Team #: R9

No. 03-240

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

V.

WILLIAM LARSON
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Thirteenth Circuit

October Term 2016

BRIEF FOR RESPONDENT

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II. A third party can consent to a search of another's property if law enforcement officers have a reasonable, but factually erroneous, belief that the third party has authority to consent based on the facts known to the officer at that time. Here, the officer seeking third party apparent consent from W.M. to search Mr. Larson's apartment and cell phone ascertained facts casting ambiguity on W.M.'s authority to consent to the searches. Based on the totality of the circumstances at the time of consent, did law enforcement officers have a reasonable belief that W.M., a sixteen-year-old minor living with Mr. Larson, had apparent authority to consent to a search of his apartment and cell phone?

STATEMENT OF FACTS

Starwood Park is a neighborhood in Victoria City, Victoria with a history of gang activity. R. at 2. The gangs of this neighborhood engage in a broad spectrum of criminal activity, including human trafficking. *Id.* In 2013, the Cadbury Park baseball stadium, located in Starwood Park, was selected to host the 2015 All-Star Game, scheduled for July 14, 2015. *Id.* In response to citizen concern about human trafficking, the Board of Supervisors passed Local Ordinance 1923 ("L.O. 1923"). *Id.* The ordinance authorized the search of any person "obtaining a room in a hotel, motel, or other public lodging facility" if the officer had a reasonable suspicion that the person was engaged in or facilitating a commercial sex act with a minor. R. at 2-3. The ordinance would be valid for a seven-day period surrounding the game and would be limited to a three-mile radius surrounding the stadium. *Id.* The Board followed with a press release indicating its belief that sex trafficking spikes around a major sporting event and its desire to protect vulnerable children with this new ordinance. R. at 40-41.

On July 12, 2015, Officers Joseph Richols and Zachary Nelson were surveilling individuals in the lobby of the Stripes Motel in Starwood Park. R. at 3. William Larson and a female identified as W.M. entered the motel. *Id.* Based on Mr. Larson's gang tattoos, W.M.'s young appearance, attire, and lack of luggage, the officers became suspicious that they were going to engage in a commercial sex act. *Id.* The officers approached the couple and searched them. R. at 3-4. On Mr. Larson, they discovered "condoms, lube, two oxycodone pills, a list of names and corresponding allotments of time . . . and $600 in cash." R. at 4. On W.M., they discovered a driver's license identifying her as sixteen years old. *Id.* The officers then placed Mr. Larson under arrest. *Id.*

After arresting Mr. Larson, Officer Nelson believed W.M. to be a victim, and began asking her questions about her living situation and relationship with Mr. Larson. *Id.* W.M. indicated that she and Mr. Larson were boyfriend and girlfriend, and that they were "in the area to do business with the all-star game fans." R. at 29. When Officer Nelson asked if W.M. had a safe place to stay, she claimed that she lived in an apartment with Mr. Larson at 621 Sasha Lane. *Id.* W.M. indicated that they lived together and shared money from their business venture. *Id.* Officer Nelson did not ask about the nature of their business venture. R. at 29-30. W.M. then told Officer Nelson that she ran away from home "about a year and a half ago," but she had lived with Mr. Larson for about one year. R. at 30. She stated that Mr. Larson was "really nice to her," but indicated that Mr. Larson once slapped her when he found her texting "a guy she was doing a class project with at school." *Id.* Afterwards, he only allowed her to use the cell phone he had given her, which he paid for, so he could monitor her activities. *Id.*

W.M. went on to tell Officer Nelson that she had few belongings, and only kept her backpack and some spare clothing at Mr. Larson's apartment. R. at 30. Officer Nelson believed that Mr. Larson was the only one listed on the paperwork related to the apartment, and W.M. told Officer Nelson that she did not pay any rent. R. at 33. W.M. stated that she did almost all of the chores around the house, but indicated that she and Mr. Larson kept separate food. *Id.* She also indicated that she did not have her own room, but she usually slept with Mr. Larson in his bedroom and had her own section of the closet in Mr. Larson's bedroom. *Id.* W.M. further indicated that she received medical bills and personal mail sent to Mr. Larson's apartment. R. at 31. Officer Nelson indicated that he believed this was "clearly a pretty abnormal" living situation. R. at 34. In total, W.M. estimated that Officer Nelson's questioning lasted "about ten minutes." R. at 37.

Based on the information obtained from W.M., Officer Nelson asked her for permission to search the apartment. R. at 31. She gave her consent to search Mr. Larson's apartment, and led Officer Nelson to 621 Sasha Lane. *Id.* She used a spare key located underneath a fake rock to open the door. *Id.* Officer Nelson searched the apartment and found a loaded black semi-automatic handgun with the serial number scratched off underneath the bed. *Id.* In the bedroom were two nightstands. R. at 37. On one nightstand there was an issue of "Seventeen" magazine, and a pink eye cover with the word "MONEY" on it that W.M. used when she slept. *Id.* The other nightstand had an Apple IPhone 5S, "what looked like men's glasses, a gold fake Rolex men's watch, and some condoms." R. at 34-35. The cell phone had a sticker that was the same design as Mr. Larson's gang tattoo, and a picture of Mr. Larson and W.M. on the phone's lock screen. R. at 34. W.M. indicated that she shared the phone with Mr. Larson, but he paid the bill. R. at 31-32. W.M. told Officer Nelson that she could use the phone to access her Instagram, Facebook, and Snapchat accounts, and also used the phone for some personal calls and texts. R. at 32. She further indicated that Mr. Larson used the phone to make calls and send texts for the business they had together. *Id.* Officer Nelson then obtained consent from W.M. to access the phone, and she provided the password, "4-11-5-11," which matched the numbers tattooed on Mr. Larson's neck. R. at 34. Officer Nelson found "a few inappropriate pictures of W.M. and a video of Mr. Larson rapping about pimping" on the phone. R. at 32.

Mr. Larson was indicted for sex trafficking, in violation of 18 U.S.C. § 1591(a)(1) and for illegal possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). R. at 5. At trial, Mr. Larson moved to suppress the evidence obtained from the search of his person and the search of his apartment. *Id.* The district court denied his motion, R. at 13, and Mr. Larson was convicted. R. at 15. Following his conviction, Mr. Larson appealed to the Thirteenth Circuit and that court

reversed his conviction, holding that the searches violated the Fourth Amendment. *Id.* The government then appealed and this Court granted certiorari. R. at 24.

SUMMARY OF THE ARGUMENT

This Court should affirm the Thirteenth Circuit's decision that L.O. 1923 violates the Fourth Amendment because the ordinance does not fall within the special needs exception. The essential requirement of a special needs search is that it fulfills a special purpose independent of traditional crime control. In *Ferguson v. City of Charleston*, this Court recognized that a special needs search must be effectuated in a manner independent from traditional law enforcement. Although Charleston asserted that its drug-testing program was for the protection of unborn children, it was carried out through evidence gathering and threat of criminal prosecution. Similarly, L.O. 1923 purports to protect children from human trafficking but it does so through searches to gather evidence of criminal activity. Thus, this ordinance is distinguishable from the constitutional sobriety checkpoint in *Michigan Department of State Police v. Sitz*. Unlike the goal of deterring the imminent threat of drunk driving, this ordinance merely seeks to allow officers to search for evidence of crimes without having to secure a warrant under the guise of protecting the victims. Therefore, the ordinance's purpose is indistinguishable from traditional crime control and does not advance an independent special need.

Alternatively, even if this Court accepts that the ordinance advances a special need, the searches are unreasonable under the circumstances. In *Vernonia School District 47J v. Acton*, this Court identified three factors to balance for reasonableness of special needs searches: (1) the nature of the privacy interest; (2) the nature of the government's intrusion; and (3) the nature of the special need and the efficacy of the policy. Unlike the schoolchildren in *Vernonia*, the average person does not have a reduced privacy expectation and has a fundamental privacy interest in his or her

person. Additionally, this Court has recognized in *Terry v. Ohio* that a search of a person is a severe intrusion into that privacy interest. Lastly, like in *Chandler v. Miller*, the ordinance is easy to avoid because of its limited geographic scope and is thus ineffective at meeting the state's concern. Because the severe government intrusion outweighs the ordinance's efficacy, the search is still unreasonable under the Fourth Amendment.

Turning to the second issue, the Thirteenth Circuit correctly held that the evidence obtained during the search of Mr. Larson's apartment and cell phone should be suppressed, because a reasonable officer presented with the facts of the case at the time of consent by W.M. would have known that she did not have authority to consent. A third party may validly consent to a search of another's property if the third party has joint access or control over the property to be searched. Police may rely on a third party's apparent consent to search another's premises or possessions, if the police have a reasonable, albeit erroneous, belief that the individual has authority to do so. The Government has the burden to prove that an officer had a reasonable belief that a third party had apparent authority to consent to a search.

Courts use an objective totality of the circumstances test to determine whether an officer had a reasonable belief that a third party had apparent authority to consent to a search based on the facts that the officer knew at the time of consent. In *Georgia v. Randolph*, the test for apparent authority was expanded to include taking into account widely accepted social living arrangements. If ambiguities arise during the officer's fact finding, the officer has a duty to investigate further before obtaining consent to search from a third party.

First, Officer Nelson's belief that W.M. had any authority over Mr. Larson's apartment was not reasonable based on the facts he knew at the time of W.M.'s consent to search the apartment. Ambiguities arose during Officer Nelson's discussion with W.M. about her living

situation with the Mr. Larson. Suspecting that W.M. was the victim of sex trafficking by Mr. Larson, Officer Nelson nonetheless claimed to believe that they lived together with joint access over Mr. Larson's apartment. W.M.'s statements to Officer Nelson indicated that she did not actually have joint access or control over the apartment. Officer Nelson did not attempt to probe deeper into the relationship between W.M. and Mr. Larson, despite admitting that he believed their relationship was unusual. Because Officer Nelson had knowledge of facts that would cause a reasonable person to doubt the validity of W.M.'s claimed authority over the apartment, her consent to search under the third party apparent authority doctrine was invalid.

Second, even if W.M. had authority to allow police to search the apartment, she did not have apparent authority to search Mr. Larson's cell phone. In *Riley v. California*, the Supreme Court noted that an individual has a high expectation of privacy in the contents of his cell phone, because cell phones store vast amounts of data about an individual. Courts have likened a password protected computer to a locked container in a room, which is afforded great protection against warrantless Fourth Amendment searches even when a third party had authority to consent to a search of the room where the locked container is located. Here, Officer Nelson was presented with facts demonstrating that the password protected phone belonged solely to Mr. Larson. He paid all the bills for the phone, and he closely monitored W.M.'s use of the phone. While W.M. had the password to the phone, she was generally not allowed to use it without Mr. Larson's oversight. Based on the facts presented to Officer Nelson at the time of W.M.'s consent to search the phone, he should reasonably have known that W.M. did not have joint access or control over the phone for most purposes, so she could not validly consent to a search.

Alternatively, this Court should adopt the Eighth Circuit's reasoning in *United States v. James*, and hold that the Government cannot rely on the apparent authority doctrine when Officer

Nelson was presented with evidence that W.M.'s authority over the phone was limited to checking her social media accounts and making some calls and sending some text messages. The court in *James* persuasively argued that it is inherently unreasonable for officers to rely on apparent authority to consent when they know the extent of the third party's actual authority over the object to be searched. Here, W.M. told the police that her use of the phone was limited to certain features, but the police decided to search the entire contents of the phone. Even if this Court finds that W.M. had apparent authority to access the phone, this Court should hold that it was unreasonable for Officer Nelson to expand his search of the phone beyond the files that W.M. expressly told him that she had authority to access.

STANDARD OF REVIEW

The Thirteenth Circuit decided this case by determining that the searches of Mr. Larson's person, cell phone, and apartment violated the Fourth Amendment as a matter of law. R. at 15. Questions of law are reviewed under *de novo* review without deference to the lower court's holding. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

ARGUMENT

I. THE THIRTEENTH CIRCUIT SHOULD BE AFFIRMED BECAUSE LOCAL ORDINANCE 1923 VIOLATES THE FOURTH AMENDMENT'S PROHIBITION ON UNREASONABLE SEARCHES AND SEIZURES.

Searches conducted under L.O. 1923 violate the Fourth Amendment because they are not within the special needs exemption to the warrant requirement. The Fourth Amendment requires that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. In light of the essential interest of preventing governmental overreach, a search is presumptively unreasonable

unless authorized by a judicial warrant supported by probable cause. *Katz v. United States*, 389 U.S. 347, 357 (1967). But this Court has recognized that, in narrow circumstances, a warrant is not required "where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement." *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665 (1989). When such a special need exists, it is then "necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *Id.* at 665-66.

A. Searches Under Local Ordinance 1923 Are Unconstitutional Under The Fourth Amendment Because They Serve No Special Needs Purpose Other Than Traditional Law Enforcement.

In *Ferguson v. City of Charleston*, the medical staff at a public hospital was concerned about the rates of drug use among pregnant patients. 532 U.S. 67, 70 (2001). In response, they established a policy in cooperation with law enforcement for the purpose of protecting unborn children. *Id.* at 70-71. Pregnant mothers who were likely drug users were identified and subjected to urine tests. *Id.* at 71-72. If they tested positive, they were given the opportunity to participate in substance abuse treatment or face arrest. *Id.* at 72. Otherwise, the policy had no changes in treatment for the mothers or any newborn children. *Id.* at 73. In assessing whether a special need existed, this Court found it dispositive that "the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment." *Id.* at 80. Although the city asserted the ultimate goal was separate from law enforcement, "the immediate objective of the searches was to generate evidence for *law enforcement purposes* in order to reach that goal." *Id.* at 83-84. Because law enforcement was pervasively involved in carrying out the policy, this Court held that the searches were

indistinguishable from normal law enforcement purposes and did not immediately serve a special need. *Id.* at 85-86. *But see Griffin v. Wisconsin*, 483 U.S. 868, 873-75 (1987) (holding that a warrantless search of a probationer's home satisfied the special need of supervision because the state had a comprehensive probation scheme designed to transition and rehabilitate former inmates that was distinct from law enforcement).

Similarly, this Court held in *City of Indianapolis v. Edmond* that a highway checkpoint designed to stop illegal drugs violated the Fourth Amendment. 531 U.S. 32, 36 (2000). Indianapolis operated vehicle checkpoints that stopped specific cars and inspected them for signs of impairment and drug possession if the officers had a reasonable suspicion to do so. *Id.* The avowed purpose of the checkpoints was "an effort to interdict unlawful drugs in Indianapolis." *Id.* at 41. This Court held that the checkpoints violated the Fourth Amendment because they did not serve a special need outside of the general interest in law enforcement. *Id.* at 41-42. *But see Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (holding that the state's interest in deterring drunk driving justified a sobriety checkpoint). Although the city tried to justify the checkpoints by pointing to the immediate harm caused by illegal drugs, this Court noted that "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose." *Edmond*, 531 U.S. at 42. Because the program's primary purpose was "ultimately indistinguishable from the general interest in crime control," the stops were unconstitutional. *Id.* at 48.

Ferguson is the binding precedent that controls this case. Just as the program in *Ferguson* operated through drug testing and the pervasive involvement of law enforcement, L.O. 1923 functions solely through law enforcement officers conducting standard searches for evidence of criminal activity. R. at 2-3. While the Board of Supervisors stated that they were concerned with

protecting the victims of sex trafficking, R. at 41, this Court rejected a similar concern for protecting unborn children in *Ferguson* where the program operated by gathering evidence of illegal activity. Lastly, just as this Court considered the lack of additional treatment for the pregnant mothers in *Ferguson* as evidence that the program's true motive was evidence gathering for prosecution, here, the language of the ordinance is solely concerned with searches and authorizes no additional assistance for the victims. *Id.* The Board might have intended to "allow law enforcement to . . . remov[e] [children] from dangerous situations." *id.*, but the law it passed was concerned only with warrantless searches. R. at 2-3. Therefore, because the sole operation of this ordinance is to gather evidence of criminal activity, the searches authorized under it are indistinguishable from the state's general interest in law enforcement.

By contrast, *Griffin* is distinguishable. Unlike the comprehensive statutory scheme that proved a special need existed there, here there is only a single local ordinance that contains no provisions indicating a special need other than authorizing searches. R. at 2-3. Additionally, whereas a probation officer clearly serves a dual role by guiding probationers through their rehabilitation as well as enforcing the law, the officers in this case acted solely in their traditional law enforcement role by gathering evidence of a crime and arresting a suspect. R. at 4. Because L.O. 1923 operates solely through law enforcement officers acting in their traditional role, it is unconstitutional.

Edmond is analogous to the present case as well. Just as a checkpoint designed to stop illegal drugs functioned primarily for the purpose of traditional crime control, here, the searches authorized under L.O. 1923 were to stop the crime of human trafficking. R. at 41. While the ordinance was justified by the desire to prevent the harms from human trafficking, as in *Edmond*, this end does not justify traditional crime control means. Unlike *Sitz*, where the sobriety

checkpoint accomplished the state's goal through deterring drunk driving, here, L.O. 1923 is worded to accomplish the state's goal through the traditional crime control method of evidence gathering. R. at 2-4. Thus, this case lines up with *Edmond*. Just as Indianapolis tried to accomplish its goal of preventing the harm from drug use through general evidence gathering, here, the ordinance's sole purpose is to allow police to gather evidence through warrantless searches. R. at 2-3. Because the ordinance exists to expand officers' crime control powers by allowing warrantless searches, it does not serve an independent special need and is unconstitutional.

B. Even If Local Ordinance 1923 Searches Serve A Special Needs Purpose, They Are Unconstitutional Because They Are Unreasonable Under The Fourth Amendment.

L.O. 1923 searches are unconstitutional under the Fourth Amendment because the severity of the government's intrusion outweighs its interest. A special needs search must still be reasonable to be constitutional. "This application of 'traditional standards of reasonableness' requires a court to weigh 'the promotion of legitimate governmental interests' against 'the degree to which [the search] intrudes upon an individual's privacy.'" *Maryland v. King*, 133 S. Ct. 1958, 1970 (2013) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). Specifically, this Court has considered three factors in assessing that balance: (1) "the nature of the privacy interest" intruded upon, *Vernonia School District 47J v. Acton*, 515 U.S. 646, 654 (1995); (2) "the character of the intrusion that is complained of," *id.* at 658; and (3) "the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it." *Id.* at 660.

In *Vernonia*, the school district observed a sharp increase in drug use among the students, particularly among athletes. *Id.* at 648-49. In response, the district established a drug-testing program that tested all students at the beginning of the semester and randomly tested them

throughout the year. *Id.* at 659. The tests were conducted through a urine sample given under limited supervision to preserve student's privacy and the worst punishment under the program was for testing positive on two tests and consisted of "suspension for the remainder of the current season and the next two athletic seasons." *Id.* at 650-51.

This Court upheld the program as a reasonable special needs search under the circumstances. *Id.* at 666. In assessing the nature of the student's privacy interest, the Court found it dispositive that the students were children placed in the state's custody and thus, inherently had a reduced expectation of privacy. *Id.* at 654. *But see New Jersey v. T.L.O.*, 469 U.S. 325, 337-39 (1985) (recognizing that even school children have a substantial privacy interest in their person and personal effects). Turning then to the intrusion, the Court recognized that a urine analysis could be an extreme invasion of privacy, but that "the degree of intrusion depends upon the manner" of the intrusion. *Vernonia*, 515 U.S. at 658. Here, the policy preserved student privacy while they gave the sample and the results revealed only the presence of drugs and were not shared with law enforcement. *Id.* Thus, because the intrusion was limited in both procedure and scope, "the invasion of privacy was not significant." *Id.* at 660. *But see Terry v. Ohio*, 392 U.S. 1, 17 (1968) (recognizing that a search of an individual's person is "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly."). Turning to the significance of the interest, the Court was particularly concerned with the fact that the children were placed in the government's care. *Vernonia*, 515 U.S. at 662. Lastly, while the least restrictive means were not required, the Court could not identify a workable alternative that still accomplished the government's goal. *Id.* at 663-64. Because the interests weighed in favor of reasonableness, the Court upheld the district's policy. *Id.* at 665.

By contrast, this Court struck down a special needs program designed to drug test political candidates as an unconstitutional search. *Chandler v. Miller*, 520 U.S. 305, 313 (1997). Georgia passed a law that required candidates seeking a state-wide office to certify that they had taken and passed a drug test to be placed on the ballot. *Id.* at 309. The test was done through a urine analysis and the results were delivered only to the candidate. *Id.* at 309-10. Several members of the Libertarian Party sued, alleging that the law was unconstitutional. *Id.* at 310.

This Court struck down the law, finding that it violated the Fourth Amendment. *Id.* at 313. Turning first to the scope of the privacy invasion, the urine analysis was viewed as noninvasive. *Id.* at 318. The analysis could be conducted at the office of the candidate's physician and the results were not shared with anyone other than the candidate, thus the intrusion was minimal. *Id.* Although the intrusion was minimal, it still outweighed the government's interest because Georgia failed to present "any indication of a concrete danger demanding departure from the Fourth Amendment's main rule." *Id.* at 319. *But see Von Raab*, 489 U.S. at 660 (upholding a drug testing program for Customs Service employees without evidence of drug abuse, in part, because of the unique exposure they had to drug trafficking). Thus, there was no immediate concern that made the state's interest anything more than a hypothetical. *Chandler*, 520 U.S. at 319. Lastly, the program was ineffective at combatting drug use by political candidates as there was nothing stopping them from abstaining before the test and the state failed to show why normal law enforcement means were insufficient. *Id.* at 319-20. Because the law was unreasonable in light of the circumstances, it was an unconstitutional warrantless search. *Id.* at 323.

Turning to the first factor, the nature of the privacy interest in this case is far greater than in *Vernonia*. Unlike school children being in the state's custody, L.O. 1923 applies to people, without limitation, who are checking into hotels within a three-mile radius of a stadium. R. at 2-

3. Just as this court recognized in *T.L.O.* that even children under the state's custody have a substantial privacy interest in their person, it must also recognize that the individual on the street has the same, if not greater, privacy interest. Because an individual has a substantial privacy interest in their person, this factor weighs against the reasonableness of the search.

Turning to the second factor, this case is distinguishable from *Vernonia* and *Chandler*. Unlike the limited urine analysis in those cases, L.O. 1983 authorizes an unlimited bodily search without probable cause. R. at 3. As this court recognized in *Terry*, bodily searches must be limited because of the fundamental privacy interests they implicate. Unlike the policies in *Vernonia* and *Chandler* having procedures to safeguard privacy and limit that intrusion, L.O. 1923 makes any person "subject to search" based on reasonable suspicion without further guidelines of what that search might entail or what it might be looking for. R. at 2-3. While the ordinance is limited in "scope and duration" to seeking evidence of sex trafficking, it does not define what might be relevant to that search. *Id.* Unlike the drug screening in *Vernonia* and *Chandler* revealing the presence of illegal drugs and limiting who sees the results, Mr. Larson had all his personal items exposed to law enforcement as that officer searched for evidence of sex trafficking. R. at 4. Because this intrusion violates an individual's person and can reveal the intimate details of their lives, this factor weighs against reasonableness.

Lastly, the third factor also weighs against the reasonableness of the search. It must be recognized that, like the increased drug abuse in *Vernonia*, there is evidence of immediate criminal sex trafficking in Starwood Park. R. at 40-41. But the nature and immediacy of the concern is only the beginning, a program must be effective at meeting that need to be reasonable. Like in *Chandler*, where this court recognized that the drug test was ineffective because candidates could abstain from drugs to fool the test, here, there is nothing preventing individuals engaged in sex

trafficking from taking their activities outside the range of the ordinance. L.O. 1923 is valid within a three-mile radius of Cadbury Park Stadium, R. at 2-3, thus anyone stepping a single foot outside that radius can easily avoid the searches. But even if this Court accepts the efficacy of the ordinance, it is outweighed by the severe and pervasive search it authorizes. If a bodily search of individuals in a hotel lobby can be justified by a temporary increase in crime, then this Court will be carving out abroad exception to the warrant requirement. Because the state's concern is outweighed by the severity of the intrusion into a fundamental privacy interest, this ordinance is unconstitutional.

II. THIS COURT SHOULD AFFIRM THE THIRTEENTH CIRCUIT'S DECISION TO SUPPRESS THE EVIDENCE OBTAINED THROUGH SEARCHES OF MR. LARSON'S APARTMENT AND CELL PHONE BECAUSE W.M. DID NOT POSSESS APPARENT AUTHORITY TO CONSENT TO A SEARCH OF THE APARTMENT OR CELL PHONE.

The Fourth Amendment protects "[t]he 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 ultimate touchstone of the Fourth Amendment is reasonableness," and "searches and seizures inside a home without a warrant are presumptively unreasonable." *Kentucky v. King*, 563 U.S. 452, 459 (2011). A warrant does not need to be obtained if free and voluntary consent to search the premises is obtained from the "individual whose property is searched . . . or from a third party who possesses common authority over the premises." *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). A co-occupant has "common authority" over property where there is:

> [M]utual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

United States v. Matlock, 415 U.S. 164, 171 n.7 (1974). Ultimately, "the burden of establishing that common authority rests upon the State." *Rodriguez*, 497 U.S. at 181.

A. The Government's Search of Mr. Larson's Apartment Violated the Fourth Amendment, Because the Facts Available to the Police Officer at the Time of W.M.'s Consent Did Not Reasonably Indicate That She Had Common Authority Over the Apartment.

Absent a showing of actual authority, consent may be obtained from a "co-occupant whom the police reasonably, but erroneously, believe to possess shared authority as an occupant." *Georgia v. Randolph*, 547 U.S. 103, 109 (2006). To determine whether a third party possessed "apparent authority" to validly consent to a search of another's premises, the Supreme Court established an objective standard asking whether the facts available to the office at the moment of consent would "warrant a man of reasonable caution" to believe that the consenting party had authority over the premises. *Rodriguez*, 497 U.S. at 188 (citing *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968)). Even if a person consents to a search "by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry." *Id.* If the facts do not "warrant a man of reasonable caution" to believe that authority to consent to a search exists, then "warrantless entry without further inquiry is unlawful unless authority actually exists." *Id.* at 188-89.

Courts examine the totality of the circumstances to determine whether apparent authority existed at the time of consent, including the following factors:

> (1) possession of a key to the premises; (2) a person's admission that she lives at the residence in question; (3) possession of a driver's license listing the residence as the driver's legal address; (4) receiving mail and bills at that residence; (5) keeping clothing at the residence; (6) having one's children reside at that address; (7) keeping personal belongings such as a diary or a pet at that residence; (8) performing household chores at the home; (9) being on the lease for the premises

> and/or paying rent; and (10) being allowed into the home when the owner is not present.

United States v. Groves, 530 F.3d 506, 509–10 (7th Cir. 2008). Age of the party giving consent may also be considered by a court. *United States v. Gutierrez-Hermosillo*, 142 F.3d 1225, 1231 (10th Cir. 1998) (holding that it was reasonable for police officers to believe that a fourteen-year-old had authority to allow them to enter a motel room, when she answered the door of a motel room and the officers had knowledge that she was travelling with her father.) The mere fact that a third party has access to the premises, without more, does not establish apparent authority to consent to a search. *United States v. Reid*, 226 F.3d 1020, 1025-26 (9th Cir. 2000) (holding that it was not reasonable for police to assume that an individual had authority to consent to a search of an apartment merely because the individual was alone inside the apartment and answered the door when police knocked). If the facts presented to a police officer at the time of consent are ambiguous, "he or she has a duty to investigate further before relying on the consent." *United States v. Cos*, 498 F.3d 1115, 1128 (10th Cir. 2007).

Additionally, the Supreme Court recently stated that a constant element in assessing Fourth Amendment reasonableness for consent cases "is the great significance given to widely shared social expectations" of co-inhabitants living arrangements. *Randolph*, 547 U.S. at 111. The reasonableness of a search authorized by a co-inhabitant "is in significant part a function of commonly held understanding about the authority that co-inhabitants may exercise in ways that affect each other's interests." *Id.* The Court stated that there is generally "no burden on the police to eliminate the possibility of atypical arrangements," unless the officer has "reason to doubt that the regular [living] scheme was in place." *Id.*

This case stands in stark contrast to the Tenth Circuit's decision in *Gutierrez-Hermosillo*, where law-enforcement officers reasonably believed a fourteen-year-old had authority to let the

officers search the motel room she shared with her father. Unlike in *Gutierrez-Hermosillo*, W.M. is a minor who ran away from home and is now living with an older individual who is not related to her. R. at 30. Here, the totality of the circumstances at the time of W.M.'s consent indicates that Officer Nelson did not have a reasonable belief that W.M. had authority to consent to a search of Mr. Larson's apartment. W.M. was with Mr. Larson when he was arrested for sex trafficking of a minor after officers identified W.M. as a sixteen-year-old female. R. at 4. Mr. Larson was a member of the Starwood Homeboyz street gang, a gang that Officer Nelson knew was affiliated with sex trafficking activities. R. at 28. W.M. told Officer Nelson that she lived with Mr. Larson for about a year, and that he took her in after she ran away from home and became homeless. R. at 30. Furthermore, Officer Nelson admitted that few sixteen year olds have control of their own apartment, and that the living situation was "clearly a pretty abnormal situation." R. at 34. These facts alone should have presented Officer Nelson with reason to doubt that W.M. had a normal living situation.

Additionally, W.M. notified Officer Nelson that she kept few personal belongings at the apartment, was not listed on the lease, did not pay rent, did not have her own room, and kept separate food from Mr. Larson. R. at 33. While W.M. told Officer Nelson that she received mail at the apartment, she also informed Officer Nelson that she did all the chores around the apartment, and that Mr. Larson had previously hit her when he discovered that she was communicating with a fellow student for a class project. R. at 30, 33. All of these factors indicate an abnormal living situation in which W.M. did not have joint access and control over the apartment. These facts more reasonably indicate that W.M. probably did not have the freedom to come and go from the apartment as she pleased. Officer Nelson had a duty, when faced with ambiguous facts, to instigate additional fact finding to determine the extent of W.M.'s authority over Mr. Larson's apartment.

Officer Nelson did not take additional steps to validate W.M.'s claims of authority over the apartment when faced with ambiguities in her story. Because Officer Nelson failed to pursue additional fact finding when presented with ambiguity, the Government has failed to satisfy its burden to show that W.M. possessed apparent authority to consent to a search of Mr. Larson's apartment.

B. Even If W.M. Had Apparent Authority to Consent to A Search of the Apartment, She Did Not Have Authority to Consent to a Search of All the Files on Mr. Larson's Cell Phone, Because She Did Not Have Joint Access or Control of the Phone.

"While authority to consent to search of a general area must obviously extend to most objects in plain view within the area, it cannot be thought automatically to extend to the interiors of every discrete enclosed space capable of search within the area." *United States v. Block*, 590 F.2d 535, 541-42 (4th Cir. 1978) (holding that the defendant's mother could not give actual or apparent consent to search the defendant's locked footlocker, even though it was in a common area of the home where the mother had access); s*ee also United States v. Wilson*, 536 F.2d 883, 885 (9th Cir. 1976) (holding that the owner of an apartment lacked actual or apparent authority to consent to the search of locked suitcases within her apartment that were left by visitors the night before); *Holzhey v. United States*, 223 F.2d 823, 826 (5th Cir. 1955) (holding that homeowners could not consent to the search of a locked cabinet that belonged to the appellant).

Courts have analogized password-protected computers to locked containers when analyzing third party consent to a search. *See United States v. Andrus*, 483 F.3d 711, 719 (10th Cir.), decision clarified on denial of reh'g, 499 F.3d 1162 (10th Cir. 2007) (stating that a "personal computer is often a repository for private information the computer's owner does not intend to share with others"); *Trulock v. Freeh*, 275 F.3d 391, 403 (4th Cir. 2001) (comparing password

protected files to a "locked footlocker inside [a] bedroom). Much like computers, the amount of information stored on a cell phone is immense, and "a cell phone search would typically expose to the government far more than the most exhaustive search of a house." *Riley v. California*, 134 S. Ct. 2473, 2491 (2014). "When the property to be searched is an object or container, the relevant inquiry must address the third party's relationship to the object." *Andrus*, 483 F.3d at 717. "The government must therefore come forward with persuasive evidence of both shared use and joint access or control of a container in order to support third party consent." *United States v. Salinas-Cano*, 959 F.2d 861, 864 (10th Cir. 1992) (citing *Matlock*, 415 U.S. at 171 n.7).

To determine whether a third party has apparent authority to consent to the search of a computer, courts generally look at two factors: (1) the location of the computer within the home, and (2) whether the computer is password protected. *See Andrus*, 483 F.3d at 719. In *United States v. Buckner*, 473 F.3d 551, 555 (4th Cir. 2007), the court held that a wife had apparent authority to consent to a search of the computer that she and her husband jointly used because it was not password protected, the computer was leased solely in the wife's name, the computer was located in a common area of the home, and the computer was on and active despite the husband's absence. Similarly, in *United States v. Morgan*, 435 F.3d 660, 664 (6th Cir. 2006), the court held that a wife's third party apparent consent to search a computer was valid when the computer was located in a common area to which the wife had complete access, and she indicated to the investigating officers that the computer was not password protected and she had complete access and use of the computer. In contrast, courts are unwilling to find third party authority, even for computers located in common areas, if "the third party has affirmatively disclaimed access to or control over the computer or a portion of the computer's files." *Andrus*, 483 F.3d at 720.

Unlike the above cases where a computer was located in a common area and accessible by all members of the house, here Mr. Larson's password protected cell phone was found on a nightstand in his bedroom alongside men's glasses, a man's watch, and some condoms. R. at 35. A sticker of a wizard hat with the letters "SM" was on the phone, and this sticker matched the tattoo on his arm. R. at 34. Unlike in *Buckner*, where the court weighed ownership of the searched computer in favor of finding apparent authority, here W.M. did not own or make payments on the phone. R. at 32. On the contrary, Mr. Larson made all payments on the phone, indicating that he had the right to take away use from W.M. at any time. Additionally, unlike the cases where unfettered access to computers weighed in favor of apparent authority, here Officer Nelson knew that Mr. Larson previously restricted W.M.'s access of the cell phone. R. at 31-32. While she did make some calls and send some texts, she indicated that Mr. Larson used the phone primarily to make calls and send texts "for the business they had together." R. at 32. While W.M. did possess the password to use the phone, these facts taken as a whole indicate that there was ambiguity as to whether W.M. truly had "joint access and control" over the phone.

Even if it was reasonable for Officer Nelson to believe that W.M. had apparent authority to access some features of the phone, the Eighth Circuit has held that "[i]t cannot be reasonable to rely on a certain theory of apparent authority, when the police themselves know what the consenting party's actual authority is." *United States v. James*, 353 F.3d 606, 615 (8th Cir. 2003). In *James*, the Eighth Circuit found that a third party did not have authority to consent to a search of back-up computer discs, because the law enforcement officers knew that the defendant owned the discs, and they knew that the third party's authority was strictly limited to scratching and destroying the discs. *Id.* "The standard of reasonableness is governed by what the law-enforcement officers know, not what the consenting party knows." *Id.* The court held that the

officers could not rely on the third party's apparent authority to access the discs, because the officers actually knew too much about the disc owner's desire to keep others, including the third party, from seeing the contents of the discs. *Id.*

The present case is analogous to *James*, where the law-enforcement officers knew the third party's actual authority and could not rely on apparent authority, because W.M. told the officers exactly how she used the phone. As discussed above, Officer Nelson knew that Mr. Larson owned the phone and paid the bills associated with the phone. R. at 32. While W.M. did have the password to the phone, which was identical to the tattoo on Mr. Larson's arm, W.M. told Officer Nelson that he closely monitored her use of the phone, and that she could only use certain social media accounts without first obtaining his express permission. R. at 32. W.M. claimed that she also used the phone for text messaging and phone calls, but never indicated that she used the phone to take pictures. *Id.* Based on what W.M. told Officer Nelson, the Officer should have known that Mr. Larson owned the phone and limited the authority that W.M. had over the phone to social media and monitored phone calls and text messages. Because Officer Nelson knew the extent of W.M.'s authority over the phone, the Government's argument that W.M. had apparent authority to consent to search the phone should fail.

CONCLUSION

For the foregoing reasons, William Larson respectfully requests that the Court affirm the decision of the Thirteenth Circuit and hold that:

I. The evidence gathered from the search of Mr. Larson be suppressed because L.O. 1923 does not further an interest independent from crime control, is not reasonable under the circumstances, and is thus not a valid special needs search under the Fourth Amendment.

II. The evidence obtained through the search of Mr. Larson's apartment and cell phone be suppressed because Officer Nelson's belief that W.M. had authority to consent to the searches was not reasonable based on the facts known by the officer at the time of consent.

October 21, 2016

Respectfully submitted,

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