

No. 08-31958

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**IN THE SUPREME COURT OF THE UNITED STATES**

October Term, 2008

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RUSHMORE COUNTY, CRAVEN, POLICE DEPARTMENT,

Petitioner,

v.

WILLIAM R. TRACEY,

Respondent

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

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BRIEF OF RESPONDENT

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**Team A**

## **QUESTIONS PRESENTED FOR REVIEW**

- I. Does the Fourth Amendment prohibit a police officer, acting under a reasonable suspicion, from moving aside an exterior garment of a suspect?
  
- II. Does the Due Process Clause of the Fourteenth Amendment prohibit the termination of a police officer for his participation in an extramarital affair?

**TABLE OF CONTENTS**

**QUESTIONS PRESENTED FOR REVIEW ..... i**

**TABLE OF CONTENTS ..... ii**

**TABLE OF AUTHORITIES ..... v**

**STATEMENT OF JURISDICTION..... ix**

**CONSTITUTIONAL, TREATY, STATUTORY, AND ADMINISTRATIVE LAW  
PROVISIONS..... ix**

**STATEMENT OF THE CASE..... 1**

**SUMMARY OF THE ARGUMENT ..... 3**

**ARGUMENT..... 5**

**I. The United States Court of Appeals for the Thirteenth Circuit correctly found that Officer Calloway violated Tracey’s Fourth Amendment protection from unreasonable searches and seizures when he conducted an unconstitutional search by reaching into Tracey’s jacket absent the requisite probable cause, warrant, or exception. .... 5**

**A. Officer Calloway’s mere accosting of Tracey did not implicate the Fourth Amendment until he physically prevented Tracey from ending the encounter. .... 7**

**B. Officer Calloway violated Tracey’s Fourth Amendment rights by continuing to detain Tracey after a fruitless Terry stop and frisk dispelled any reasonable articulable suspicion of wrongdoing. .... 7**

**1. Officer Calloway’s seizure of Tracey triggers Tracey’s Fourth Amendment protections because a reasonable person would not have felt free to end the encounter with the police officer. .... 7**

**2. Officer Calloway violated Tracey’s Fourth Amendment rights by conducting a Terry frisk absent articulable suspicion that Tracey was armed and dangerous and by not releasing Tracey after the frisk dispelled any articulable suspicion. .... 8**

**C. Officer Calloway conducted an unconstitutional search of Tracey by not having the requisite probable cause or warrant to reach into Tracey’s jacket. .... 10**

1. Considering the totality of the circumstances surrounding Calloway’s <u>Terry</u> frisk of Tracey, the situation did not justify a more intrusive search. ....	11
2. Officer Calloway lacked the requisite probable cause to seize the firearm, therefore, none of the Fourth Amendment warrant exceptions apply. ....	13
a. Plain View Doctrine .....	14
b. Exigent Circumstances .....	15
<b>II. The United States Court of Appeals for the Thirteenth Circuit correctly found that Police Chief Malone’s dismissal of Tracey was unconstitutional because the Due Process Clause of the Fourteenth Amendment protects consenting adults’ right to private intimate activity independent of job performance. ....</b>	<b>16</b>
<b>A. The historical development, legal traditions, and practices surrounding one’s right to private intimate activity substantiate it as a fundamental right. ....</b>	<b>18</b>
1. History shows that decisions related to one’s private intimate activities are implicit to ordered liberty.....	19
2. The United States Supreme Court’s legal traditions protect one’s right to private intimate activity. ....	22
3. Contemporary practices prohibit an officer’s dismissal for being involved in an extramarital relationship with a civilian absent a showing that it affects job performance.....	27
<b>B. Since one’s right to private intimate activity is a fundamental right, this Court must strike down the basis for Tracey’s termination because it does not survive a strict scrutiny analysis and, while inappropriate, applying a lower level of scrutiny would still find the Rushmore County Police Department’s actions unconstitutional. ....</b>	<b>33</b>
1. The Rushmore County Police Department’s termination of Tracey was unconstitutional because the regulation was neither narrowly tailored nor served a compelling governmental interest. ....	33
2. Even by not applying strict scrutiny, the Rushmore County Police Department’s termination of Tracey was unconstitutional because the degree of intrusion into Tracey’s private intimate life outweighed the governmental interest in prohibiting certain conduct.....	34
3. The Rushmore County Police Department’s termination of Tracey was unconstitutional because the regulation, as applied, bore no rational relationship to a legitimate governmental interest. ....	38

**III. Assuming this Court chooses not to address the substantive due process right, the Rushmore County Police Department’s policy authorizing Police Chief Malone’s dismissal of Tracey for “behavior unbecoming of an officer” denies Tracey of his due process rights because the regulation is unconstitutionally vague. .... 39**

**CONCLUSION ..... 40**

## TABLE OF AUTHORITIES

### United States Supreme Court Cases

<u>Adams v. Williams</u> , 407 U.S. 143 (1972).....	11, 12
<u>Arizona v. Hicks</u> , 480 U.S. 321 (1986).....	13, 14
<u>Bowers v. Hardwick</u> , 478 U.S. 186 (1986).....	26
<u>Boyce Motor Line, Inc. v. United States</u> , 342 U.S. 337 (1952).....	39
<u>Brendlin v. California</u> , 127 S. Ct. 2400 (2007).....	8
<u>Brigham City, Utah v. Stuart</u> , 547 U.S. 398 (2006).....	15
<u>Caminetti v. United States</u> , 242 U.S. 470 (1917).....	22
<u>Carey v. Population Servs. Int’l</u> , 431 U.S. 678 (1977). ....	18, 24, 26
<u>Carroll v. United States</u> , 267 U.S. 132 (1925).....	14
<u>Chavez v. Martinez</u> , 538 U.S. 760 (2003). ....	19
<u>City of N. Muskegon v. Briggs</u> , 473 U.S. 909 (1985). ....	28
<u>Cleveland Bd. of Educ. v. Loudermill</u> , 470 U.S. 532 (1985). ....	17
<u>Collins v. Harker Heights</u> , 503 U.S. 115 (1992).....	17
<u>Connally v. General Constr. Co.</u> , 296 U.S. 385 (1926). ....	39, 40
<u>District of Columbia v. Heller</u> , 128 S. Ct. 2783 (2008).....	19
<u>Eisenstadt v. Baird</u> , 405 U.S. 438 (1972). ....	18, 23, 24
<u>Florida v. Royer</u> , 460 U.S. 491 (1983). ....	7
<u>Griswold v. Connecticut</u> , 381 U.S. 479 (1965).....	18, 23
<u>Illinois v. Caballes</u> , 543 U.S. 405 (2005).....	14
<u>Johnson v. California</u> , 543 U.S. 499 (2005). ....	34
<u>Katz v. United States</u> , 389 U.S. 347 (1967).....	6

<u>Lawrence v. Texas</u> , 539 U.S. 558 (2003).	17, 26, 27, 35
<u>Loving v. Virginia</u> , 388 U.S. 1 (1967).	18, 24
<u>Mapp v. Ohio</u> , 367 U.S. 643 (1961).	6
<u>Maryland v. Buie</u> , 494 U.S. 325 (1990).	13
<u>Meyer v. Nebraska</u> , 262 U.S. 390 (1923).	18
<u>Michigan v. Long</u> , 463 U.S. 1032 (1983).	10
<u>Minnesota v. Dickerson</u> , 508 U.S. 366 (1993).	11, 14
<u>Pierce v. Soc’y of Sisters</u> , 268 U.S. 510 (1925).	18, 24
<u>Planned Parenthood of Se. Pa. v. Casey</u> , 505 U.S. 833 (1992).	18, 25, 26, 27, 36
<u>Poe v. Ulman</u> , 367 U.S. 497 (1961).	18
<u>Prince v. Massachusetts</u> , 321 U.S. 158 (1944).	24
<u>Reno v. Flores</u> , 507 U.S. 292 (1993).	18
<u>Roe v. Wade</u> , 410 U.S. 113 (1973).	23
<u>Romer v. Evans</u> , 517 U.S. 620 (1996).	33
<u>Sell v. United States</u> , 539 U.S. 166 (2003).	36
<u>Skinner v. Oklahoma ex rel. Williamson</u> , 316 U.S. 535 (1942).	18, 24
<u>Terry v. Ohio</u> , 392 U.S. 1 (1968).	3, 6, 8, 9, 10, 11
<u>Thompson v. Louisiana</u> , 469 U.S. 17 (1984).	14
<u>United States v. Banks</u> , 540 U.S. 31 (2003).	15
<u>United States v. Carolene Prods. Co.</u> , 304 U.S. 144 (1938).	33
<u>United States v. Robinson</u> , 414 U.S. 218 (1973).	14
<u>Washington v. Glucksberg</u> , 521 U.S. 702 (1997).	18, 19, 33, 38
<u>Welsh v. Wisconsin</u> , 466 U.S. 740 (1984).	15, 16

Whisenhunt v. Spradlin, 464 U.S. 965 (1983)..... 28, 29

### **United States Court of Appeals Cases**

Cook v. Gates, 528 F.3d 42 (1st Cir. 2008)..... 33, 35, 36, 37

Muth v. Frank, 412 F.3d 808 (7th Cir. 2005). .... 35

Shawgo v. Spradlin, 701 F.2d 470 (5th Cir. 1983)..... 28, 29

Sylvester v. Fogley, 465 F.3d 851 (8th Cir. 2006). .... 35

United States v. DeBerry, 76 F.3d 884 (7th Cir. 1996)..... 7

United States v. Finley, 477 F.3d 250 (5th Cir. 2007)..... 30

United States v. One Package, 86 F.2d 737 (2d Cir. 1936)..... 22

United States v. Schmidt, 403 F.3d 1009 (8th Cir. 2005)..... 16

Williams v. Att’y Gen. of Alabama, 378 F.3d 1232 (11th Cir. 2004)..... 35

### **United States District Court Cases**

Briggs v. N. Muskegon Police Dep’t, 563 F. Supp. 585 (W.D. Mich. 1983)..... 28, 30, 31, 32, 34

Doe v. Miller, 298 F. Supp. 2d 844 (S.D. Iowa 2004)..... 35

Fields v. Palmdale Sch. Dist., 271 F. Supp. 2d 1217 (C.D. Cal. 2003)..... 35

Hudson Valley Black Press v. IRS, 307 F. Supp. 2d 543 (S.D.N.Y. 2004). .... 35

Major v. Hampton, 413 F. Supp. 66 (E.D. La. 1976). .... 33, 38

Shuman v. City of Philadelphia, 470 F. Supp. 449 (E.D. Pa. 1979)..... 32, 37

United States v. Fierros-Alvarez, 547 F. Supp. 2d 1206 (D. Kan. 2008). .... 30

United States v. Mercado-Nava, 486 F. Supp. 2d 1271 (D. Kan. 2007). .... 30

United States v. Santillan, 571 F. Supp. 2d 1093 (D. Ariz. 2008)..... 16, 30

### **State Cases**

State v. Heitzmann, 632 N.W.2d 1 (N.D. 2001)..... 10, 12, 13

State v. Kearney, 443 A.2d 214 (N.J. Super. Ct. App. Div. 1982)..... 11

State v. Warren, 603 P.2d 550 (Ariz. Ct. App. 1979)..... 11

**Constitutions, Statutes, and Administrative Regulations**

10 U.S.C. § 654 (1993)..... 36

18 U.S.C. § 2421 (1986)..... 22

18 U.S.C. §§ 2421-2424 (1910)..... 22

U.S. Const. amend IV. .... 6

U.S. Const. amend XIV. .... 17

Va. Slavery Act, 1662..... 20

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## **OPINIONS AND JUDGMENTS ENTERED IN THE CASE**

The Decision and Order of the United States District Court for the District of Craven, Docket Number 05-1947, February 19, 2006, is unreported and reprinted in the record.

The Decision and Order of the United States Court of Appeals for the Thirteenth Circuit, Docket Number 06-6436, April 29, 2007, is unreported and reprinted in the record.

The Order of the Supreme Court of the United States granting petition for certiorari, Docket Number 08-31958, undated, is unreported and reprinted in the record.

## **STATEMENT OF JURISDICTION**

Pursuant to Craven Competition Rule B.3 a formal statement of jurisdiction has been omitted.

## **CONSTITUTIONAL, TREATY, STATUTORY, AND ADMINISTRATIVE LAW PROVISIONS**

The following Constitutional provisions are relevant to the determination of this case:

### **U.S. Const. amend. IV**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### **U.S. Const. amend XIV § 1**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The following federal statutory provision is relevant to the determination of this case:

**42 U.S.C. § 1983**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

Respondent, William R. Tracey, a seven-year veteran police officer working for the Rushmore County Police Department (“RCPD”), was investigating the sale of illegal firearms. (R. at 2). On June 7, 2005, Officer Tracey, while undercover, was on the north side of McDonough Square. (R. at 2). Officer Calloway, who was investigating Red Tide (“R-T”), a firearms distribution network known to conduct business in the area, approached Tracey. (R. at 2). Calloway neither knew of Tracey’s undercover operation nor that he was a police officer because they were affiliated with different precincts. (R. at 2). Calloway identified himself and asked Tracey for his name. (R. at 3). Being undercover, Tracey became visually upset before telling Calloway that his name was “Bill.” (R. at 3). As Tracey stood and began to turn away, Calloway grabbed Tracey’s wrist and spun him around, preventing him from leaving. (R. at 3). Calloway immediately began to pat down the exterior of Tracey’s clothing, noting that he was “unable to feel any object that was consistent with a weapon.” (R. at 3).

After the fruitless frisk, Tracey turned to leave and Calloway caught a glimpse of a vertical leather strap beneath Tracey’s jacket, which was allegedly “consistent with those used to carry a concealed firearm.” (R. at 3). However, Calloway could not articulate the strap’s purpose. (R. at 3). Calloway ordered Tracey to stop and turn around. (R. at 3). Tracey complied. (R. at 3). Without warning, Calloway reached towards Tracey to move aside his jacket. (R. at 3). Tracey brushed away Calloway’s hand. (R. at 3). In response, Calloway forcefully moved aside the jacket, revealing a handgun. (R. at 3).

Calloway arrested Tracey for violating Craven Statute 19-166.81. (R. at 3). Tracey explained that he was an undercover officer and that Calloway’s actions were both jeopardizing the operation and placing Tracey in great danger. (R. at 3). Calloway asked Tracey for

identification, but Tracey did not carry anything that tied him to law enforcement while working undercover. (R. at 3). Not believing Tracey, Calloway took him to the Charlestown precinct. (R. at 3).

Once at the precinct, Calloway seized Tracey's cell phone and, without a warrant, opened the cell phone to inspect the contacts. (R. at 3). Bypassing the names of known R-T officials, Calloway discovered the contact information for Jacqueline Malone, Police Chief Patrick Malone's daughter, in the contact list. (R. at 3). Calloway called Ms. Malone and she spontaneously disclosed that Tracey was an undercover officer with whom she was having an affair. (R. at 4). Calloway then contacted Tracey's precinct to apologize for the arrest. (R. at 4). He also disclosed what he learned about Tracey's relationship with Ms. Malone. (R. at 4). Calloway discovered that Tracey's handgun was a police-issued firearm that he was authorized to carry. (R. at 4). Calloway then apologized to Tracey and immediately released him. (R. at 4).

The next day, Police Chief Malone fired Tracey for "behavior unbecoming of an officer," basing his decision on Tracey's "involvement in an extra martial affair in violation of the state's adultery statute." (R. at 4). Although still married, Tracey and his wife had been separated for eighteen months and she recently served him with divorce papers. (R. at 4). Tracey never met with Ms. Malone while on duty nor was he "in the course of performing any of his duties as an undercover officer." (R. at 4).

Tracey brought a 42 U.S.C. § 1983 action in the United States District Court for the District of Craven against the RCPD for violating his Fourth Amendment and Fourteenth Amendment rights. (R. at 2). The RCPD filed a motion for summary judgment. (R. at 2). The district court granted the RCPD's motion, finding that the seizure was constitutional under Terry v. Ohio, 392 U.S. 1 (1968), and, since there was no fundamental right to sexual privacy, the

RCPD's policy was rationally related to a legitimate purpose. (R. at 6-7). On appeal, the United States Court of Appeals for the Thirteenth Circuit reversed, finding that absent probable cause Calloway's search violated the Fourth Amendment and that the Due Process Clause of the Fourteenth Amendment protects one's right to private sexual conduct. (R. at 11). The RCPD filed a petition for writ of certiorari, which the Supreme Court of the United States granted. (R. at 13).

### **SUMMARY OF THE ARGUMENT**

The United States Court of Appeals for the Thirteenth Circuit correctly held that Officer Calloway illegally searched Tracey, therefore, violating Tracey's Fourth Amendment protections. Tracey enjoyed a reasonable expectation of privacy in his jacket's interior. First, Tracey exhibited an actual expectation of privacy by concealing the firearm and limiting others' access to it. Second, given the surrounding circumstances, society would find this expectation of privacy reasonable. Terry v. Ohio, 392 U.S. 1 (1968), held that a police officer may conduct a limited pat down of a suspect's clothing if the officer had a reasonable belief, supported by articulable facts, that the suspect was armed and dangerous. After Calloway conducted a fruitless pat down of Tracey's outer clothing, which dispelled any reasonable suspicion that Tracey was armed and dangerous, Calloway was constitutionally bound to release Tracey.

The United States District Court for the District of Craven incorrectly applied a standard that allows an officer to conduct a more intrusive Terry frisk if the suspect is dangerous and noncompliant. Calloway could not go beyond the traditional bounds of a Terry frisk because Tracey complied with his demands and the pat down failed to confirm that Tracey was armed. The Thirteenth Circuit correctly held that Calloway exceeded the permissible bounds of a Terry frisk when he moved aside the left exterior portion of Tracey's jacket.

Absent the limited circumstances that justify a more intrusive Terry frisk, an officer must have probable cause and a warrant or warrant exception to search the interior of a suspect's clothing. As evidenced by his fruitless pat down and inability to articulate a specific purpose for the leather strap, Calloway lacked the requisite probable cause to obtain a warrant or use a potential warrant exception to enter Tracey's jacket. Therefore, the search of Tracey's jacket and seizure of his department-issued firearm violated Tracey's Fourth Amendment protections.

The Due Process Clause of the Fourteenth Amendment guarantees consenting adults the fundamental right to engage in private intimate activities that do not affect their job performance. Accordingly, the United States Court of Appeals for the Thirteenth Circuit correctly held that the RCPD unconstitutionally terminated Tracey for his involvement in an extramarital affair.

This Court has never expressly held whether consenting adults have a fundamental right to engage in private intimate activities. Turning to America's history, society has moved from the oppressive pre-colonial laws that dictated intimacy choices to a cultural understanding that embraces one's liberty interest regarding intimate decisions. Equally relevant, this Court's legal traditions recognize one's control over his or her personal decisions as being essential to the concepts of ordered liberty. Finally, practices surrounding personal choices of association, intimacy, and the effect on the workplace show that a governmental employer may only dismiss its employees if their private intimate conduct directly affects job performance. Therefore, based on history, legal traditions, and practices, one has a fundamental right to engage in private intimate activities.

Any governmental action infringing upon one's fundamental right to engage in private intimate activities must satisfy strict scrutiny. The RCPD's dismissal of Tracey for "conduct unbecoming of an officer" fails to satisfy strict scrutiny because the regulation was not narrowly

tailored to serve a compelling government interest. While the intermediate court came to the correct conclusion, it should have resolved the issue using strict scrutiny.

Should this Court choose to depart from the established standard of review for fundamental rights, the RCPD's dismissal of Tracey is still unconstitutional because it fails to satisfy an alternative level of scrutiny, something more demanding than rational basis review but less than strict scrutiny. The degree of intrusion into Tracey's private sexual life by the RCPD outweighed the governmental interest to control certain officer conduct because it relied on behavior wholly independent of, and isolated from, the workplace.

Assuming this Court chooses to contravene sound precedent that protects fundamental rights, the RCPD's conduct is unconstitutional under rational basis review. There is no legitimate governmental interest in regulating the private conduct of its employees. Therefore, absent some connection to Tracey's on-the-job performance his termination bares no rational relation to a legitimate governmental interest. Having failed to survive any level of judicial scrutiny, this Court must affirm the Thirteenth Circuit's decision.

If this Court chooses not to address the substantive due process right, it should strike down the RCPD regulation as being unconstitutionally vague. A law is void for vagueness if persons of common intelligence have to guess as to its meaning and will come to different conclusions as to its application. The RCPD's policy that dismisses its employees for "conduct unbecoming of an officer" is unconstitutionally vague because it fails to enumerate what conduct is barred or permissible.

## **ARGUMENT**

- I. The United States Court of Appeals for the Thirteenth Circuit correctly found that Officer Calloway violated Tracey's Fourth Amendment protection from unreasonable searches and seizures when he conducted an unconstitutional search by reaching into Tracey's jacket absent the requisite probable cause, warrant, or exception.**

The Fourth Amendment of the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend IV. An officer's search of an individual's person requires a warrant, issued by a neutral magistrate, based on probable cause. Id.; see also Mapp v. Ohio, 367 U.S. 643 (1961). Modern jurisprudence holds that the Fourth Amendment protects people, not places. Katz v. United States, 389 U.S. 347, 351 (1967). "No right is held more sacred, or more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Terry v. Ohio, 392 U.S. 1, 9 (1968) (citing Union P. R. Co. v. Botsford, 141 U.S. 250, 251 (1891)). When an agent of the public intrudes upon the personal security of another, the Fourth Amendment affords the individual protections against unlawful searches and seizures. Id. at 19 n.15 (citing Brinegar v. United States, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting)).

There must be a reasonable expectation of privacy to trigger Fourth Amendment protections. See Katz, 389 U.S. 347 (Harlan, J., concurring). To show a reasonable expectation of privacy, (1) the person must have "exhibited an actual (subjective) expectation of privacy," and (2) the expectation must be one that "society is prepared to recognize as 'reasonable.'" Id. Tracey's act of concealing the firearm beneath his jacket and efforts to prevent Calloway from revealing it, demonstrate his subjective expectation of privacy. See (R. at 2-3). Additionally, society would find this subjective expectation reasonable because the concealed interior of clothing encompasses a very personal and private space.

**A. Officer Calloway’s mere accosting of Tracey did not implicate the Fourth Amendment until he physically prevented Tracey from ending the encounter.**

An officer’s actions do not implicate the Fourth Amendment when the officer merely approaches an “individual on the street or in another public place [and asks] him if he is willing to answer some questions.” Florida v. Royer, 460 U.S. 491, 497 (1983). The mere accosting of an individual by a police officer is not a seizure within the meaning of the Fourth Amendment because the officer “does not have to have *any* degree of reasonable suspicion in order to accost a person.” United States v. DeBerry, 76 F.3d 884, 885-86 (7th Cir. 1996). However, the approached person does not have to answer any of the officer’s questions and is free to leave. Royer, 460 U.S. at 497-98.

In the instant case, Calloway approached Tracey, who was seated on a park bench, identified himself as a police officer, and asked Tracey for his name. (R. at 2-3). Tracey, after responding to Calloway’s question, stood up and turned away. (R. at 3). Up to this point, Calloway merely accosted Tracey, therefore, not implicating the Fourth Amendment. However, the mere accosting ended the moment Calloway grabbed Tracey’s left wrist.

**B. Officer Calloway violated Tracey’s Fourth Amendment rights by continuing to detain Tracey after a fruitless Terry stop and frisk dispelled any reasonable articulable suspicion of wrongdoing.**

**1. Officer Calloway’s seizure of Tracey triggers Tracey’s Fourth Amendment protections because a reasonable person would not have felt free to end the encounter with the police officer.**

Within the context of the Fourth Amendment, a seizure of the person occurs “whenever a police officer accosts an individual and restrains his freedom to walk away.” Terry, 392 U.S. at 16. The Supreme Court stated that “[a] person is seized and thus entitled to challenge the government’s action under the Fourth Amendment when the officer, ‘by means of physical force or show of authority’ terminates his freedom of movement.” Brendlin v. California, 127 S. Ct.

2400, 2405 (2007). The seizure does not have to escalate to a full blown arrest to implicate the Fourth Amendment. Terry, 392 U.S. at 10. A seizure does not occur until the individual being seized actually submits to the seizure. Brendlin, 127 S. Ct. at 2405 (citing California v. Hodari D., 499 U.S. 621, 626 (1991)). If it is ambiguous as to whether an officer attempted to seize an individual, considering the totality of the circumstances, the fact finder must determine whether “a reasonable person would have believed that he was not free to leave.” Id. (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)).

In the instant case, Tracey was turning to leave when Calloway exerted physical force by grabbing Tracey’s left wrist to prevent him from leaving. (R. at 3). By not leaving, Tracey actually submitted to the seizure. The exertion of physical force by Calloway and Tracey’s acquiescence to the seizure satisfies the standards set forth in Brendlin. Assuming that Calloway’s actions were ambiguous as to whether he was attempting to restrain Tracey, looking at the totality of the circumstances, a reasonable person would not have felt free to leave. Tracey, after responding to Calloway’s initial questioning, “stood and began to turn away.” (R. at 3). Calloway grabbed Tracey’s left wrist, forcefully spun him around, and then immediately frisked his outer clothing. (R. at 3). A reasonable person would not believe that he or she was free to leave when manhandled in such a manner by a police officer. At this moment, the Fourth Amendment protected Tracey from unreasonable searches and seizures.

**2. Officer Calloway violated Tracey’s Fourth Amendment rights by conducting a Terry frisk absent articulable suspicion that Tracey was armed and dangerous and by not releasing Tracey after the frisk dispelled any articulable suspicion.**

To be a constitutional stop, the police officer must be “able to point to specific and articulable facts which taken together with rational inferences from those facts, reasonably warrant that intrusion.” Terry, 392 U.S. at 21. In Terry v. Ohio, Officer McFadden, while

patrolling as a plain-clothed officer, noticed two men, Terry and Chilton, standing on a street corner. Id. at 4-5. Officer McFadden observed these men take turns to repeatedly walk down the street to “case out” a storefront window. Id. at 5-6. Having thirty-years of experience patrolling the area, Officer McFadden became thoroughly suspicious that the two men were planning a “stick-up” and feared that they may be armed. Id. at 6. The officer approached the two men, who were now accompanied by a third suspect, and asked them to identify themselves. Id. at 6-7. After a mumbled response, Officer McFadden grabbed Terry “spun him around . . . and patted down the outside of his clothing. In the left breast pocket of Terry’s overcoat Officer McFadden felt a pistol.” Id. at 7. McFadden then proceeded to pat down the other suspects’ outer clothing, finding an additional firearm. Id. Officer McFadden arrested Terry and Chilton for carrying concealed weapons. Id. Terry challenged the constitutionality of the search but the Supreme Court upheld Terry’s conviction. Id. at 8. According to Terry, an officer may stop and, given appropriate circumstances, frisk a suspect to confirm or dispel suspicion of wrongdoing. Id.

Terry noted that patting down the exterior of a suspect’s clothing 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.” Id. at 17. However, the purpose of this search is not to further a criminal investigation. Id. at 23. In searching the outer clothing of a suspect for a weapon, there is an “immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.” Id. The search must be “limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a full search, even though it remains a serious intrusion.” Id. at 26.

Before frisking an individual, a police officer must possess a “reasonable belief based on ‘specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant’ the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.” Michigan v. Long, 463 U.S. 1032, 1049 (1983) (quoting Terry, 392 U.S. at 21). The test for whether the officer has a reasonable belief to frisk a suspect is based on “whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of the others is in danger.” State v. Heitzmann, 632 N.W.2d 1, 7 (N.D. 2001) (citing Beck v. Ohio, 379 U.S. 89, 91 (1964)).

After grabbing Tracey’s wrist, Calloway immediately began patting down Tracey’s outer clothing to determine whether Tracey was armed. (R. at 3). While Calloway arguably had grounds to perform a Terry stop, the record is silent as to whether Calloway could articulate specific facts that would lead him to believe that Tracey possessed a firearm. Therefore, Calloway lacked the constitutional authority to frisk Tracey. Assuming he had articulable suspicion that Tracey was armed, the subsequent frisk and failure to feel a weapon would have dispelled this suspicion. Any further action violates Tracey’s Fourth Amendment protections.

**C. Officer Calloway conducted an unconstitutional search of Tracey by not having the requisite probable cause or warrant to reach into Tracey’s jacket.**

In Terry, this Court carved out a narrow exception for probable cause, which allowed a frisk limited to patting the exterior of a suspect’s clothing to confirm or dispel a reasonable articulable suspicion that the suspect is armed and dangerous. Terry, 392 U.S. at 21. For the seizure of Tracey’s firearm to be an extension of the original Terry frisk, Calloway had to have felt what he suspected to be a weapon. This would have elevated his reasonable articulable suspicion to the requisite probable cause for the seizure. See Terry, 392 U.S. 1 (officer lawfully conducted a more intrusive search after feeling an object immediately identifiable as a pistol

while patting down a suspect's outer clothing). But see Minnesota v. Dickerson, 508 U.S. 366 (1993) (officer unlawfully conducted a more intrusive search by manipulating and squeezing an object in a suspect's pocket after the officer was unable to immediately identify the contraband during the limited pat down). Therefore, the Fourth Amendment barred Calloway from intruding into Tracey's jacket.

**1. Considering the totality of the circumstances surrounding Calloway's Terry frisk of Tracey, the situation did not justify a more intrusive search.**

Courts have recognized instances in which Terry allows a more intrusive search. See, e.g., Adams v. Williams, 407 U.S. 143 (1972); State v. Warren, 603 P.2d 550, 552 (Ariz. Ct. App. 1979); State v. Kearney, 443 A.2d 214, 216 (N.J. Super. Ct. App. Div. 1982). In Adams v. Williams, the Supreme Court held that an officer acted reasonably when he pulled a handgun from the waistband of an uncooperative suspect. 407 U.S. 143. After receiving a tip from a reliable informant that Williams had a handgun in his waistband, Officer Connolly approached Williams' car and asked him to open the car door. Id. at 144-45. Williams did not comply with the request. Id. at 145. Connolly, while not being able to see the handgun, reached into the car and pulled the handgun from Williams' waistband, the precise location specified by the informant. Id.

One may distinguish the instant case from Adams on several points. First, the officer in Adams had reliable information that Williams was armed, and he also knew the precise location of the handgun. Id. Here, while Calloway may have had some general knowledge stemming from an eight-month investigation related to the park, he did not have any specific information that Tracey was armed. (R. at 2-3). Second, the suspect in Adams was uncooperative by disregarding the officer's direct order to open the car door. Adams, 407 U.S. at 145. This is not the case with regard to Tracey. When Calloway gave Tracey specific orders, Tracey complied.

(R. at 3). It was unreasonable for Calloway to reach into Tracey's jacket seeing how Tracey followed his orders. Finally, the seizure of the firearm in Adams stemmed from the officer's first encounter with Williams. Adams, 407 U.S. at 145. Calloway conducted an unconstitutional search of Tracey after an unfruitful Terry stop and frisk. This creates a materially distinct scenario from Adams, where an intrusive Terry stop and frisk stemmed from a recalcitrant first encounter.

The district court incorrectly justified a more intrusive Terry search by applying the Supreme Court of North Dakota's decision in State v. Heitzmann, 632 N.W.2d 1 (N.D. 2001). (R. at 5-6). The facts in that scenario are distinguishable from the instant case. In Heitzmann, the defendant, who was on probation, was a passenger in the truck of a friend lawfully arrested for driving without a license. 632 N.W.2d at 4. A deputy told the sole arresting officer that the defendant had recently received a drug shipment and warned the officer to "be cautious." Id. at 4-5. The officer told the noticeably nervous defendant that he would conduct a protective frisk of the defendant for both of their safety. Id. at 5. The officer felt many items through the defendant's clothing but could not ascertain their nature. Id. He asked the defendant to empty his pockets and, after doing so, the defendant began walking toward the back of the truck. Id. Having been notified by the driver that a pistol was in the back of the truck, the officer grabbed the defendant, continued the frisk, and reached into the defendant's pockets. Id. at 4-5. The defendant then broke free from the officer and began to flee. Id. at 5. The court held that the officer's search and seizure was reasonable because the suspect was known to be dangerous and, during the frisk, was uncooperative and evasive. Id. at 11. Therefore, a Heitzmann scenario applies when there is a dangerous suspect who "attempts to prevent an officer from performing an effective pat-down." Id. at 9.

The facts surrounding the instant case fail to justify Calloway having the authority to conduct a more intrusive Terry search. First, Calloway did not have actual knowledge of whether Tracey posed a danger. While Calloway was suspicious of Tracey's behavior and the purpose behind the leather strap under his jacket, the record is silent as to whether Calloway had actual knowledge of any threat stemming from Tracey. Second, Tracey was neither uncooperative nor evasive during the protective frisk. Even though Tracey acted somewhat obstinately to preserve the integrity of his undercover investigation, he complied with each of Calloway's requests, ultimately allowing him to complete a pat down. See (R. at 2-3). Finally, Heitzmann narrowly applies to the facts stemming from the period of time when an officer conducts a pat down. Therefore, the lower court erred in applying Heitzmann to Tracey brushing away Calloway's hand. (R. at 5-6). This fact is irrelevant to a Heitzmann-type scenario because it occurred after Calloway concluded the Terry frisk. See Heitzmann, 632 N.W.2d at 9 (An officer may perform a more intrusive search when faced "with threatening conduct by a suspect *during* a Terry frisk." (emphasis added)).

**2. Officer Calloway lacked the requisite probable cause to seize the firearm, therefore, none of the Fourth Amendment warrant exceptions apply.**

While the Fourth Amendment requires an officer to obtain a warrant before conducting a search, there are exceptions to this general rule. See Maryland v. Buie, 494 U.S. 325 (1990) (exigent circumstances); Arizona v. Hicks, 480 U.S. 321 (1986) (plain view doctrine); United States v. Robinson, 414 U.S. 218 (1973) (search incident to lawful arrest); Carroll v. United States, 267 U.S. 132 (1925) (automobile exception). Absent a warrant, "for the search to be valid, it must fall within one of the narrow and specifically delineated exceptions to the warrant requirement." Thompson v. Louisiana, 469 U.S. 17 (1984). Calloway's seizure of Tracey's firearm is not supported by any warrant exception.

### **a. Plain View Doctrine**

An officer seizing an item in plain view does not implicate the Fourth Amendment because there is no reasonable expectation of privacy. Illinois v. Caballes, 543 U.S. 405, 416 n.6 (2005). According to the plain view doctrine, “if the police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant.” Dickerson, 508 U.S. at 375. An officer still needs probable cause to make a constitutional seizure under the plain view doctrine. See Hicks, 480 U.S. 321.

In Arizona v. Hicks, officers lawfully entered an apartment to investigate the discharge of a firearm. Id. at 323. While searching “the squalid and otherwise ill-appointed” apartment, the officers saw two sets of expensive stereo equipment. Id. Suspecting the equipment stolen, an officer moved the stereo components to reveal the serial numbers and reported the numbers to his headquarters. Id. The officer seized the equipment upon learning that they were acquired during an armed robbery. Id. at 323-24. The Supreme Court held that moving the equipment constituted an unreasonable search that could not be cured by the plain view doctrine because the officer could not observe the serial numbers from a lawful vantage point. Id. at 325-27.

Arizona v. Hicks is analogous to the instant case. After Calloway conducted a Terry frisk and found no weapons, he noticed from a lawful vantage point that Tracey was wearing a leather strap. (R. at 9). Calloway indicated that he was unsure of the strap’s purpose. (R. at 3). In spite of this, Calloway asked Tracey to stop, turn around, and Tracey complied. (R. at 3). “Calloway reached towards [Tracey] to move aside the left exterior portion of [his] jacket, in order to get a better view of the strap.” (R. at 3). When Tracey objected to this intrusion, Calloway responded by forcefully reaching out and moving the left exterior portion of Tracey’s jacket, revealing

Tracey's police issued firearm. (R. at 3). The strap's incriminating character was not immediately apparent and, by his own admission, Calloway was unsure as to its purpose. (R. at 3). Much like Hicks, by not being able to see the firearm from a lawful vantage point, Calloway's act of moving Tracey's jacket was unreasonable and could not be cured by the plain view doctrine.

Additionally, the subsequent search of the clothing's interior was without probable cause. Calloway had already performed a Terry frisk, the purpose of which is to confirm or dispel an officer's reasonable articulable suspicion that a suspect is armed and dangerous, and found nothing. By not discovering the firearm, Calloway's reasonable articulable suspicion never elevated to the level of probable cause. Much like in Hicks, any movement of an object — in this case Tracey's jacket — is unreasonable absent the requisite probable cause.

#### **b. Exigent Circumstances**

The United States Supreme Court has held that an officer may conduct a warrantless search when there is probable cause and an exigent circumstance. Welsh v. Wisconsin, 466 U.S. 740, 746 (1984). Much of this law applies to the warrantless search of a person's home. See, e.g., Brigham City, Utah v. Stuart, 547 U.S. 398 (2006) (officers allowed to enter a home to provide emergency assistance to the occupants); United States v. Banks, 540 U.S. 31 (2003) (officers allowed to enter home without performing a knock-and-announce to prevent the destruction of evidence). However, lower courts have recognized the application of this doctrine to events outside of the home. See United States v. Santillan, 571 F. Supp. 2d 1093 (D. Ariz. 2008) (exigent circumstances justified officers accessing defendant's cell phone and incoming and outgoing calls). "Exigent circumstances are 'those circumstances that would cause a reasonable person to believe that entry . . . was necessary to prevent physical harm to the officers

or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.’ ” Santillan, 571 F. Supp. 2d at 1103 (quoting United States v. Brooks, 367 F.3d 1128, 1135 (9th Cir. 2004)). To conduct a warrantless search under exigent circumstances, an officer must have probable cause that the suspect is committing, or has evidence of, a crime. United States v. Schmidt, 403 F.3d 1009, 1013 (8th Cir. 2005). The police carry a heavy burden to show the reasonableness as to whether the exigent circumstances obviated the Fourth Amendment warrant requirement. Welsh, 466 U.S. at 749-50.

For exigent circumstances to apply in the instant case, Calloway had to support the warrantless search with probable cause that Tracey was concealing a weapon in his jacket. Prior to the search, Calloway had no knowledge that Tracey was armed and Tracey did not fit the profile of Calloway’s suspected R-T official. (R. at 2-3). Calloway not only lacked the requisite probable cause, he dispelled any reasonable suspicion that Tracey was armed after conducting the fruitless Terry frisk. (R. at 3). The only new piece of information Calloway obtained in the interim was a glimpse of a vertical leather strap inside Tracey’s jacket of which Calloway could not definitively articulate a purpose. (R. at 3). Having dispelled his reasonable articulable suspicion that Tracey was armed and dangerous through the Terry frisk and by not knowing the purpose of the vertical strap, Calloway lacked the requisite probable cause to justify moving aside Tracey’s exterior garment as an exigent circumstance.

**II. The United States Court of Appeals for the Thirteenth Circuit correctly found that Police Chief Malone’s dismissal of Tracey was unconstitutional because the Due Process Clause of the Fourteenth Amendment protects consenting adults’ right to private intimate activity independent of job performance.**

The Fourteenth Amendment of the United States Constitution states, in relevant part,

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend XIV (emphasis added). The Fourteenth Amendment's Due Process Clause protects individuals from governmental infringement upon one's procedural or substantive rights. Procedural due process demands that an individual receives notice and a hearing before the government deprives him or her of a life, liberty, or property interest. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (citing Boddie v. Connecticut, 401 U.S. 371, 379 (1971)). Substantive due process "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement.'" Collins v. Harker Heights, 503 U.S. 115 (1992) (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)). As Justice Kennedy stated in Lawrence v. Texas:

Liberty protects the person from unwarranted government intrusion into a dwelling or other private places . . . And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence . . . Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate control.

Lawrence v. Texas, 539 U.S. 558, 563 (2003). The instant case involves one of the most intimate liberty interests private citizens enjoy, one's right to private intimate activity, which must be protected as a fundamental right by the Fourteenth Amendment against substantive due process violations.

Applying substantive due process, this Court recognized certain rights and liberty interests as fundamental, requiring heightened protection against governmental interference. Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (citing Reno v. Flores, 507 U.S. 292, 301-02 (1986)); see Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (right to have an abortion); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) (right to give contraception to

people under 16 years of age); Eisenstadt v. Baird, 405 U.S. 438 (1972) (right to use contraception); Loving v. Virginia, 388 U.S. 1 (1967) (right to marry); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to marital privacy); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) (right to have children); Pierce v. Soc’y of Sisters, 268 U.S. 510 (1925) (right to select private education for one’s child); Meyer v. Nebraska, 262 U.S. 390 (1923) (right to make decisions regarding how one raises his or her child). Substantive due process “forbids the government to infringe certain ‘fundamental’ liberty interests *at all* . . . unless the infringement is narrowly tailored to serve a compelling state interest.” Flores, 507 U.S. at 302.

As Justice Harlan stated in his dissent in Poe v. Ulman, “[e]ach new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed.” 367 U.S. 497, 544 (1961) (Harlan, J., dissenting). With this Court’s subsequent adoption of Justice Harlan’s substantive due process analysis, it is this Court’s duty to interpret the Constitution and its protections when presented with a substantive due process matter. Casey, 505 U.S. at 848-50; see Griswold, 381 U.S. 479. First, there must be a “ ‘careful description’ of the asserted fundamental liberty interest.” Glucksberg, 521 U.S. at 720-21 (citing Flores, 507 U.S. at 302). The asserted fundamental right in this case is the right of consenting adults to engage in private intimate activities that do not affect their job performance. Second, the asserted liberty interest must be “ ‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if they were sacrificed.’ ” Id. To satisfy these standards, one should turn to our Nation’s history, legal traditions, and practices as “guideposts for responsible decisionmaking.” Id. at 721.

**A. The historical development, legal traditions, and practices surrounding one’s right to private intimate activity substantiate it as a fundamental right.**

**1. History shows that decisions related to one’s private intimate activities are implicit to ordered liberty.**

In assessing whether a liberty interest is implicit to ordered liberty, one must show that it is deeply rooted in this Nation’s history. See Chavez v. Martinez, 538 U.S. 760, 775 (2003). This requires one to look at the complete history of the asserted right. Oliver Wendell Holmes stated that “the law embodies the story of a nation’s development through many centuries. . . . In order to know what it is, we must know what it has been, and what it tends to become.” Oliver Wendell Holmes, Jr., The Common Law 1 (Little, Brown, and Co. Boston 1881). Even when interpreting a fundamental right frozen in time, Justices rely on a complete history to take a more protracted view of the issue. See, e.g., District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (Scalia’s “Originalist” opinion interpreted a fundamental right using historical support ranging from colonial customs to modern-day practices). Turning to the liberty interest in the case at bar, as society evolved to ensure the rights possessed by all citizens, private intimate rights broke free from society’s arbitrary oppression of one’s choice of association and conduct.

Before the founding of the United States, the colonies implemented laws that substantially infringed upon citizens’ rights to engage in private intimate activities. For example, Puritan society made adultery a capital offense. See John Winthrop, The History of New England 1630 to 1649 162-63 (1908) (a 1644 eyewitness account describing the trial and execution of a man and woman who committed adultery). The Virginia Slavery Act of 1662 created another limitation on private choice by criminalizing sexual relationships with African Americans and making any child born in Virginia to “be held bond or free only according to the condition of the mother.” Va. Slavery Act, 1662. Colonial-era Protestants condoned marital intimacy and outlawed fornication, adultery, and sodomy. John D’Emilio & Estelle B.

Freedman, Intimate Matters: A History of Sexuality in America 13 (1988). Being rooted in a religious purpose with the intent to control morality, these types of laws imposed a duty on family members and neighbors to help the community regulate sexuality. Id. at 29. This serves as a high watermark in society's intrusion into one's right to private intimate activities.

At the time of the Constitution's drafting, with issues like property and separation of church and state piquing the public's interest, matters of private sexuality became an issue for the family. Id. at 66-67. However, citizens were far from freely exercising their right to engage in private intimate activities. Having adopted the British common law, the states recognized that upon marriage, the husband and wife became "one person in law," meaning the "legal existence of the woman [was] suspended during the marriage." William Blackstone, Commentaries on the Laws of England 625 (William Care Jones ed., Bancroft-Whitney Co. 1915). The wife could not own property, nor could she bring a lawsuit in her name. Id. at 625-29. Laws, such as adultery, while still seen as crimes against society, played a larger role in private causes of action, resulting in a sharp decline in the prosecution of "moral offenses." D'Emilio & Freedman, supra, at 38.

Drafters of the Fourteenth Amendment acknowledged that the "entire extent and precise nature" of the rights protected by the Constitution have yet to be defined. Cong. Globe, 39th Cong., 1st Sess. 2764 (May 23, 1866) (Sen. Jacob Howard). Senator Howard affirmed that Fourteenth Amendment protections extended to all United States citizens and implicated at least the first eight amendments. Id. However, Senator Howard found "all United States citizens" to mean a limited group of people. He stated that, "[James] Madison was old enough and wise enough to take it for granted there was such a thing as the law of nature which has a certain

influence even in political affairs, and that by that law women . . . are not regarded as the equals of men.” Id.

Yet at this same period, while lawmakers openly advocated inequality, movements in this Nation began to demand female autonomy, including the rights of suffrage, of property ownership, and to make private sexual decisions. Of these advocates, Victoria Claflin Woodhull, a successful Wall Street broker and alleged first female presidential candidate, in 1876, advocated the concept of free-love. Victoria Claflin Woodhull & Tennessee C. Claflin, The Human Body the Temple of God 552 (London 1890). This was not in the sense of promiscuity; rather, it meant that an individual woman and man should have control over their own decisions regarding intimate relations. Id. Her lectures challenged women’s servitude in marriage and advocated overcoming society’s ignorance — and embarrassment — surrounding intimate relationships through “discussion, virtuous habits, education, and intelligence.” Id. at 454.

As advocates for one’s individual right to make private intimate decisions grounded their argument in the concepts of ordered liberty, legislatures passed laws that were the frozen representation of antiquated social mores, ignorant of society’s growing demand for an individual’s right to private intimate activity. For example, the Comstock Act of 1873 was a federal statute banning the importation of all forms of contraceptives. Richard A. Posner, Sex and Reason 78 (Harvard University Press 1992). However, sixty years after its adoption, the Second Circuit held that the law did not prohibit a physician from importing contraceptives for her practice. Id. at 78-79; see United States v. One Package, 86 F.2d 737 (2d Cir. 1936). In his concurring opinion, Learned Hand, while believing it is a legislative matter for the people to decide, acknowledged that many people had changed their minds and accepted the use of contraceptives. One Package, 86 F.2d at 740.

There are situations where the government has the authority to regulate certain spheres of sexual conduct. For example, the White Slave Traffic Act of 1910, later called the Mann Act, criminalized the transport of women across state borders for “immoral purposes.” 18 U.S.C. §§ 2421-2424 (1910). While the law regulated conduct related to sexual activity, its purpose was to target “commercial vices” and what the Court found to be the non-consensual transportation of women across state lines to become another’s concubine. Caminetti v. United States, 242 U.S. 470 (1917). Looking at the historical context of Caminetti, Judge Posner noted that the Supreme Court handed down this decision long after most states stopped taking “criminal laws against adultery and fornication . . . seriously.” Posner, supra, at 79.

At the beginning of the twentieth-century, against the backdrop of World War I, relevant technical and social changes affirmed one’s right to private intimate activity. See id. at 54. These changes included improved access to effective contraceptives, a decline in religious authority, a decrease in infant mortality, and an interest in having a smaller family. Id. Women were liberated “from a life of continual pregnancy and from the submissiveness to male authority.” Id. at 55. These trends, along with the diverse cultures comprising the United States, establish a society untroubled by premarital sex, the use of birth control, sexual pleasure, cohabitation, and divorce. Id. at 62. By understanding America’s transformation from an oppressive pre-colonial society to its modern-day acceptance of sexual freedom, one finds that history substantiates the right of consenting adults to engage in private intimate activities.

## **2. The United States Supreme Court’s legal traditions protect one’s right to private intimate activity.**

The nature of the case at bar warrants the same treatment as other cases where the Supreme Court recognized a protected liberty interest in one’s private conduct. Often starting with a specific factual scenario, the Court has extended protections afforded to one’s private

intimate decisions, implicit in the concept of ordered liberty, based on substantive due process or equal protection grounds. See, e.g., Griswold, 381 U.S. 479 (substantive due process protects married couples' rights to use contraception); Roe v. Wade, 410 U.S. 113 (1973) (substantive due process protects a woman's right to have an abortion); Eisenstadt, 405 U.S. 438 (Equal Protection Clause guarantees the right of unmarried people to use contraception).

The Court recognized a married couple's right to use contraceptives in Griswold v. Connecticut, 381 U.S. 479 (1965). Griswold was arrested for providing married couples with information, instruction, and medical advice for using contraceptives. Id. at 480. After being found guilty, he received a \$100 fine. Id. The intermediate courts affirmed this ruling. Id. In its analysis, the Supreme Court posed the question, "Would we allow the police to search the sacred precincts of the marital bedrooms for telltale signs of the use of contraceptives?" Id. at 485. Finding this very concept repulsive and that this right of privacy was older than the Bill of Rights itself, the Court reversed the lower courts. Id. at 485-86.

The Court later held that the Equal Protection Clause affords unmarried couples the same right to use contraceptives as protected by substantive due process for married couples. Eisenstadt, 405 U.S. 438. In Eisenstadt, the Massachusetts Superior Court convicted Baird for violating the State's law banning contraceptive instruction and distribution to unmarried persons. Id. at 440. The United States Supreme Court, applying its decision in Griswold, struck down the Massachusetts law. Id. at 453. While the Court recognized that Griswold ruled on the narrow issue of one's right to privacy in a marital relationship, it found that "the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup." Id. This premise directly contravenes Blackstone's common law description of marriage. "If the right of privacy means anything, it is

the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” Id.

In addressing the private intimate decisions surrounding one’s decision to have a child, the Supreme Court struck down a New York statute criminalizing the distribution of contraceptives to people under the age of sixteen. Carey, 431 U.S. 678. In Carey, Population Planning Associates, after receiving notice from the State Board of Pharmacy to stop selling contraceptives because they were in violation of state law, challenged the constitutionality of the New York statute. Id. at 682-83. Central to its holding, the Court noted that there are certain decisions an individual makes free from unjustified governmental intrusion. Id. at 685; see Eisenstadt, 405 U.S. 438 (contraceptives); Loving, 388 U.S. 1 (marriage); Prince v. Massachusetts, 321 U.S. 158 (1944) (family relationships); Skinner, 316 U.S. 535 (procreation); Pierce, 268 U.S. 510 (child rearing). At the heart of these constitutionally protected choices is one’s personal decision to have, or not have, a child. Carey, 431 U.S. at 685. Following this premise, the Court held that the governmental intrusion of this protected liberty interest did not serve a compelling state interest. Id.

In 1992, this Court revisited its decision in Roe v. Wade, which recognized the right of a woman to make the private intimate decision to terminate pregnancy before fetal viability. Casey, 505 U.S. 833 (1992). In Planned Parenthood of Southeastern Pennsylvania v. Casey, five abortion clinics and one physician challenged the constitutionality of five provisions in the Pennsylvania Abortion Control Act of 1982, amended in 1988 and 1989. Id. at 845. The trial court, finding the provisions unconstitutional, entered an injunction against the enforcement of

the provisions. Id. On appeal, the Third Circuit affirmed in part and reversed in part, upholding four of the five provisions. Id.

This Court reaffirmed that the issue in question dealt with a “liberty” interest. Id. at 846. While some argued that the absence of constitutional language limits the extension of protections to abortion as a liberty interest, Justice O’Connor said:

It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution . . . But of course this Court has never accepted that view.

Id. at 847. The Court found that neither the Bill of Rights nor state practices contemporary to the Fourteenth Amendment’s drafting “marks the outer limits of the substantive sphere of liberty” protected by the Fourteenth amendment. Id. 848. While the Court recognized the profound support for and against abortion rights and the general premise that the government can adopt one of these positions, it found this to be a matter where it was obligated to define the liberty of all. Id.

Relying on its own case law where the Constitution protected personal decisions related to marriage, procreation, contraceptives, and child rearing, the Court reaffirmed one’s right to be free from unwarranted governmental intrusion into personal matters of having a child. Id. at 851. These are the most intimate and personal decisions and are central to the types of liberty interests protected by the Fourteenth Amendment. Id. However, the Court noted that the state had an “important and legitimate interest in potential life.” Id. at 871. Weighing the importance of these protected liberty interests against the state interests, the Court reaffirmed the essential holding of Roe v. Wade, finding that the government may not place an undue burden on a woman seeking an abortion of a nonviable fetus. Id. at 877.

Presented with yet another challenge, this Court recognized protections to one's right to private intimate activity in Lawrence v. Texas, 539 U.S. 558 (2003). Police, responding to a reported weapons disturbance, entered Lawrence's apartment and observed him engaged in a sexual act with a male partner. Id. at 562-63. After his arrest, Lawrence was charged and later convicted of violating the State's anti-sodomy statute. Id. at 563. On appeal, the intermediate court affirmed Lawrence's conviction, citing Bowers v. Hardwick, 478 U.S. 186 (1986), as controlling. Lawrence, 539 U.S. at 563. The issue in Bowers was whether the Constitution conferred a fundamental right upon homosexuals to engage in sodomy. Bowers, 478 U.S. at 190. Distinguishing Bowers from Griswold, its progeny, and other decisions centered on family, marriage, or procreation, the Court found no connection between the claimed constitutional right in Bowers and established precedent. Id. at 190-91. The Court further noted that there was no basis in the proposition that these cases constitutionally insulate "any kind of private sexual conduct between consenting adults" from governmental interference. Id. at 191.

Revisiting Bowers, Lawrence addressed the issue of whether the "petitioners were free as adults to engage in private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution." Lawrence, 539 U.S. at 564. Relying on the already established case law recognizing one's right to private intimate activity, the Court decided Lawrence on substantive due process grounds. Id. at 558. Citing Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, the Court said:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the state.

Lawrence, 539 U.S. at 574. The Court overruled Bowers and struck down the state law as unconstitutionally infringing upon the petitioner’s right to engage in certain intimate sexual conduct. Id. at 578-79.

The instance case is a matter of an individual who, on his personal time, exercised his right to engage in a private intimate relationship with another consenting adult. Although married, Tracey was separated from his wife for eighteen months and she had recently served him with divorce papers. (R. at 4). While divorce presents challenges to a family, it is a reality in American culture, where forty-eight percent of people getting married will end up getting a divorce. Nat’l Ctr. for Health Statistics, Ctr. for Disease Control, Births, Marriages, Divorces, and Deaths: Provisional Data for 2005 54.20 (2006). If this Court holds the RCPD’s termination of Tracey constitutional, it effectively would sentence any person abandoned by or separated from a spouse to a state of purgatory absent the fundamental right of private intimate relationships. Additionally, it would present a more repulsive scenario than the Court rejected in Griswold, where the government could theoretically justify a search of the “sacred precincts of the marital bedroom” and the intimate relationships occurring therein to ascertain one’s fitness for employment.

**3. Contemporary practices prohibit an officer’s dismissal for being involved in an extramarital relationship with a civilian absent a showing that it affects job performance.**

The Supreme Court rejected the opportunity to consider a police department’s authority to regulate the private intimate activities of its officers. See City of N. Muskegon v. Briggs, 473 U.S. 909 (1985); Whisenhunt v. Spradlin, 464 U.S. 965 (1983). Two cases in particular, one upholding the termination of an officer and the other denying, demonstrate both the police department’s practices and the courts’ analyses of the distinct factual scenarios. See Shawgo v.

Spradlin, 701 F.2d 470 (5th Cir. 1983), cert. denied, 464 U.S. 965 (1983); Briggs v. N. Muskegon Police Dep't, 563 F. Supp. 585 (W.D. Mich. 1983), cert. denied, 473 U.S. 909 (1985).

In the instant case, the trial court relied on Shawgo v. Spradlin. (R. at 7). In Shawgo, the plaintiffs, Shawgo and Whisenhunt, brought a 42 U.S.C. § 1983 claim against the Amarillo Police Department (“APD”) alleging violation of their Fourteenth Amendment due process rights. Shawgo, 701 F.2d at 472. Sergeant Whisenhunt disclosed his relationship with Shawgo, a subordinate officer, to Lieutenant Boydston, his supervisor. Id. Lieutenant Boydston told Whisenhunt “that [the relationship] would probably be fine” but to not set up “house-keeping” with Shawgo. Id. Police Chief Spradlin heard a rumor about the relationship and assigned an investigation unit to observe the couple. Id. Based upon the surveillance, Chief Spradlin confirmed the Shawgo-Wishenhunt relationship while also learning that the plaintiffs maintained separate residences. Id. Despite the evidence, Chief Spradlin concluded that the officers were cohabitating outside of marriage and suspended both officers, while demoting Whisenhunt. Id. The officers did not have an opportunity to respond to the initial disciplinary action. Id. at 473. However, they requested a hearing and the review commission upheld the sanctions. Id. The trial court found no violation of the plaintiffs’ procedural due process rights, nor did it recognize a protected liberty interest in a superior officer’s intimate conduct with a subordinate officer. Id. The Fifth Circuit affirmed the lower court’s ruling. Id. at 470.

The Shawgo court conducted an in-depth analysis of the plaintiff’s procedural due process rights. See id. The issue was whether the APD afforded sufficient notice and hearing prior to the suspensions and demotion. Id. at 474-82. In fact, in his dissent to the Supreme Court’s denial of the plaintiff’s petition for writ of certiorari, Justice Brennan focused his analysis on the APD’s failure to provide reasonable warning regarding the prohibited conduct

and evidence to support the activity's adverse effect on job performance. Whisenhunt, 464 U.S. at 971 (Brennan, J., dissenting). Essentially, Shawgo is a procedural due process case.

While the Shawgo court provided substantive due process with limited treatment, the alleged liberty interest is materially distinct from the protected liberty interest in the instant case.

Shawgo upheld the prohibition of a superior officer cohabitating with a subordinate officer.

Shawgo, 701 F.2d at 472. The court noted that:

we do not attempt to outline all the contours of a police department's scope of regulation of the off-duty activities of its employees, for we can ascertain a rational connection between the exigencies of department discipline and forbidding members of a quasi-military unit, especially those different in rank, to share an apartment or to cohabit.

Id. at 483. The APD regulated the private intimate conduct of two of its officers who were in a superior-subordinate work relationship. There is a governmental interest in regulating this type of conduct because of the professional relationship between the plaintiffs. Conversely, the RCPD infringed upon Tracey's right to private intimate activities with a civilian. He and Ms. Malone would meet when he was off-duty. (R. at 4). Additionally, she had no professional affiliation with the RCPD. (R. at 4). The governmental interest behind this intrusion is so far removed from the facts and governmental interest articulated in Shawgo that it renders the application of Shawgo's holding to the instant case inappropriate.

The sanctions against the officers in Shawgo were a result of information corroborated by a formal investigation by the APD. In the instant case, there was no formal investigation into Tracey's extramarital affair with Ms. Malone. This information was nothing more than a product of Officer Calloway's mere curiosity. In fact, Calloway opened Tracey's cell phone, looked at the contact list, and on his own initiative, after bypassing R-T officials' names, called Ms. Malone. (R. at 4). Generally, an officer needs a warrant issued on probable cause or a

recognized warrant exception prior to searching a cell phone. See, e.g., United States v. Mercado-Nava, 486 F. Supp. 2d 1271 (D. Kan. 2007); Santillan, 571 F. Supp. 2d 1093 (exigent circumstances involving a drug cartel’s speeding truck justified a limited warrantless search of the defendant’s cell phone’s incoming and outgoing call records); United States v. Fierros-Alvarez, 547 F. Supp. 2d 1206 (D. Kan. 2008) (automobile exception justified trooper’s search of defendant’s cell phone seized from the vehicle); United States v. Finley, 477 F.3d 250 (5th Cir. 2007) (officers validly searched a drug dealer’s cell phone incident to a lawful arrest because cell phones often contain information related to drug transactions). Seeing how Calloway was unable to meet any Fourth Amendment requirements to open the cell phone, he acted on nothing more than his own impulsion throughout the events which led to his discovery of Tracey’s extramarital relationship.

Instead, the trial court should have turned to Briggs v. North Muskegon Police Department, 563 F. Supp. 585, which is on-point with the case at bar. In Briggs, the North Muskegon Police Department (“NMPD”) dismissed one of its officers despite eight years of satisfactory job performance. Id. at 586. Officer Briggs, although still married, moved in with Cynthia Secret, whom he had an intimate relationship with, after separating from his wife. Id. at 586-87. Briggs disclosed his new living arrangements to his police chief. Id. at 587. The City Council, upon learning of the relationship, ordered the chief to suspend Briggs for conduct “unbecoming a police officer,” until further notice. Id. Five months later, the NMPD terminated Briggs’ employment. Id. The NMPD based his dismissal on a state statute criminalizing lewd and lascivious cohabitation by non-married couples. Id. at 587 n.2. During Briggs’ reinstatement hearing, he admitted to his continued cohabitation with Ms. Secret and challenged

the statute as antiquated and unenforceable. Id. at 587. The City Council refused to reinstate him. Id.

Briggs filed a 42 U.S.C. § 1983 action challenging his dismissal as an “intrusion upon his constitutionally-guaranteed rights of privacy and association.” Id. Furthermore, he alleged that his dismissal failed to satisfy the lowest level of scrutiny by not bearing a rational relationship between Briggs’ “private, off-duty living arrangements” and his job performance. Id. The NMPD argued that it could mandate its officers to “conform their conduct to the requirements of the law” as a condition of their employment. Id.

The United States District Court for the Western District of Michigan, relying on Griswold and its progeny, concluded that there is a constitutional right of sexual privacy, which required the NMPD’s action to have more than a rational relation to its stated interest. Id. at 590. The NMPD tied Briggs’ private intimate activities to his capacity to perform his duties. Id. Specifically, it argued that public knowledge of his affair would likely lead to a “loss of credibility with the citizens.” Id. The court expressly rejected this notion because the “very purpose of constitutional protection of individual liberties is to prevent such majoritarian coercion.” Id. The court held that many spheres of an officer’s private sexual life are beyond the scope of reasonable department investigation. Id. at 591 (citing Shuman v. City of Philadelphia, 470 F. Supp. 449, 459 (E.D. Pa. 1979)). Furthermore, a department violates an officer’s constitutionally protected right to privacy if it fails to show whether the private, off-duty conduct affects on-the-job performance. Id. (citing Shuman, 470 F. Supp. at 459). Noting the NMPD’s testimony that Briggs’ job performance was satisfactory, the court found that Briggs’ private intimate activities did not impair his job performance and that his termination violated his constitutionally protected right of privacy. Id.

The instant case is analogous to Briggs. Police Chief Malone dismissed Tracey for “behavior unbecoming of an officer,” conceding that the termination stemmed from Tracey’s extramarital affair with his daughter. (R. at 4). There is no indication that Tracey’s job performance was unsatisfactory. In fact, he had operated as an officer effectively over his seven-year tenure. (R. at 2). More importantly, Tracey kept his relationship private until Calloway intruded upon Tracey’s personal life. (R. at 4). Briggs held that the Constitution protects an officer’s right to private intimate activities even when he voluntarily disclosed his living arrangements to a superior. Briggs, 563 F. Supp. 585. Cf. Shuman, 470 F. Supp. 449 (Constitution protected an officer’s right to private intimate activities when his extramarital affair was involuntarily disclosed to his superiors). It would challenge logic to conclude that the Constitution does not protect an officer’s right to private intimate activities when a governmental entity actively intrudes upon the officer’s personal life.

The court in Briggs found that the “real” reason for Briggs’ termination was that his private intimate activities failed to conform to the NMPD’s concept of the community’s morals. Briggs, 563 F. Supp. at 592. “Constitutional rights should not depend upon popularity polls or the whims of public opinion.” Id. Considering Ms. Malone’s relationship to the Police Chief, her past record of estrangement from her father, and the Police Chief’s prompt termination of Tracey’s employment based upon a non-prosecuted adultery law, (R. at 4), the real reason for Tracey’s dismissal was the fact that he had an intimate relationship with Police Chief Malone’s daughter. “The Constitution prevents the discharge of an employee merely because his personal conduct during off-duty hours incurs the disapproval of his supervisor.” Major v. Hampton, 413 F. Supp. 66, 70 (E.D. La. 1976). Police Chief Malone’s conduct is far more repugnant than that

of the NMPD in Briggs, for it appears that Tracey’s constitutional rights depended upon the whims of an intimate partner’s father.

**B. Since one’s right to private intimate activity is a fundamental right, this Court must strike down the basis for Tracey’s termination because it does not survive a strict scrutiny analysis and, while inappropriate, applying a lower level of scrutiny would still find the Rushmore County Police Department’s actions unconstitutional.**

Depending on the liberty interest at stake in a substantive due process case, the Court traditionally applies either strict scrutiny or a rational basis review to assess whether the government acted in a constitutional manner. Compare Griswold, 381 U.S. 479 (applying strict scrutiny) with Glucksberg, 521 U.S. 702 (1997) (applying rational basis). In matters concerning a fundamental right, the Court must apply strict scrutiny, which requires a finding that the governmental act is “narrowly tailored to serve a compelling state interest.” Glucksberg, 521 U.S. at 767. If a liberty interest is not a fundamental right, then that right does not receive heightened protection and the governmental interference need only “bear a rational relationship to a legitimate governmental purpose.” Romer v. Evans, 517 U.S. 620, 631, 635 (1996); see United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938). However, this Court has also applied an alternate level of scrutiny to protected liberty interests. See Cook v. Gates, 528 F.3d 42, 55 (1st Cir. 2008) (noting a long line of Supreme Court decisions that apply standards of review more demanding than rational basis but less than strict scrutiny).

**1. The Rushmore County Police Department’s termination of Tracey was unconstitutional because the regulation was neither narrowly tailored nor served a compelling governmental interest.**

The RCPD has the burden to show that the regulation justifying Tracey’s dismissal is narrowly tailored and serves a compelling governmental interest. Johnson v. California, 543 U.S. 499, 505 (2005). The RCPD dismissed Officer Tracey for “behavior unbecoming of an officer.” (R. at 4). The underlying ground for his termination was “his involvement in an extra

martial affair in violation of the state’s adultery statute.” (R. at 4). As the intermediate court noted, the state interest in question is the department’s desire to regulate moral conduct. (R. at 11). More specifically, it is regulating an officer’s private intimate decisions. Courts have found that a police department may have a legitimate government interest in the personal sexual activities of its officers, especially if the conduct affects job performance. See, e.g., Briggs, 563 F. Supp. 585. This does not meet the standard of a compelling governmental interest to satisfy strict scrutiny. Furthermore, if it met this standard, the record states that Officer Tracey did not rendezvous with Ms. Malone while on duty, nor while performing any of his undercover duties. (R. at 4). Therefore, Officer Tracey’s conduct is beyond the purview of the RCPD.

Assuming the State has a compelling interest to regulate moral conduct, dismissal for “behavior unbecoming of an officer” is not narrowly tailored to serve that purpose. The Police Chief has broad discretion to justify a subordinate’s termination for “behavior unbecoming of an officer.” Police Chief Malone relied on Craven Statute 11-198.01, the state’s adultery statute that has seen no prosecution in over twenty years, to justify Tracey’s dismissal. (R. at 4). Without specific language defining “behavior unbecoming of an officer,” this regulation is not narrowly tailored in manner that satisfies strict scrutiny.

**2. Even by not applying strict scrutiny, the Rushmore County Police Department’s termination of Tracey was unconstitutional because the degree of intrusion into Tracey’s private intimate life outweighed the governmental interest in prohibiting certain conduct.**

In Lawrence v. Texas, this Court struck down a state law criminalizing consensual sex between homosexuals as a violation of the petitioners’ substantive due process rights. Lawrence, 539 U.S. at 578-79. In doing so, the Court used language that has led lower courts to apply different standards of review private intimate conduct cases. The Lawrence Court developed its analysis within the framework of Griswold, which treated privacy and liberty as fundamental

rights demanding strict scrutiny. Id. at 564-65. Courts have interpreted Lawrence as applying strict scrutiny in matters of private sexual activity claims. See Fields v. Palmdale Sch. Dist., 271 F. Supp. 2d 1217, 1221 (C.D. Cal. 2003); see also Williams v. Att’y Gen. of Alabama, 378 F.3d 1232, 1252 (11th Cir. 2004) (Barkett, J., dissenting); Doe v. Miller, 298 F. Supp. 2d 844, 871 (S.D. Iowa 2004), rev’d on other grounds, 405 F.3d 700 (8th Cir. 2005); Hudson Valley Black Press v. IRS, 307 F. Supp. 2d 543, 548 (S.D.N.Y. 2004). The Court in Lawrence also stated that the statute furthered “no legitimate state interest,” a central element used in rational basis review. See Lawrence, 539 U.S. at 578. This has led some courts to apply a rational basis review. See Sylvester v. Fogley, 465 F.3d 851, 858 (8th Cir. 2006); Muth v. Frank, 412 F.3d 808, 818 (7th Cir. 2005); Williams v. Att’y Gen. of Alabama, 378 F.3d 1232 (11th Cir. 2004). Rational basis review focuses a court’s analysis on the “rationality of the state’s reason for enacting the law,” thereby foreclosing any analysis associated with a higher level of scrutiny. Cook, 528 F.3d at 55. However, by recognizing a protected liberty interest, the Lawrence Court had to apply something higher than a rational basis test. Id.

In Cook v. Gates, the court held that Lawrence used a balancing test, weighing “the strength of the state’s asserted interest in prohibiting immoral conduct against the degree of intrusion into the petitioners’ private sexual life caused by the statute in order to determine whether the law was unconstitutionally applied.” Id. at 56. In Cook, members of the United States military brought suit in federal court claiming violations of their constitutional rights when they were separated from the military under 10 U.S.C. § 654, the “Don’t Ask, Don’t Tell” Act. Id. at 45. On appeal, the First Circuit agreed with the plaintiffs by holding that Lawrence “recognize[d] a protected liberty interest for adults to engage in private, consensual sexual intimacy and applied a balancing of constitutional interest that defie[d] either strict scrutiny or

rational basis.” Id. at 52. Cook further noted that Lawrence is far from unique, citing a long line of Supreme Court jurisprudence applying an alternative level of scrutiny to protected liberty interests. Id. at 55; see, e.g., Sell v. United States, 539 U.S. 166, 179 (2003) (applied a balancing test that weighed the appropriateness of administering antipsychotic drugs and their potential side effect on the fairness of the trial against the governmental interest to try a mentally-ill criminal defendant who was not competent to stand trial); Casey, 505 U.S. 833 (applied an “undue burden” test to assess the constitutionality of fetal pre-viability limits on abortion).

In assessing whether “Don’t Ask, Don’t Tell” violates the parties’ substantive due process rights, the court balanced the government’s asserted interest against the degree of intrusion caused by the statute into the petitioner’s liberty interest. Cook, 528 F.3d at 55. The Cook court found the governmental interest was “to preserve the military’s effectiveness as a fighting force, and thus, to ensure national security.” Id. at 60. Additionally, Congress’s power to raise and support armies provided constitutional grounds for the court to grant great deference to the legislative body’s decisions when regulating military affairs. Id. at 57 (citing United States v. O’Brien, 391 U.S. 367, 377 (1968)). The court found that these interests outweighed the parties’ rights to private sexual activities. Id. at 60.

The instant case is distinguishable from the facts in Cook. The regulation in Cook addressed the conduct of military personnel. Id. at 45. This warrants the court to give great deference to congressional action. The court noted that Congress conducted lengthy and in-depth hearings by consulting experts and soldiers. Id. at 59. As a result of this study, Congress adopted the “Don’t Ask, Don’t Tell” Act to preserve morale, good order, discipline, and unit cohesion, as well as “the military’s effectiveness as a fighting force.” Id. at 60. Given the court’s deferential treatment of Congress’s thorough inquiry and the national security interest at

stake, Cook held that the governmental interest outweighed the soldiers' liberty interest in private intimate activities. Id. This decision was not solely rooted in the moral implications of the soldiers' activities.

The intermediate court found that it did not owe the same deference to a RCPD regulation as it would to Congress exercising its constitutional power to raise and support armies. (R. at 11). While the intermediate court did not cite any authority, the Eastern District for Pennsylvania addressed this issue. See Shuman, 470 F. Supp. at 458. In Shuman, the Philadelphia Police Department, after it learned from a mother that her daughter was cohabitating with Shuman, dismissed him for conduct unbecoming of an officer. Id. at 454. The department informed Shuman that the specific reason for his dismissal was that, while in "married status," he "induced" an eighteen-year old woman to leave her parents and cohabit with him. Id. Shuman filed a 42 U.S.C. § 1983 claim in federal court. Id. at 451-52. The court applied a balancing test weighing the state's interest in intruding upon an officer's private matters against the privacy needs of the officer. Id. at 458. While the court conceded that the police department had some interest in Shuman's sexual activities, it was limited to those activities that impacted his job performance. Id. at 459 (for example, open and notorious sexual activities). In fact, the court stated that absent a "showing that a policeman's private, off-duty personal activities have an impact upon his on-the-job performance, we believe that inquiry into those activities violates the constitutionally protected right of privacy." Id.

As shown in Shuman, a police department does not have the same flexibility to intrude upon its employees' private lives as does the military. Even if this Court were to entertain applying the deference owed to Congress in regulating the military to the RCPD's termination of Tracey, the record is silent as to whether there is any reason or purpose for the RCPD to intrude

upon Tracey's private intimate activity. Nor is there any indication that the RCPD conducted research to support this interest. Furthermore, the intermediate court concluded that the "only possible state interest [in prohibiting adultery] that could be implicated is the desire to enforce regulations condoning what is in its view, immoral conduct." (R. at 11).

**3. The Rushmore County Police Department's termination of Tracey was unconstitutional because the regulation, as applied, bore no rational relationship to a legitimate governmental interest.**

Assuming this Court chooses to contravene precedent by applying neither a strict nor heightened level of scrutiny to a protected liberty interest, Tracey's dismissal is still unconstitutional under a rational basis review. "[T]he government, even when it is acting as an employer, does not have an unlimited license to inquire into its employees' private lives." Major, 413 F. Supp. at 67. In this type of situation, a party may challenge the law, either on its face or as applied, by showing that the law is not rationally related to a legitimate government purpose. See, e.g., Glucksberg, 521 U.S. 702; see also Major, 413 F. Supp. 66 (Federal court held that the dismissal of a married IRS agent for engaging in extramarital relations while off-duty bore no rational relationship to the asserted governmental interest in preventing conduct likely to discredit the government.).

On its face, the police department has a legitimate interest to ensure that its officers behave professionally in the course of their duties. However, as applied, Tracey's dismissal is not rationally related to this interest. The Police Chief based Tracey's termination on the State of Craven's adultery statute, which had not been prosecuted in over twenty years. (R. at 4). Tracey's relationship with Ms. Malone, the Police Chief's daughter, had nothing to do with his conduct as an officer. (R. at 4). His encounters with Ms. Malone occurred neither while on-duty nor in the course of performing his undercover duties. (R. at 4). The record does not state

whether the relationship affected his performance as an officer. In fact, Tracey's employment was not at issue until after Officer Calloway disclosed the relationship to Police Chief Malone. (R. at 4). The day after he learned of Tracey's relationship with his daughter, the Police Chief fired Tracey. (R. at 4). The dismissal of Tracey for his consensual private intimate activities with Ms. Malone outside the scope of his employment or official police duties is not rationally related to the asserted interest.

**III. Assuming this Court chooses not to address the substantive due process right, the Rushmore County Police Department's policy authorizing Police Chief Malone's dismissal of Tracey for "behavior unbecoming of an officer" denies Tracey of his due process rights because the regulation is unconstitutionally vague.**

The terms of a statute or regulation "creating a new offense must be sufficiently explicit to inform" individuals that they may be liable to its penalties. Connally v. General Constr. Co., 296 U.S. 385, 391 (1926). Additionally, a statute or regulation violates due process if it is so vague that persons of "common intelligence must necessarily guess as to its meaning and differ as to its application." Id. (finding a statute void for vagueness); Boyce Motor Line, Inc. v. United States, 342 U.S. 337 (1952) (assessing whether a government regulation was void for vagueness). As this Court noted in Connolly, a vague regulation depends upon the varying impressions of the fact finder, not the adopted language, legislative intent, judicial interpretation, or other sound forms of statutory construction. Connally, 296 U.S. at 395. The premise behind having a clear regulation, and elements that lead to a penalty, is to create an environment where an "ordinary person" can intelligently decide what action is prudent to take. Id. at 393. Therefore, to be constitutional, a regulation must clearly delineate the actor, the regulated behavior or conduct, and the potential consequence for not following the regulation.

The case at bar challenges the RCPD's regulation permitting the termination of an officer for "conduct unbecoming of an officer." There is no question as to whether the RCPD's

regulation intends to control its officers. Additionally, the consequence for violating the regulation is termination. However, the RCPD's regulation fails to state the regulated action.

General language, like "conduct unbecoming of an officer," establishes no bounds for the Police Chief's discretion. Persons of common intelligence would have to guess as to the meaning of the RCPD regulation. One could naturally guess that the regulation applies to inappropriate on-duty conduct, like stealing from the evidence locker or lying while under oath. It is also reasonable to expect this regulation to extend to egregious felonies, carrying significant prison sentences, committed while off duty. However, without enumerating potential causes for dismissal, persons of common intelligence would not know whether a specific form of conduct falls within the Police Chief's meaning. Looking at Tracey's scenario, a person of common intelligence, who is separated from his wife and recently served with divorce papers, could reasonably expect that engaging in an off-duty relationship would not implicate the RCPD's regulation.

### **CONCLUSION**

For the foregoing reasons, Respondent William R. Tracey respectfully requests this Court to affirm the decision of the United States Court of Appeals for the Thirteenth Circuit, which reversed the trial court's grant of summary judgment in favor of the Petitioner having found that the Rushmore County Police Department violated the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment.