgar and not Velasquez. *Id.* at 1041-42.

Although the Seventh Circuit's standard is favorable to an officer's reasonable belief to search, the standard was still not met in Mr. Larson's case. An officer can rely on the apparent authority of a third party unless there is "reason to believe" that consent was not valid. *Id.* at 1042. Even if this Court were to accept the Seventh Circuit's standard of reasonable belief, it is clear that Officer Nelson was presented with facts that would have given him reason to believe that the phone did not belong to W.M., but to Mr. Larson. The sticker found on phone matches the tattoo that Mr. Larson has on his left forearm. Additionally, the password "4-11-5-11" matches a tattoo Mr. Larson has on his neck. Unlike *Melgar*, Officer Nelson was presented with a phone with clear exterior markings that are identical to Mr. Larson's tattoos. Because of this, Officer Nelson should have reasonably known that he could not rely on W.M.'s apparent authority.

Like *Purcell*, *Taylor*, and *Waller*, the apparent authority of W.M. to search Mr. Larson's cell phone evaporated amongst the facts known to Officer Nelson at the time. Further, Mr. Larson's cell phone is unique because it implicates privacy concerns far beyond those of traditional containers, *Riley*, 134 S. Ct. at 2488-89, such as the purse in *Melgar* or the bags in *Purcell*. Because of Mr. Larson's heightened expectation of privacy, it was even more vital that Officer Nelson dispelled any ambiguity surrounding W.M.'s consent before unlocking the cell phone and searching its contents. The facts in the record clearly show that Mr. Larson was the one with sole authority over the cell phone and not W.M. Because Officer Nelson failed to cure the ambiguity surrounding W.M.'s authority to consent, he could not reasonably rely on it to conduct a warrantless search of Mr. Larson's cell phone. For these reasons, the warrantless

searches of Mr. Larson's apartment and cell phone are unconstitutional, for which the only remedy is the suppression of the fruits of those searches.

CONCLUSION

For the aforementioned reasons, the Court should uphold the ruling of the United States Court of Appeals for the Thirteenth Circuit.