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 THE RESPONDENT, WILLIAM LARSON

October Term 2016

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STATEMENT OF THE ISSUES

1. Was L.O. 1923 facially unconstitutional because its sanction of warrantless searches of all hotel patrons in Starwood Park failed to meet the requirements of the special needs exception to the Fourth Amendment's warrant requirement?

2. Was there sufficient ambiguity as to W.M.'s relationship to Mr. Larson, the apartment, and the cell phone to render Officer Nelson's reliance on W.M.'s authority to consent to the searches of Mr. Larson's apartment and cell phone unreasonable under the Fourth Amendment?

STATEMENT OF THE FACTS

In March 2013, Victoria City was selected by the Professional Baseball Association to host the 2015 All-Star Game. Gangs in the Starwood Park area control approximately 1,500 sex workers, many of which are believed to be underage. R. at 2. In response to fears that the increase in male spectators traveling for the All-Star Game would engender a swell of human trafficking in Starwood Park, the Victoria City Board of Supervisors passed Local Ordinance 1923 (L.O. 1923). R. at 2. L.O. 1923 allows police officers to search any person that an officer suspects may be a minor engaged in a commercial sex act or an adult or minor facilitating or attempting to facilitate the use of a minor for a commercial sex act in the three-mile radius of Starwood Park. R. at 2.

On July 12, 2015, Officers Joseph Richols and Zachary Nelson inspected patrons as they checked into the Stripes Motel in Starwood Park. R. at 3. The officers observed Defendant William Larson enter the motel with W.M. The officers noticed two tattoos on Mr. Larson they believed indicated gang affiliation. R. at 3. The officers deemed W.M.'s clothing tight and exposing and also observed that she appeared to be younger than Mr. Larson. R. at 3. As a result of these observations, the officers subjected Mr. Larson and W.M. to a search of their persons. Officer Nelson's search of W.M. produced a driver's license identifying her as a 16-year-old female, but he did not ask her about the address it listed for her. R. at 4. A search of Mr. Larson produced several items that resulted in Mr. Larson's arrest for sex trafficking of a minor in violation of 18 U.S.C. § 1591(a)(1). R. at 3.

Officer Nelson believed W.M. to be a victim of sex trafficking and declined to place her under arrest. R. at 4. Officer Nelson interviewed W.M. and she identified herself as Mr.

Larson's live-in girlfriend and business partner. R. at 29. After W.M. identified herself as Mr. Larson's live-in girlfriend, Officer Nelson asked her a series of questions to determine her ability to consent to the search of Mr. Larson's apartment. R. at 29-31. He asked if she had a safe place to stay and she stated she could stay in an apartment she had shared with Mr. Larson for the last year. R. at 29.

Through continued questions Officer Nelson learned that she did not pay rent and was not on the lease. R. at 33. He then asked her to clarify because he was having trouble understanding. R. at 29. W.M. told him that she was in business with Mr. Larson and that they shared all the money, even though he held it all. R. at 29. Officer Nelson did not ask her any more questions regarding her business or relationship to Mr. Larson because "she was answering so many questions." R. at 30.

Nevertheless, Officer Nelson continued questioning her to determine her authority. R. at 30. Officer Nelson asked her if Mr. Larson ever got mad at her and she told Officer Nelson about a time when Mr. Larson got angry when she was using her phone to text a male classmate about a school project. R. at 30. Mr. Larson and took her phone and told her that she could only use the cell phone he paid for and gave her, so that he could check it. R. at 30.

Because of his uncertainty, Officer Nelson continued to question W.M. about her relationship to the apartment. R. at 30. She told him that she kept a duffel bag's worth of things there, but that she had to keep it in a closet designated by Mr. Larson and really did not have anything else. R. at 30. W.M. also complained to Officer Nelson that she did almost all the chores around the house. R. at 33. At this point, Officer Nelson "felt like they were probably sharing the apartment" and requested W.M.'s permission to search Mr. Larson's apartment. R. at 31. W.M. consented, but when they arrived W.M. had to retrieve a spare key from under a

fake rock to provide Officer Nelson access. R. at 31. Officer Nelson knew she did not possess a key before he proceeded, but did not ask her any further questions about the key. R. at 33.

When Officer Nelson searched the apartment, he found a handgun under a bed and a cell phone on a nightstand. R. at 31. The handgun served as the basis for charging Mr. Larson with a violation of 18 U.S.C. § 922(g)(1). The apartment bedroom contained two nightstands, one with a Seventeen Magazine and a pink eye mask and another with the cell phone among men's glasses, a men's Rolex watch, and condoms. R. at 4, 34-35, 37.

The cell phone had a sticker of a wizard's hat on the cover matching one of Mr. Larson's tattoos and the gang moniker Officer Nelson believed was associated with Mr. Larson. R. at 31. W.M. also had a tattoo of an "SW" on her ankle, but it was different than the sticker on the phone. R. at 31, 37. W.M. told Officer Nelson that she did not pay the phone's bill and that Mr. Larson used it regularly to make calls and send texts for their business. R. at 31-32, 34. W.M. stated she sent some personal texts and some personal calls. R. at 32. She also told him that she accessed her Instagram, Facebook, and Snapchat and the phone and could use them without Mr. Larson's permission. R. at 32.

Officer Nelson asked her if he could search the phone and she consented. R. at 32. Before he could access the phone, Officer Nelson encountered a lock screen with both W.M. and Mr. Larson's picture. R. at 34. W.M. gave him the password to access the phone after granting him permission to search it. Officer Nelson did not ask her how she knew the password. R. at 32. The password to the phone matched the numbers Officer Nelson had seen tattooed on Mr. Larson's neck. R. at 34. On the phone, Officer Nelson found inappropriate photos of W.M. and a video of Mr. Larson rapping about pimping. R. at 32.

SUMMARY OF THE ARGUMENT

The Victoria City Board of Supervisors passed L.O. 1923, an ordinance meant to bypass the Fourth Amendment's normal warrant procedures by allowing police officers to search all individuals in Starwood Park they deemed sex traffickers or victims of trafficking. According to the Board, an increase in male spectators traveling to the game would result in a swell of sex trafficking. The Board stated that a local sporting event created a situation where the special needs exception to the traditional warrant requirement applied.

In this case, Victoria City police relied on L.O. 1923 to conduct a warrantless search of Mr. Larson's person. As a result of the evidence gathered, the police placed Mr. Larson under arrest for sex trafficking of W.M., a minor in his company, and relied on her authority to conduct a search of Mr. Larson's apartment and cell phone.

In the search of Mr. Larson's person, Victoria City police chose to circumvent the constitutionally preferred practice of obtaining a search warrant. Instead, relying on L.O. 1923 the police searched Mr. Larson without probable cause and arrested him on the basis of the evidence discovered during the search.

The State seeks to justify this constitutionally disallowed search by relying upon the special needs exception to the Fourth Amendment's prohibition of warrantless searches. Searches conducted under L.O. 1923 do not meet the special needs exception for two reasons. First, the purpose of the ordinance was to facilitate warrantless searches leading to criminal investigation of hotel patrons, a purpose that is not divorceable from general law enforcement purposes. Second, because Victoria City has failed to prove a special need separate from general law enforcement, obtaining a warrant was not impracticable.

Next, in the search of Mr. Larson's apartment, the State argues that Victoria City police relied on W.M.'s apparent authority to consent to the search. Officer Nelson was mistaken about the nature of W.M.'s relationship to Mr. Larson when evaluating her authority to search. Based on the totality of the circumstances, Officer Nelson's belief in W.M.'s authority to consent as Mr. Larson's girlfriend was unreasonable. Even if his belief that W.M. was Mr. Larson's girlfriend was reasonable, the totality of the circumstances concerning her authority to consent were ambiguous and required further investigation.

Finally, in the search of Mr. Larson's cell phone, the government argues that Victoria City police relied on W.M.'s apparent authority to consent to the search. Officer Nelson was mistaken in his belief that she shared the phone with Mr. Larson because Officer Nelson knew that she had another phone. The fact that she had another phone is significant because it creates ambiguity about her statement that she shared the phone. His belief that she shared Mr. Larson's phone was unreasonable based on the totality of the circumstances. Even if Officer Nelson's belief that W.M. had common authority over the phone was reasonable, the fact the phone was password protected indicated that her authority did not extend to the files to which she did not have access.

For the reasons stated above, L.O. 1923 was facially unconstitutional and W.M. did not have apparent authority to consent to the search of Mr. Larson's apartment or phone. Therefore, we ask the Court to uphold the Court of Appeals ruling and suppress the evidence from all three encounters.

STANDARD OF REVIEW

The Court reviews a district court's denial of a motion to suppress de novo and its factual findings for clear error. *Ornealas v. United States*, 517 U.S. 690, 699 (1996). In considering all three searches, the Court evaluates the District Court's legal determination of the reasonableness of the search de novo and the facts it relied upon for clear error.

ARGUMENT

The Fourth Amendment guards the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. U.S. Const. amend IV. The Fourth Amendment was created to prevent "the privacies of the life of all the people from being exposed to agents of the government who will act at their own discretion. . . unauthorized and unrestrained by the courts." *Olmstead v. United States*, 277 U.S. 438, 487 n.12 (1928). It is for this reason that a judge or magistrate must authorize a warrant, "subject only to a few specifically established and delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967).

If the police conduct a search without a warrant issued by a judge or magistrate, the government bears the burden to show than an exception to the warrant requirement makes the search reasonable. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). Evidence gathered in violation of the Fourth Amendment is inadmissible at the criminal trial of the victim of the search or seizure, as unconstitutional searches "should find no sanction in the judgement of courts." *Weeks v. United States*, 232 U.S. 383 (1914).

I. L.O. 1923 IS FACIALLY UNCONSTITUTIONAL UNDER THE FOURTH AMENDMENT BECAUSE WARRANTLESS SEARCHES ARE PER SE UNREASONABLE AND L.O. 1923 FAILS TO MEET THE REQUIREMENTS OF THE SPECIAL NEEDS EXCEPTION.

A specifically established and delineated exception to the Fourth Amendment's warrant requirement is the special needs doctrine, which Victoria City incorrectly argues applies to the instant case. The special needs exception applies when special needs, beyond the normal need for law enforcement, make the warrant requirement impracticable. *Griffin v. Wisconsin*, 483 U.S. 868 (1987) citing *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). When such special needs are alleged to justify a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests. *Chandler v. Miller*, 520 U.S. 305, 306 (1997). If the primary purpose of the policy is ordinary law enforcement, the special needs doctrine does not apply and the search violates the Fourth Amendment. *United States v. Sczubelek*, 402 F.3d 175 (3d Cir. 2005).

The Supreme Court of the United States examines three factors in determining that obtaining a warrant was impracticable. First, the court examines the nature of the privacy interest intruded upon. Second, the court examines the character of the intrusion upon that interest. Finally, the court examines the nature and immediacy of the government concern at issue. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

Because the focus of L.O. 1923 was the arrest and prosecution of potential offenders, Victoria City cannot divorce its purpose from general law enforcement and thus it fails the first element of the special needs exception. Additionally, because it was not impracticable for police officers to obtain a warrant before searching Larson's person, the government fails to meet their burden to establish a special need. For the reasons stated above, L.O. 1923 is facially

unconstitutional and the Court should exclude from trial all evidence seized from Mr. Larson at the time of his arrest.

A. The ultimate purpose of L.O. 1923 was to facilitate warrantless searches leading to criminal investigation of hotel patrons, a purpose not divorced from general law enforcement.

Because the immediate and ultimate purpose of L.O. 1923 is to enable law enforcement to inspect potential criminals and to gather evidence for prosecution, it is inherently connected to general law enforcement. Thus, it fails the first prong of the special needs analysis and is unconstitutional under the Fourth Amendment.

If the government seeks to justify a warrantless search with the special needs exception and its immediate purpose is connected to general law enforcement, it does not fit within the closely guarded category of special needs that exempt a search from the Fourth Amendment's warrant requirement and is unconstitutional. *Ferguson v. City of Charleston*, 121 S. Ct. 1281 (2001). Victoria City's stated purpose is the prevention of human trafficking. R. at 41. While the government's goal of preventing human trafficking is honorable, the Supreme Court has noted that "because law enforcement involvement always serves some broader social purpose or objective . . . virtually any non-consensual suspicionless search could be immunized under the special needs doctrine." *Ferguson*, 121 S. Ct. 1281.

The instant case is analogous to *Ferguson v. City of Charleston*, in which the Medical University of South Carolina (MUSC) cooperated with the City of Charleston to formulate a policy to prosecute mothers whose children tested positive for drugs at birth. Pregnant patients at the MUSC were forced to submit to urine tests and police arrested them if they tested positive for cocaine. The Court found that because the drug tests were conducted for criminal investigatory purposes, they were unconstitutional. *Ferguson v. City of Charleston*, 121 S. Ct.

1281, 1292-3. Charleston's purpose was also a noble one, to protect unborn children and help women get off of drugs. But like L.O. 1923, the central feature of Charleston's policy was threat of prosecution, and thus its purpose was indistinguishable from a general interest in crime control and not a special need.

In *Ferguson*, the court analyzed both the immediate and ultimate goals of Charleston's drug testing policy. The Court identified the immediate purpose of the policy as the generation of evidence for law enforcement purposes. *Ferguson*, 121 S. Ct. at 1291. Once identified, the Court held that the special needs balancing test did not apply and it applied the Fourth Amendment strictly. A special need may not serve a law enforcement end. *Id.* at 1282. The immediate purpose inquiry ads a new aspect to the special needs exception, an aspect that the Court should apply in this case.

Officer Nelson's search and seizure helped L.O. 1923 to carry out its immediate purpose, gathering evidence to stop sex traffickers through arrest and prosecution. L.O. 1923's purpose violates *Ferguson's* ruling that any program whose immediate purpose is the generation of evidence for law enforcement is unconstitutional. *Id.* at 1290. The natural end point of providing law enforcement tools to enforce the L.O. 1923 is the arrest and prosecution of those engaged in sex trafficking. Any arrest and prosecution necessarily entails the gathering of evidence, evinced by Officer Nelson's search of Mr. Larson's person and the seizure of his personal items which led to his arrest. This search and seizure program belongs to the genre of general programs of surveillance which invades privacy wholesale in order to discover evidence of crime. *Edmond v. Goldsmith*, 183 F.3d 659 (7th Cir. 1999), aff'd sub nom. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

Under the ordinance, any individual within Starwood Park whom police officers deem a potential criminal engaged in trafficking may be subject to search. R. at 2. If the items seized during a search produce evidence of trafficking, the police may arrest the subjects of the search. Victoria City can only accomplish its goal to stop potential increases in sex trafficking by removing the traffickers. It can only accomplish the removal of traffickers through arrest and incarceration, and the gathering of evidence is the only conduit through which this removal can occur. Warrantless searches undertaken pursuant to a supposed non-criminal inspection regime, but actually "designed as a pretext to enable law enforcement authorities to gather evidence of penal law violations" are unconstitutional. *Skinner v. Ry. Lab. Executives' Ass'n*, 489 U.S. 602 n.5 (1989) citing *New York v. Burger*, 482 U.S. 691 (1987).

To determine if a warrantless search is a pretext for a criminal investigation, the Court examines the "programmatic purpose" of the law to determine if it is "divorced from the State's general law enforcement interest" or is instead a means of crime control. *Ferguson,* 121 S. Ct. at 1289. The Court does not "simply accept the State's invocation of a special need." *Id.* The Court must carry out a close review of the scheme, considering all the available evidence." *Id.*

The programmatic purpose of L.O. 1923 is general crime control that cannot be divorced from law enforcement. Victoria City issued a press release outlining their concern over potential increases in sex trafficking as a result of the 2015 Professional Baseball Association All-Star Game, stating its purpose was to interdict sex traffickers in Starwood Park while the Game occurred. R. at 41, 53. The press release emphasizes law enforcement's importance in carrying out the mission of sex trafficking, providing them special tools to deter sex trafficking. Notably, only law enforcement has the authority to carry out L.O. 1923. Deterrence of crime by police,

even crime as heinous as sex trafficking, is a general law enforcement goal, no different than the daily deterrence of endemic scourges such as drugs.

The surveillance and stop of hotel patrons in the Starwood Park area is analogous to the drug interdiction checkpoints that that the Supreme Court declared unconstitutional in *City of Indianapolis v. Edmond*. In *Edmond*, the City of Indianapolis enacted a policy to place check points on its roads to stop the flow of illegal drugs. The Court found these roadblocks and seizures unconstitutional under the Fourth Amendment because the checkpoint program's primary purpose was indistinguishable from the general interest in crime control, thus the checkpoints violated the Fourth Amendment. *Edmond*, 531 U.S. at 44. Likewise, Victoria City's interest in stopping human trafficking, while admirable, cannot be distinguished from a general interest in crime control. The posting of officers in hotel lobbies created a checkpoint within the hotel lobby, whose unquestionable purpose was to stop and search potential criminals in order to gather evidence and prosecute as necessary.

Any argument made by Victoria City that L.O. 1923's focus was not to empower law enforcement or aid a law enforcement goal is unpersuasive. The sole sanction for violating L.O. 1923 is criminal and police are the only government officials who enforce L.O. 1923. Consequentially, any actions taken to achieve L.O. 1923's stated purpose of removing underage victims from dangerous situations are enforcing a criminal statute. R. at 41. Victoria City may argue that its goal is to deter sex trafficking and not to gather evidence for punishment, but this is a fine and dangerous line. Any search and seizure that punishes crime also deters crime. Thus, all available evidence shows that L.O. 1923's immediate and ultimate purpose is not divorced from the city's general interest in law enforcement. Because special needs beyond law

enforcement do not exist, L.O. 1923 fails the first prong of the special needs analysis and is unconstitutional.

B. Obtaining a warrant was not impracticable because the interest of individuals in Starwood Park to be free from a blanket search carried out by law enforcement is an unreasonable burden upon privacy interests and fails the second prong of the special needs analysis, rendering it unconstitutional under the Fourth Amendment.

To justify a warrantless search under the special needs exception, the government must also show that the special need makes the ordinary requirement of a warrant impracticable under the circumstances. The court uses a three factor analysis to determine impracticability, examining (1) the nature of the privacy interest intruded upon, (2) the character of the intrusion upon that interest, and (3) the nature and immediacy of the government concern at issue. *Natl. Treas. Employees Union v. Von Rabb*, 489 U.S. 656 (1989). The government must prove that its search meets a general test of reasonableness; under this standard, the court judges the constitutionality of a particular search by balancing its intrusion on individual's Fourth Amendment interests against its promotion of legitimate governmental interests. If the Court finds the government interest lacking, then it considers the search unreasonable and therefore unconstitutional under the Fourth Amendment. *Wilcher v. City of Wilmington*, 139 F.3d 366 (3rd Cir. 1998) citing *Skinner*, 489 U.S. at 602. We will examine each of these factors in turn.

The privacy interest at stake in L.O. 1923 is that of remaining free from unreasonable searches. R. at 8. In a special needs analysis, an individual's expectation of privacy must be objectively reasonable. “Since the Fourth Amendment protects persons, not places, it protections follow wherever a person has a legitimate expectation of privacy . . . [t]hus, an overnight guest . . . in a hotel has a legitimate expectation of privacy in the premises.” *United States v. Conway*, 854 F. Supp. 834, 837 (D. Kan. 1994). As the District Court stated in its opinion, while police

officers may observe an individual from a public place such as a motel lobby without violating any reasonable expectation of privacy, this does not afford them the right to search an individual's person or possessions. R. at 8.

Notably, in the cases where the Supreme Court decided that a defendant’s expectation of privacy was insignificant the government’s interest involved public safety, the care of school children, or individuals who had a reduced expectation of privacy. *See Vernonia*, 515 U.S. at 646 (random drug testing of students who participate in interscholastic sports, who have less expectation of privacy than adults); *Von Rabb*, 489 U.S. at 656 (Customs Service employees subject to drug testing for employees carrying firearms or intercepting drugs who seek transfer or promotion to certain positions); *Skinner*, 489 U.S. at 602 (Federal Railroad Administration institutes random drug tests for employees involved in certain train accidents and those who violate particular safety rules); *Griffin*, 483 U.S. at 868 (parole officer’s search of a parolee’s home does not violate Fourth Amendment because probationers are in legal custody of the government).

Here, Mr. Larson was not in any position of trust which affected public safety, was not subject to a higher degree of regulation, nor placed in the care of another. Mr. Larson was a free adult entered the hotel with a reasonable expectation that it would afford him a private place to rest. Instead, Mr. Larson and W.M. were subject to a search of their bodies and seizure of Mr. Larson’s possessions.

On the night of his arrest, Mr. Larson's privacy interest to be secure in his person was not outweighed by L.O. 1923's mandate allowing police officers to search all individuals in the three-mile radius of Starwood Park. R. at 3. Mr. Larson's interest in privacy was rightfully recognized by the District Court as being greater than that of the government and thus

unreasonable. As the Supreme Court has stated, a decision to invade a privacy interest is too important to be left to the discretion of zealous officers engaged in the often competitive enterprise of ferreting out crime. *Johnson v. United States*, 333 U.S. 10 (1948).

The next consideration is the character of the government's intrusion upon the privacy interest. In its announcement of L.O. 1923, Victoria City was careful to highlight that it would limit potential privacy violations to those absolutely necessary, but the ability to stop and search the body and belongings of any person within three miles cannot be classified as limited.

In *Carroll v. United States*, the Supreme Court upheld a warrantless search of an automobile, but took care to state that "it would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search." *Carroll v. United States*, 267 U.S. 132, 153-54 (1925). It is similarly intolerable and unreasonable to subject all patrons lawfully using a motel to the inconvenience and indignity of a search by police on the chance that they are sex traffickers. Yet this is exactly what happened to Mr. Larson.

Moreover, the character of L.O. 1923 does not appear well designed to identify potential traffickers or victims of trafficking. *Chandler*, 520 U.S. at 319-20. L.O. 1923 does not provide guidelines as to how to identify those trafficked or those engaged in trafficking, only a general allowance to search hotel patrons. R. at 2. Nor is the scheme a credible means to deter potential traffickers. *Chandler*, 520 U.S. at 319. Victoria City advertised the areas and time periods during which the searches would occur in its press release. Any traffickers would know what areas to avoid in conducting their crimes allowing them to escape detection.

Victoria City's blanket search policy for anyone within the Starwood Park neighborhood should elicit great suspicion. Although Victoria City took pains to describe the policy as limited and reasonable, those pains appear to have been driven by a belief in what would pass constitutional muster and less to limit the intrusion upon individual privacy. *Vernonia*, 515 U.S. at 665. L.O. 1923's allowance of unfettered discretion to search the possessions and person of any individual within Starwood Park is an unreasonable burden on individual privacy interests.

The last factor of the test for warrant impracticability is the nature and immediacy of the government concern at issue. Victoria City's interest in deterring underage sexual trafficking is important and rightfully deserves law enforcement resources. Victoria City asserts that approximately 1,500 underage sexually trafficked victims operate within the Starwood Park area. R. at 40. Victoria City is obviously aware of the large number of underage victims. To combat this problem, it should have mechanisms in place to allow police to contact judges and magistrates for proper authorization of a search warrant, not local ordinances that trample the rights of its residents. The Supreme Court noted in *Steagald v. U.S.* that full-time magistrates are often on duty. *Steagald v. United States*, 451 U.S. 204, 222 (1981). If the police know the locations of potential traffickers (hotels in Starwood Park), the burden on them to obtain a search warrant is not high. *Id.* In cases such as this, where a potential criminal's location is known and the criminal will not be leaving that location due to exigent circumstances such as hot pursuit, the short time required to obtain a search warrant from a magistrate will seldom hinder efforts to apprehend the criminal. *Id.* Additionally, the Court noted that if a magistrate is not nearby, a telephonic search warrant can usually be obtained. *Id.*

Therefore, the government has failed to meet its burden to prove that obtaining a warrant is impracticable.

II. W.M. DID NOT POSSESS APPARENT AUTHORITY TO CONSENT TO THE SEARCH OF MR. LARSON'S APARTMENT BECAUSE OFFICER NELSON'S MISTAKEN BELIEF THAT SHE WAS MR. LARSON'S GIRLFRIEND WAS OBJECTIVELY UNREASONABLE AND EVEN IF HIS BELIEF WERE REASONABLE THE AMBIGUOUS CIRCUMSTANCES REQUIRED FURTHER INVESTIGATION.

In *Illinois v. Rodriguez* the Supreme Court created the apparent authority exception to the warrant requirement. *Illinois v. Rodriguez*, 497 U.S. 177, 179 (1990). Under the doctrine of apparent authority, a warrantless search authorized by a third party is lawful as long as that third party had the appearance of actual authority to consent to the search, even if the third party did not in fact possess this authority. *Id.* at 188. The third party's appearance of authority must be objectively reasonable, based on the totality of the circumstances known to the officer at the time of the search. *Id.* at 188. Some circumstances, however, will make a third party's appearance of authority suspect, even if the third party claims to have authority. *Id.* In those instances, the officer must continue to investigate to determine whether the third party does in fact have authority. *Id.*

Since the *Rodriguez* decision, the Circuits have struggled to apply the apparent authority doctrine in a uniform way. To provide clarity, the Court should adopt the Ninth Circuit's test because it incorporates all of the factors from the *Rodriguez* decision in a framework that will allow courts to systematically analyze all of *Rodriguez's* requirements. The Ninth Circuit test recognizes that the question is not only whether the officer's belief was reasonable, but also assuming that the belief was correct, would the third party have had actual authority? *United States v. Reid*, 226 F.3d 1020, 1025 (9th Cir. 2000). The Ninth Circuit's test asks:

> First, did the searching officer believe some untrue fact that was then used to assess the consent-giver's use of and access to or control over the area searched? Second, was it under the circumstances objectively reasonable to believe that the

> fact was true? Finally, assuming the truth of the reasonably believed but untrue fact, would the consent-giver have had actual authority?

Id.

The Ninth Circuit test provides the clearest evaluation of the standard from *Rodriguez* and in this case leads to the conclusion that W.M. did not possess apparent authority to search Mr. Larson's apartment. Therefore, the Court should grant Mr. Larson's motion to suppress the evidence gathered from the search of his apartment and cell phone.

A. Under the first prong of the Ninth Circuit's test for apparent authority Officer Nelson believed the untrue assertion that W.M. was Mr. Larson's girlfriend and used this assertion to assess W.M.'s use, access, or control over Mr. Larson's apartment.

Officer Nelson mistakenly used W.M.'s status as Mr. Larson's girlfriend without taking steps to ascertain the veracity of this statement and its effects on her ability to consent to a search. Officer Nelson accepted W.M.'s assertion that she was Mr. Larson's girlfriend without question and the District Court evaluated W.M.'s apparent authority using ten factors from *United States v. Groves* designed to evaluate a live-in girlfriend's actual authority to consent to a search of her boyfriend's residence. R. at 11; *United States v. Groves*, 530 F.3d 506, 509-510 (7th Cir. 2008).

Officer Nelson committed a mistake when he failed to consider W.M.'s status as a possible sex trafficking victim when evaluating her relationship to Mr. Larson because a consenter's relationship to the owner of the premises is a relevant factor to consider. *United States v. Whitfield*, 939 F.2d 1071, 1072 (D.C. Cir. 1991) (deciding that a mother did not have apparent authority to search because she appeared to have landlord-tenant relationship with her son, the defendant); *Rodriguez*, 497 U.S. at 177 (deciding that a girlfriend had apparent authority to consent to the search of her boyfriend's residence); *United States v. Gutierrez-Hermosillo*, 142 F.3d 1125, 1231 (10th Cir. 1998) (deciding that a minor is not per se barred

from possessing apparent authority, but minority is a factor to consider); *United States v. Cos*, 498 F.3d 1115 (2007) (recognizing that parent-child and husband-wife relationships trigger a presumption of control for most purposes over the property by the third party).

Similarly, courts have determined that a party's status as a crime victim is a relevant factor to consider when the police evaluate her authority to consent to a search of premises. *United States v. McAlpine*, 919 F.2d 1461 (10th Cir. 1990) (deciding that an adult victim of kidnapping had actual authority to search the defendant's trailer because she lived there for two months, could come and go as she pleased, and initiated the police's entry to the residence); *United States v. Johnson*, 22 F.3d 674 (6th Cir. 1994) (deciding that a minor victim did not have actual authority to search an apartment because she had only been present four days and could not provide access); *United States v. Thomas*, No. 3:14-CR-00031 RNC, WL 164075 (D. Conn. Jan. 13, 2015) (deciding that a minor victim of sex trafficking did have apparent authority to search because there was outside verification that she stayed in the room for which she claimed access, even though she did not have a key.)

Officer Nelson did not ask W.M. any questions regarding her status as a possible victim of sex trafficking. Without further inquiry about her relationship status, Officer Nelson relied on W.M.'s statement that she was Mr. Larson's live-in girlfriend, even though she is a minor, to evaluate her authority to consent to the search of Mr. Larson's apartment. R. at 31. His mistake was significant because the relationship of a third party to the owner of the premises provides context to the factual analysis that the police must engage in to determine a third party's authority to consent. In this case, W.M. is a minor who Officer Nelson considered a victim of sex trafficking and he should have considered that when questioning W.M.

Because Officer Nelson failed to evaluate W.M.'s authority in the context of her status as a possible crime victim, and not simply Mr. Larson's girlfriend, he was mistaken.

B. It was objectively unreasonable for Officer Nelson to believe that W.M. was Mr. Larson's girlfriend because Officer Nelson had arrested Mr. Larson only moments before for sex trafficking of a minor and failed to ask her any questions about her relationship to Mr. Larson.

Officer Nelson's belief that W.M. was Mr. Larson's girlfriend was unreasonable because a reasonable police officer enforcing a human trafficking ordinance would not have relied on the statement of an underage sex trafficking victim to confirm her status as her trafficker's girlfriend and business partner. In *Rodriguez*, the Court recognized that even where the third party explicitly states they live on the premises "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. A reasonable person would have doubted W.M.'s assertion that she was Mr. Larson's girlfriend and business partner and would have asked her more questions about her statement because it is a fact that "cr[ied] out for further inquiry." *Cos*, 498 F.3d at 1129.

Officer Nelson chose not to pursue any questions about W.M.'s statement that she was Mr. Larson's girlfriend and business partner "because she was answering so many questions." R. at 30. The statement itself is unreasonable. Officer Nelson had a cooperating witness who willingly answered all of his questions, but he failed to ask about her relationship with Mr. Larson, despite obvious ambiguity. "The government cannot establish that its agents reasonably relied upon a third party's apparent authority 'if agents, faced with an ambiguous situation, nevertheless proceed without making further inquiry." *United States v. Waller*, 426 F.3d 838, 846 (6th Cir. 2005). Officer Nelson's actions give rise to the inference that he avoided asking her questions about her relationship to Mr. Larson because he wanted to retain the appearance of

his reasonable belief that she was his girlfriend. A belief he relied on to assess her ability to consent to a unconstitutional search.

A reasonable person would not have accepted W.M.'s statement that she was Mr. Larson's girlfriend and business partner without inquiring further about the nature of their relationship.

C. Assuming Officer Nelson's belief that W.M. was Mr. Larson's girlfriend was reasonable, W.M. still lacked authority to consent to the search of the apartment because whether she had joint access or control over the premises was ambiguous.

Officer Nelson did not dispel the lingering ambiguity surrounding W.M.'s ability to freely access Mr. Larson's apartment. Officer Nelson asked W.M. a series of superficial and cursory questions designed to evaluate her authority to consent to search Mr. Larson's apartment, but his "superficial and cursory questioning . . . did not disclose sufficient information to support a reasonable belief that [W.M.] had the authority to permit the search." *Whitfield*, 939 F.2d at 1075. Because Officer Nelson failed to move beyond superficial questions, he lacked the information necessary to determine W.M.'s relationship to Mr. Larson and by extension her authority to consent to a search. Therefore, he could not establish that she had authority to search.

Further, Officer Nelson learned on the way to Mr. Larson's apartment that W.M. did not possess a key. R. at 31. Instead, W.M. accessed Mr. Larson's hide-a-key under a fake rock and provided it to Officer Nelson. Even if the police establish the appearance of actual authority, they must re-establish that authority if they encounter new ambiguity. *Waller*, 426 F.3d at 846. At this point, there was new ambiguity about W.M.'s ability to permit access to Mr. Larson's apartment that required Officer Nelson to clarify their living arrangement. Officer Nelson failed to conduct this inquiry. This error is compounded by the fact that W.M. was present and simple

questions could have clarified the ambiguity. *United States v. Purcell*, 526 F. 3d 953, 964 (6th Cir. 2008); *Waller*, 426 F. 3d at 849.

A defendant's girlfriend has authority to consent to a search of shared premises. *Rodriguez*, 497 U.S. 177. The facts of the instant case, however, are distinguishable from cases in which a defendant's girlfriend provided consent in in at least four important respects.

First, as mentioned, there was significant ambiguity as to whether W.M. was in fact his girlfriend. Second, even if W.M. was Mr. Larson's girlfriend, she is still a minor. While minors can provide consent where they are related to the defendant, where a minor claims to be the girlfriend of the defendant the police should doubt the authenticity of the statement and investigate further. "[S]ome facts known by the police cry out for further inquiry, and when this is the case it is not reasonable for the police to proceed on the theory that 'ignorance is bliss.'" *Cos*, 498 F.3d at 1129.

Third, when Officer Nelson checked W.M.'s driver's license he noted her age, but he failed to ask her any questions regarding the address listed on it. R. at 29-31. Fourth, W.M. told Officer Nelson that she had to keep her personal belongings in a designated area in Mr. Larson's closet. Officer Nelson failed to ask vital follow up questions regarding Mr. Larson's designation that she keep her belongings in a specific area of the apartment. R. at 30-31. The same ambiguity resulted when Officer Nelson discussed W.M.'s household chores. She stated that she did all the chores and that she did not like it. R. at 33. He failed to ask her questions that would have clarified whether she did the chores to contribute to the household or was forced to do them. In the context of Mr. Larson's arrest, a reasonable person would wonder if she did the chores to contribute to the household, or if she was forced to do chores as Mr. Larson's victim.

Because the circumstances surrounding W.M.'s authority to search the premises were ambiguous it was unreasonable for Officer Nelson to proceed without further investigation, even if he reasonably believed she was Mr. Larson's girlfriend. Therefore, we urge the Court to suppress the firearm and the cell phone found within.

III. W.M. DID NOT POSSESS APPARENT AUTHORITY TO CONSENT TO A SEARCH OF MR. LARSON'S CELL PHONE BECAUSE OFFICER NELSON'S MISTAKEN BELIEF THAT SHE HAD COMPLETE ACCESS TO THE PHONE WAS OBJECTIVELY UNREASONABLE AND ALTERNATIVELY IF HIS BELIEF WERE REASONABLE THE CIRCUMSTANCES REQUIRED FURTHER INVESTIGATION.

The Ninth Circuit's test for apparent authority applies to the search of containers as well. *United States v. Ruiz*, 428 F.3d 877 (9th Cir. 2005). The search of Mr. Larson's cell phone is analogous to the search of a container. "When the 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), *decision clarified on denial of reh'g*, 499 F.3d 1162 (10th Cir. 2007) (quoting *United States v. Matlock*, 415 U.S. 164 (1974)). Generally, a warrant is required before the police search a cell phone. *Riley v. California*, 134 S. Ct. 2473, 2493 (2014). W.M.'s relationship to Mr. Larson's cell phone was ambiguous and required further investigation. The fact that he protected the phone with a password exhibited Mr. Larson's subjective expectation of privacy and his expectation of privacy was reasonable. *Katz*, 389 U.S. at 351; *Riley*, 134 S. Ct. at 2493.

A. Officer Nelson mistakenly believed that W.M. shared Mr. Larson's cell phone and used this fact to assess her joint use or control over the phone.

W.M.'s statements concerning her access to cell phone were ambiguous. She told Officer Nelson that her cell phone had been taken after she used it to text a male classmate about a class project. R. at 30. W.M. stated that once the phone was taken she could only use a phone Mr.

Larson paid for and provided her so that he could check it. R. at 30. She did not tell him that the phone on the nightstand was the one that Mr. Larson provided. W.M. then consented to Officer Nelson's search of the cell phone. R. at 32. This is a direct contradiction of her earlier statement.

Because it was still ambiguous whether W.M. shared Mr. Larson's phone or he provided her one to control her access to the outside world, Officer Nelson's belief that W.M. shared Mr. Larson's cell phone was mistaken.

B. It was objectively unreasonable for Officer Nelson to believe that W.M. shared Mr. Larson's cell phone because the circumstances surrounding her access to it were ambiguous and required further investigation.

It was objectively unreasonable to believe that the seized phone was the phone Mr. Larson had given W.M. because it was located on a nightstand among his things. *United States v. Taylor*, 600 F.3d 678, 682 (6th Cir. 2010) (deciding a search of a shoebox based on apparent authority was unreasonable where the shoebox was surrounded by things not associated with the third party.) There were two nightstands in the bedroom. R. at 37. Officer Nelson stated that he could not tell if the nightstand where he found the phone was a man's or a woman's nightstand. The nightstand, however, was covered in men's glasses, a man's fake gold Rolex watch, and men's condoms. R. at 35. The only other nightstand in plain view contained a "Seventeen" magazine and a pink eye cover. R. at 37. It should have been obvious that the nightstand on which the phone rested was Mr. Larson's. It was unreasonable to see the cell phone sitting among Mr. Larson's things and not ask clarifying questions to determine if this was indeed the phone she had access to or whether it was Mr. Larson's phone.

The phone's outward indicia strongly indicated that this cell phone was Mr. Larson's and not W.M.'s. Officer Nelson noticed the cell phone had a sticker on its case that matched a tattoo Officer Nelson observed on Mr. Larson's forearm. R. at 34. The design was a wizard's hat and Officer Nelson knew that Mr. Larson's gang moniker was "wizard." R. at 34. When Officer Nelson turned the phone on there was a picture of both Mr. Larson and W.M. which did not definitively confirm the phone's users or owners. R. at 34. The password, however, was excellent indicia that the phone belonged to Mr. Larson. It matched a tattoo Officer Nelson observed on the back of Mr. Larson's neck. R. at 34. W.M. did have a tattoo of an "SW" on her ankle, but it did not match the sticker on the phone exactly as Mr. Larson's did. R. at 34 & 37. The tattoos and their connection to the phone should have put Officer Nelson on notice that the phone belonged to Mr. Larson. It was objectively unreasonable not to question W.M. further about her access to the phone when Officer Nelson encountered ambiguity as to W.M.'s claim of sharing the phone.

Officer Nelson knew the phone's indicia and password were associated with Mr. Larson's tattoos and gang moniker but failed to ask necessary questions to clarify how W.M. knew the phone's password. Therefore, Officer Nelson's belief that she shared the phone with Mr. Larson was objectively unreasonable.

C. If Officer Nelson's belief was reasonable W.M. still did not have the actual authority to consent to the search of Mr. Larson's cell phone because it was password protected and even if Mr. Larson gave her the password to access social media that did give her the authority to search his files.

The dissent in *Andrus* correctly surmised "that in content-based, warrantless computer searches, law enforcement personnel inquire or otherwise check for the presence of password protection and, if a password is present, inquire about the consenter's knowledge of that

password and joint access to the computer." *Andrus*, 483 F.3d 725. Further, even if the third party has access to the computer, that does not mean they have access to all the computer files contained therein. *Turlock v. Freeh*, 275 F.3d 391, 403 (4th Cir. 2001).

Even assuming W.M. had actual authority to consent to the search of Mr. Larson's phone her actual authority only extended to the files which she used, which were Instagram, Facebook, and Snapchat. R. at 31. Mr. Larson's high expectation of privacy in his phone entitles his password protected files to be free from warrantless searches by the police. *Katz*, 389 U.S at 347; *Riley*, 134 S. Ct. at 2485. Her authority did not extend to the photographs or the video that Officer Nelson viewed because she did not claim to have access to those files.

Therefore, even if Officer Nelson's belief that she had access to the phone was reasonable without further investigation W.M. did not possess the actual authority to consent to the search of all of the files located on Mr. Larson's phone.

CONCLUSION

Victoria City's failure to meet the special needs exception renders L.O. 1923 facially unconstitutional under the Fourth Amendment. Further, Officer's Nelson belief that W.M. had authority to consent to the search of Mr. Larson's apartment and cell phone was objectively unreasonable. As such, we urge this court to apply the exclusionary rule as requested by Mr. Larson and suppress all evidence unconstitutionally seized during the searches at the Stripes Motel and Mr. Larson's apartment. For these reasons, we request that this Court uphold the Court of Appeals ruling that L.O. 1923 is facially unconstitutional and that the searches of Mr. Larson's apartment and cell phone based on W.M.'s authority were unconstitutional under the Fourth Amendment.