

No. 08-31958

In the

In the Supreme Court of the United States

October Term, 2008

RUSHMORE COUNTY, CRAVEN, POLICE DEPARTMENT,

Petitioner,

v.

WILLIAM R. TRACEY,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR PETITIONER

**TEAM C
COUNSEL FOR THE PETITIONER**

QUESTIONS PRESENTED

- I. Whether Officer Calloway violated the Respondent's Fourth Amendment rights when he lawfully stopped the Respondent, carried out a protective frisk, saw a strap consistent with a gun holster, and then moved aside the Respondent's jacket to retrieve a concealed handgun in violation of a Craven statute.

- II. Whether Craven's Rushmore County Police Department was constitutionally permitted to terminate the Respondent, a police officer, for admittedly violating a criminal statute prohibiting adultery under the Due Process Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

QUESTIONS PRESENTED..... ii

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIES vii

STATEMENT OF CASE 1

 STATEMENT OF FACTS 1

 PROCEDURAL HISTORY..... 3

SUMMARY OF ARGUMENT 4

ARGUMENT..... 6

 I. OFFICER CALLOWAY CONDUCTED A CONSTITUTIONAL SEARCH OF THE RESPONDENT’S PERSON AND LAWFULLY SEIZED A CONCEALED WEAPON PURSUANT TO THE TERRY STOP AND PLAIN VIEW EXCEPTIONS TO THE FOURTH AMENDMENT. 6

 A. The Terry exception to the Fourth Amendment warrant requirement provided Officer Calloway with the authority to perform an investigatory stop and a subsequent protective search of the Respondent..... 6

 1. Fourth Amendment jurisprudence allows Officer Calloway to carry out a lawful stop, a protective search, and a seizure of a gun from within Respondent’s open coat, where there is a reasonable suspicion that the Respondent was armed and dangerous and engaged in criminal activity. 7

 2. Officer Calloway had a reasonable suspicion that Respondent was engaged in criminal activity sufficient to support an investigatory stop and as well as sufficient evidence to believe that Respondent was armed and dangerous to justify his protective search of the Respondent’s person. 8

 a. Under a totality of the circumstances analysis, Officer Calloway had reason to believe the Respondent was engaged in criminal activity..... 8

 i. Officer Calloway reasonably suspected the Respondent of criminal activity because of his proximity to an anticipated arms deal as well as his suspicious behavior, inappropriate dress, and hostility towards police..... 8

 ii. The totality of the circumstances surrounding Officer Calloway’s encounter with the Respondent was sufficient to justify an investigatory stop and a protective search. 11

| | | |
|-----|--|----|
| b. | The protective search of the Respondent was constitutional because Officer Calloway had reasonable suspicion to believe that the suspect was armed and dangerous..... | 12 |
| i. | A reasonably prudent person in Officer Calloway’s position would have believed Respondent to be armed and dangerous..... | 12 |
| ii. | Officer Calloway searched the Respondent for weapons because of a reasonable concern for his personal safety. | 13 |
| 3. | Officer Calloway acted within the scope of a permissible <u>Terry</u> stop when he stopped the Respondent to make inquiries, patted him for concealed weapons, and reached inside his jacket to confiscate a hidden gun..... | 14 |
| a. | The stop was valid because Officer Calloway’s purpose was to secure his own safety. | 14 |
| b. | Officer Calloway’s search of the Respondent was constitutional under the Fourth Amendment because it was minimally intrusive..... | 15 |
| c. | Officer Calloway’s search of the Respondent did not exceed the parameters of the Fourth Amendment..... | 17 |
| d. | The Fourth Amendment did not prohibit Officer Calloway from performing a second protective search..... | 17 |
| B. | The Respondent’s concealed weapon was properly seized by Officer Calloway under the “plain view” doctrine of the Fourth Amendment. | 18 |
| 1. | Officer Calloway had lawful access to the weapon concealed under the Respondent’s jacket. | 18 |
| 2. | The incriminating nature of Respondent’s handgun was clear because concealed weapons are illegal in Craven. | 19 |
| 3. | The Respondent’s weapon was immediately apparent as contraband. | 20 |
| II. | THE RESPONDENT’S TERMINATION WAS CONSTITUTIONAL BECAUSE THE RESPONDENT VIOLATED A LEGITIMATE STATUTE CRIMINALIZING ADULTERY IN THE STATE OF CRAVEN. | 21 |
| A. | The right to privacy recognized under the Due Process Clause of the Fourteenth Amendment does not entitle the Respondent to engage in adulterous acts..... | 22 |
| 1. | The Respondent’s actions are not protected by the Fourteenth Amendment because substantive due process guarantees are limited to fundamental rights..... | 22 |

| | | |
|----|---|----|
| a. | The Craven statute is constitutional because this Court has never held that adultery is a fundamental right protected by substantive due process. | 23 |
| b. | The Respondent’s challenge to the Craven statute is invalid because under the Constitution it is an impermissible expansion of judicial authority. | 25 |
| 2. | The Respondent’s challenge to the Craven statute banning adultery fails to satisfy due process because it cannot meet the <u>Glucksberg</u> test for evaluating fundamental rights. | 25 |
| a. | The Respondent’s claim is neither essential to the concept of liberty nor deeply rooted in American cultural and historical traditions as required by <u>Glucksberg</u> . . | 26 |
| b. | A general right to privacy for sexual acts including adultery does not exist because it cannot be defined with sufficient particularity to constitute a fundamental right under <u>Glucksberg</u> | 28 |
| 3. | <u>Lawrence v. Texas</u> did not create a broad fundamental right to sexual privacy that would protect or legitimize the Respondent’s behavior. | 29 |
| 4. | The Respondent’s claim that his adulterous affair is private fails because his behavior implicates a public legal relationship with the State of Craven. | 31 |
| B. | The Craven statute under which the Respondent was terminated should be subject to rational basis review because it does not offend a fundamental right and the state has a valid and compelling interest in legislating against immoral conduct. | 31 |
| 1. | The right asserted by the Respondent is not fundamental and cannot trigger strict scrutiny under the Due Process Clause. | 32 |
| 2. | The Respondent’s claim does not qualify for intermediate scrutiny because his behavior does not make him a member of a quasi-suspect class and adulterers are not victims of an adverse political process or historical discrimination. | 32 |
| 3. | Rational basis review presumes that the Craven statute is constitutional because the right to sexual privacy is not fundamental. | 33 |
| C. | Craven has a legitimate, compelling interest in protecting marriage against the threats posed by Respondent’s immoral conduct and his improperly asserted right to engage in it. | 34 |
| 1. | Marriage is legitimately sanctioned, endorsed, and regulated by the state as an essential societal institution. | 34 |

| | |
|--|----|
| a. Marriage is a product of the state and the fundamental organizational unit of the social and legal system. | 34 |
| b. American courts have defended marriage against a variety of constitutional challenges and repeatedly validated its role in protecting society from fraud, abuse, and moral harm. | 36 |
| 2. Public morality is a legitimate government interest and the State of Craven is constitutionally permitted to make moral judgments on behalf of its citizens. | 37 |
| 3. The Respondent failed to meet the expectations set for a Craven police officer when he acted in an illegal and immoral manner. | 37 |
| a. Criminal conduct is a constitutionally permissible basis for the Respondent’s dismissal from the Rushmore County Police Department. | 38 |
| b. The Respondent’s adulterous behavior undermined the effectiveness and integrity of the police force as a whole and thereby subverts Craven’s substantial interest in protecting its citizenry. | 38 |
| CONCLUSION..... | 40 |
| APPENDIX A..... | 41 |
| APPENDIX B..... | 42 |

TABLE OF AUTHORITIES

United States Supreme Court Cases

| | |
|---|------------|
| <u>Adams v. Williams</u> , 407 U.S. 143 (1972)..... | 7 |
| <u>Air Line Pilots Ass'n v. Miller</u> , 523 U.S. 866 (1998)..... | 21 |
| <u>Arizona v. Hicks</u> , 480 U.S. 326 (1987)..... | 20 |
| <u>Boddie v. Connecticut</u> , 401 U.S. 371 (1971) | 35 |
| <u>Brigham City v. Stuart</u> , 547 U.S. 398 (2006)..... | 6 |
| <u>Brinegar v. United States</u> , 338 U.S. 160 (1949)..... | 20 |
| <u>Califano v. Jobst</u> , 434 U.S. 47 (1977)..... | 34, 35 |
| <u>Carroll v. United States</u> , 267 U.S. 132 (1925)..... | 19 |
| <u>Casey v. Planned Parenthood</u> , 505 U.S. 833 (1992)..... | 24 |
| <u>City of Cleburne v. Cleburne Living Ctr.</u> , 473 U.S. 432 (1985)..... | 33 |
| <u>Collins v. Harker Heights</u> , 503 U.S. 115 (1992)..... | 24, 25, 28 |
| <u>Coolidge v. New Hampshire</u> , 403 U.S. 443 (1971)..... | 18 |
| <u>County of Sacramento v. Lewis</u> , 523 U.S. 833 (1998)..... | 23 |

| | |
|--|--------|
| <u>Cruzan v. Dir., Mo. Dep't. of Health,</u> 497 U.S. 261 (1990)..... | 24, 28 |
| <u>Eisenstadt v. Baird,</u> 405 U.S. 438 (1972)..... | 24 |
| <u>FCC v. Beach Commc'ns, Inc.,</u> 508 U.S. 307 (1993)..... | 33 |
| <u>Florida v. J.L.,</u> 529 U.S. 266 (2000)..... | 9 |
| <u>Florida v. Royer,</u> 460 U.S. 491 (1983)..... | 15 |
| <u>Griswold v. Connecticut,</u> 381 U.S. 479 (1965)..... | 24 |
| <u>Illinois v. Wardlow,</u> 528 U.S. 119 (2000)..... | 9 |
| <u>Katz v. United States,</u> 389 U.S. 347 (1967)..... | 6 |
| <u>Kelley v. Johnson,</u> 425 U.S. 238 (1978)..... | 39 |
| <u>Kyllo v. United States,</u> 533 U.S. 27 (2001) | 19 |
| <u>Lawrence v. Texas,</u> 539 U.S. 558 (2003)..... | passim |
| <u>Loving v. Virginia,</u> 388 U.S. 1 (1967)..... | 24, 34 |
| <u>Maynard v. Hill,</u> 125 U.S. 190 (1888)..... | 36 |
| <u>Meyer v. Nebraska,</u> 262 U.S. 390 (1923)..... | 24 |
| <u>Michael H. v. Gerald D.,</u> 491 U.S. 110 (1989)..... | 36 |

| | |
|---|-----------|
| <u>Minnesota v. Dickerson</u> , 508 U.S. 366 (1993) | 7, 17 |
| <u>Moore v. East Cleveland</u> , 431 U.S. 494 (1977) | 25 |
| <u>Ornelas v. United States</u> , 517 U.S. 690 (1996)..... | 6, 10, 11 |
| <u>Palko v. Connecticut</u> , 302 U.S. 319 (1937)..... | 26 |
| <u>Paris Adult Theatre v. Slaton</u> , 413 U.S. 49 (1973)..... | 37 |
| <u>Payton v. New York</u> , 445 U.S. 573 (1980)..... | 19 |
| <u>Pierce v. Soc’y of Sisters</u> , 268 U.S. 510 (1925)..... | 24 |
| <u>Poe v. Ullman</u> , 367 U.S. 497 (1961)..... | 27 |
| <u>Reno v. Flores</u> , 507 U.S. 292 (1993)..... | 28 |
| <u>Rochin v. California</u> , 342 U.S. 165 (1952)..... | 24 |
| <u>Romer v. Evans</u> , 517 U.S. 620 (1996) | 32 |
| <u>San Antonio Indep. Sch. Dist. v. Rodriguez</u> , 411 U.S. 1 (1973)..... | 29 |
| <u>Santosky v. Kramer</u> , 455 U.S. 745 (1982)..... | 23 |
| <u>Sibron v. United States</u> , 392 U.S. 40 (1968)..... | 12 |
| <u>Skinner v. Oklahoma ex rel. Williamson</u> , 316 U.S. 535 (1942)..... | 24 |

| | |
|---|----------------|
| <u>Snyder v. Massachusetts</u> , 291 U.S. 97 (1934)..... | 26 |
| <u>Terry v. Ohio</u> , 392 U.S. 1 (1968)..... | passim |
| <u>Texas v. Brown</u> , 460 U.S. 730 (1983)..... | 15, 19, 20, 21 |
| <u>United States v. Brignoni-Ponce</u> , 422 U.S. 873 (1975)..... | 10 |
| <u>United States v. Carolene Prods.</u> , 304 U.S. 142 (1938)..... | 32 |
| <u>United States v. Cortez</u> , 449 U.S. 411 (1981)..... | 9, 11 |
| <u>United States v. Drayton</u> , 536 U.S. 194 (2002)..... | 12 |
| <u>United States v. Hensley</u> , 469 U.S. 221 (1985) | 18 |
| <u>United States v. Mendenhall</u> , 446 U.S. 544 (1980) | 7 |
| <u>United States v. Place</u> , 462 U.S. 696 (1983)..... | 9, 13 |
| <u>United States v. Sharpe</u> , 470 U.S. 675 (1985) | 13, 14 |
| <u>United States v. Sokolow</u> , 490 U.S. 1 (1989)..... | 11 |
| <u>United States v. Virginia</u> , 518 U.S. 515 (1996) | 32 |
| <u>Washington v. Glucksberg</u> , 521 U.S. 702 (1997)..... | passim |
| <u>Zablocki v. Redhail</u> , 434 U.S. 374 (1978)..... | 27, 35, 36 |

United States Court of Appeals Cases

| | |
|---|------------|
| <u>Allen v. City of Greensboro</u> , 452 F.2d 489 (4th Cir. 1971) | 39 |
| <u>Davis v. United States</u> , 409 F.2d 458 (D.C. Cir. 1969) | 11 |
| <u>Johnston v. U.S. Postal Serv.</u> , 756 F.2d 1461 (9th Cir. 1985) | 38 |
| <u>Lofton v. Sec’y of the Dep’t. of Children and Family Servs.</u> , 358 F.3d 804 (11th Cir. 2004) | 28, 30 |
| <u>Piscottano v. Murphy</u> , 511 F.3d 247 (2d Cir. 2007) | 38 |
| <u>Potter v. Murray City</u> , 760 F.2d 1065 (10th Cir. 1985) | 35, 36 |
| <u>Shawgo v. Spradlin</u> , 701 F.2d 470, (5th Cir. 1983) | 38, 39 |
| <u>United States v. Askew</u> , 529 F.3d 1119 (D.C. Cir. 2008) | 17 |
| <u>United States v. Calloway</u> , 116 F.3d 1129 (6th Cir. 1997) | 19 |
| <u>United States v. Casado</u> , 303 F.3d 440 (2d Cir. 2003)..... | 14 |
| <u>United States v. Erwin</u> , 155 F.3d 818 (6th Cir. 1998) | 10 |
| <u>United States v. Garces</u> , 133 F.3d 70 (D.C. Cir. 1998) | 20 |
| <u>United States v. Harris</u> , 313 F.3d 1228 (10th Cir. 2002) | 16 |
| <u>United States v. Hill</u> , 545 F.2d 1191 (9th Cir. 1976) | 13, 14, 16 |
| <u>United States v. Manuel</u> , 64 F. App’x. 823 (2d Cir. 2003) | 13, 16 |

| | |
|--|----|
| <u>United States v. Michael R.</u> , 90 F.3d 340 (9th Cir. 1996) | 11 |
| <u>United States v. Nash</u> , 876 F.2d 1359 (7th Cir. 1989) | 16 |
| <u>United States v. Osbourne</u> , 326 F.3d 274 (1st Cir. 2003) | 18 |
| <u>United States v. Rutkowski</u> , 877 F.2d 139 (1st Cir. 1989)..... | 20 |
| <u>United States v. Thompson</u> , 597 F.2d 187 (9th Cir. 1979) | 16 |
| <u>Williams v. Attorney Gen. of Ala.</u> , 378 F.3d 1232 (11th Cir. 2004) | 37 |

United States District Court Cases

| | |
|---|----|
| <u>United States v. Morton</u> , 400 F. Supp. 2d 871 (E.D. Va. 2005) | 10 |
| <u>Wilson v. Swing</u> , 463 F. Supp. 555 (M.D.N.C. 1978) | 39 |

State Court Cases

| | |
|--|----|
| <u>Baker v. Vermont</u> , 744 A.2d 864 (Vt. 1999)..... | 35 |
| <u>Goodridge v. Dep't. of Pub. Health</u> , 798 N.E.2d 941 (Mass. 2003) | 35 |
| <u>State v. Holm</u> , 137 P.3d 726 (Utah 2006)..... | 35 |

United States Constitutional and Statutory Provisions

| | |
|----------------------------------|----|
| U.S. CONST. amend. IV | 6 |
| U.S. CONST. amend. XIV § 1 | 23 |

| | |
|--------------------------------|----|
| 28 U.S.C. § 1738C (2008) | 27 |
| 42 U.S.C. § 1983 (2008) | 3 |

State Constitutional and Statutory Provisions

| | |
|---|----|
| Alaska Const. art. I, § 25 | 27 |
| Ark. Const. amend. LXXXIII, § 1 | 27 |
| Haw. Const. art. I, § 23 | 27 |
| Miss. Const. art. XIV, § 263A | 27 |
| Nev. Const. art. I, § 21 | 27 |
| Ala. Code 13A-13-2 (2003) | 27 |
| Ariz. Rev. Stat. Ann. §§ 25-101C, -112C (2007) | 27 |
| Ariz. Rev. Stat. Ann. §§ 13-1408 (West 2003) | 27 |
| Colo. Rev. Stat. § 14-2-104(b) (2006) | 27 |
| Colo. Rev. Stat. 18-6-501 (2003) | 27 |
| D.C. Code Ann. 22-201 (2001) | 27 |
| Fla. Stat. § 741.212 (2007) | 27 |
| Fla. Stat. Ann. 798.01 (West 2000) | 27 |
| Ga. Code Ann. 16-6-19 (Harrison 1990) | 27 |
| Idaho Code 18-6601 (Michie 2003) | 27 |
| 720 Ill. Comp. Stat. Ann. 5/11-7(a) (West 2002) | 27 |
| Ind. Code § 31-11-1-1 (2007) | 27 |
| Kan. Stat. Ann. 21-3507(1) (2002) | 27 |
| Md. Code Ann., Crim. 10-501 (2002) | 27 |

| | |
|--|----|
| Mass. Gen. Laws Ann. ch. 272, 14 (West 2000) | 27 |
| Mich. Comp. Laws Ann. 750.30 (West 2003)..... | 27 |
| Minn. Stat. Ann. 609.36 (West 2004)..... | 27 |
| Miss. Code Ann. 97-29-1 (1999)..... | 27 |
| N.H. Rev. Stat. Ann. 645:3 (1996) | 27 |
| N.Y. Penal Law 2.55.17 (McKinney 2004)..... | 27 |
| N.C. Gen. Stat. 14-184 (2002) | 27 |
| N.D. Cent. Code 12.1-20-09 (1997) | 27 |
| Okla. Stat. Ann. tit. 21, 871 (West 2002) | 27 |
| R.I. Gen. Laws 11-6-2 (2002)..... | 27 |
| S.C. Code Ann. 16-15-60 (Law. Co-op. 2003)..... | 27 |
| Utah Code Ann. 76-7-103(1) (1999) | 27 |
| Va. Code Ann. 18.2-365 (Michie 1996) | 27 |
| W. Va. Code Ann. 61-8-3 (Michie 2000)..... | 27 |

STATEMENT OF FACTS

From October 2005 to June 2006, Officer Calloway participated in the Rushmore County Police Department's investigation of an illegal weapons distribution network. (Record. 2). Specifically, the Police believed that the illegal arms dealing was connected to the Red Tide military corporation or "R-T." (R. 2). On June 7, 2005, Officer Calloway went to McDonough Park to pursue a tip that an official from Red Tide was meeting with potential buyers. (R. 2). Upon his arrival, Officer Calloway saw the Respondent, William Tracey, seated on a bench in the park. (R. 2). Officer Calloway noticed that the Respondent had closely cropped hair and was wearing a nylon bomber jacket even though the weather was temperature was in the seventies. (R. 2). For twenty minutes, Officer Calloway watched the Respondent survey the layout of the square and scan the rooftops of the surrounding buildings. (R. 2). Respondent appeared agitated and Officer Calloway was concerned. (R. 2).

Officer Calloway decided to approach the Respondent to investigate his peculiar behavior. (R. 3). He asked the Respondent to identify himself. (R. 3). The Respondent reacted angrily, glancing from side to side over his shoulders. (R. 3). Officer Calloway repeated his question. (R. 3). The Respondent replied that his name was "Bill" and began to turn away. (R. 3). This suspicious behavior prompted Officer Calloway to reach out, grab the Respondent's left wrist, and turn the Respondent towards him to perform a protective search. (R. 3). Officer Calloway then patted the exterior of the Respondent's clothes searching for weapons. (R. 3). The Respondent complied with the patdown but berated and cursed at Officer Calloway throughout the search. (R. 3). Initially, Officer Calloway did not find a weapon. (R. 3).

As Officer Calloway finished the patdown, the Respondent turned to leave again. (R. 3). As he did, Officer Calloway noticed a strap protruding from underneath the Respondent's jacket.

(R. 3). Partially concealed by the bomber jacket, the strap appeared to be attached to the Respondent's upper chest. (R. 3). Officer Calloway thought that the strap was consistent with those used to carry concealed firearms. (R. 9). Concealed weapons are illegal under Craven statute 19-116.81. (R. 3). Officer Calloway asked the Respondent to stop and the Respondent complied reluctantly. (R. 3). When the officer reached out to move the portion of the Respondent's jacket concealing the strap, the Respondent brushed his hand away. (R. 3). Officer Calloway then reached again to move the Respondent's jacket to determine the nature of the strap and discovered a "Glock 21" .45 caliber pistol. (R. 3). Because carrying a concealed weapon is a crime in the state of Craven, Officer Calloway placed the Respondent under arrest. (R. 3).

After being placed under arrest, Respondent could not produce any identification, but claimed to be an undercover police officer. (R. 3). Officer Calloway took the Respondent to his precinct for further questioning. (R. 3). At the precinct, Officer Calloway and other police officers discovered that the Respondent had private contact information for Jacqueline Malone, daughter of the Rushmore County Police Chief. (R. 3). Fearing that Ms. Malone might be a target of crime related to Red Tide, Officer Calloway called her for confirmation of the Respondent's identity. (R. 4). Ms. Malone verified that the Respondent was a police officer. (R. 4). Ms. Malone further revealed that she and the Respondent were having an extramarital affair. (R. 4).

Officer Calloway called the Respondent's precinct to apologize that he had arrested one of their officers without knowing that he was a fellow member of law enforcement. (R. 4). He explained the situation, including the Respondent's extramarital affair with Ms. Malone. (R. 4).

Although the Respondent was separated from his wife, he was still married. Thus, his affair violated Craven Statute 11-198.01, which criminalizes adultery. (R. 4).

On June 8, 2005, the Rushmore County Police Department terminated the Respondent for “behavior unbecoming an officer.” (R. 4). The Rushmore County Police Chief noted that the reason for the termination was the Respondent’s adulterous behavior in violation of a criminal statute. (R. 4). While the Respondent was off duty when the affair occurred and did not spend any of his time under cover engaged with Ms. Malone, the police department terminated the Respondent because his affair violated Craven penal law. (R. 4).

PROCEDURAL HISTORY

Respondent brought this action under 42 U.S.C. § 1983 to challenge the constitutionality of Officer Calloway’s search that uncovered a concealed weapon inside of his jacket and to challenge an alleged violation of his substantive due process rights for his termination from the Rushmore County Police Department for committing adultery.¹ (R. 2). In response, the Rushmore County Police Department filed a motion for summary judgment. (R. 2). The United States District Court for the District of Craven concluded that there was no genuine issue of material fact and found in favor of the Rushmore County Police Department on both of the Respondent’s claims. (R. 7). Accordingly, summary judgment was granted. (R. 7). Respondent appealed. (R. 8).

The United States Court of Appeals for the Thirteenth Circuit concluded that the District Court erred. (R. 12). The Court of Appeals found that Respondent’s Fourth Amendment and due process rights were violated. (R. 12). As such, it reversed the grant of the Rushmore County

¹ The Civil Action for Deprivation of Rights Act can be found in Appendix B.

Police Department's motion for summary judgment. (R. 12). It also remanded for further proceedings. (R. 12).

The Rushmore County Police Department appeals. (R. 13). This Court has granted certiorari for the October Term of 2008. (R. 13).

SUMMARY OF ARGUMENT

Officer Calloway's search of the Respondent was constitutionally permissible under both the Terry stop exception and plain view exception to the warrant requirement of the Fourth Amendment. Under Terry, Officer Calloway had reasonable suspicion that the Respondent was engaged in criminal activity and that he was armed and dangerous. This suspicion warranted an investigative stop and a protective search of the Respondent's person. Officer Calloway did not exceed the parameters of a constitutionally valid stop and frisk when he moved the Respondent's jacket aside to investigate a strap consistent with a hidden weapon, as the weapon could have been used against Officer Calloway. The seizing of the weapon was also appropriate under the plain view exception because Officer Calloway had lawful access and its incriminating nature was immediately apparent. The Respondent's firearm violated Craven's concealed weapons statute that gave Officer Calloway probable cause to believe that the hidden object was evidence of a crime. As such, under Terry and the plain view doctrine, Officer Calloway conducted a reasonable, constitutional search of the Respondent that did not violate his Fourth Amendment right against unreasonable searches and seizures.

The Rushmore County Police Department had constitutionally valid grounds to terminate the Respondent for his criminal, adulterous conduct and did not violate the Respondent's rights under substantive due process. The criminalization of adultery is a valid use of the state's police

power. Specifically, the liberty interests protected by the Due Process Clause of the Fourteenth Amendment do not include a fundamental right to sexual privacy, and, therefore, adultery is not protected. Craven's statute criminalizing adultery should be awarded rational basis review because there is no fundamental right at stake. The goals of the statute include protecting the institution of marriage, preventing harm to innocent third parties, and maintaining the integrity and efficiency of a police force. Such objectives are rational and compelling government interests. As a result, the Respondent's dismissal for "behavior unbecoming an officer" was constitutional because his illegal conduct was not protected under the Due Process Clause of the Fourteenth Amendment and ran counter to his duty to uphold the laws of Craven.

ARGUMENT

I. OFFICER CALLOWAY CONDUCTED A CONSTITUTIONAL SEARCH OF THE RESPONDENT'S PERSON AND LAWFULLY SEIZED A CONCEALED WEAPON PURSUANT TO THE TERRY STOP AND PLAIN VIEW EXCEPTIONS TO THE FOURTH AMENDMENT.

The Terry and plain view exceptions to the Fourth Amendment authorized Officer Calloway's search of the Respondent and the seizure of his concealed weapon. Under the Fourth Amendment, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV. The crux of the Fourth Amendment is its requirement of reasonableness. Brigham City v. Stuart, 547 U.S. 398, 403 (2006); Katz v. United States, 389 U.S. 347, 357 (1967). Some warrantless seizures may be upheld so long as they are found to be objectively reasonable. Stuart, 547 U.S. at 403; Katz, 389 U.S. at 357. Officer Calloway had the reasonable suspicion necessary to warrant an investigatory stop and protective search of the Respondent under the warrantless search exception created by Terry v. Ohio, 392 U.S. 1 (1968). The "plain view" doctrine also authorized Officer Calloway to seize the Respondent's gun under Craven's prohibition on concealed weapons. The search of the Respondent and the seizure of his firearm were thus constitutional and fall within the parameters of the Fourth Amendment.

The appropriate standard of review for determinations of reasonable suspicion and probable cause is *de novo*. Ornelas v. United States, 517 U.S. 690, 698 (1996).

A. The Terry exception to the Fourth Amendment warrant requirement provided Officer Calloway with the authority to perform an investigatory stop and a subsequent protective search of the Respondent.

Officer Calloway performed a valid investigatory stop and protective search of the Respondent under the standard established in Terry v. Ohio. The Fourth Amendment allows

Officer Calloway to take protective actions if he has a reasonable suspicion related to the Respondent's conduct. The Respondent's behavior aroused Officer Calloway's reasonable suspicions and justified a stop and protective search. Officer Calloway then acted permissibly when he stopped the Respondent, patted him for weapons, and reached inside his jacket to recover a concealed firearm. This conduct fits within the parameters outlined in Terry and fulfilled the Fourth Amendment's demand for reasonableness.

1. Fourth Amendment jurisprudence allows Officer Calloway to carry out a lawful stop, a protective search, and a seizure of a gun from within Respondent's open coat, where there is a reasonable suspicion that the Respondent was armed and dangerous and engaged in criminal activity

Fourth Amendment jurisprudence provides an exception for Officer Calloway's stop and search of the Respondent under Terry. According to Terry, a police officer has authority to conduct a warrantless search when he perceives that an individual is engaged in criminal activity but does not have probable cause for an arrest. Terry, 392 U.S. at 27; see, e.g., United States v. Mendenhall, 446 U.S. 544, 552 (1980); Adams v. Williams, 407 U.S. 143, 146 (1972). A frisk is a limited protective search for concealed weapons that enables law enforcement to conduct their duties without fear of violence from suspects. Adams, 407 U.S. at 146; see also Minnesota v. Dickerson, 508 U.S. 366, 373 (1993) (referring to a frisk as a "patdown"). While investigating an illegal firearms distribution network tied to a private military corporation, Officer Calloway performed a protective search of the Respondent premised on his fear for his personal safety. (R. 2). Officer Calloway detained the Respondent after his initial inquiry failed to dispel his suspicions of criminal activity related to arms trafficking. (R. 3). He then performed a search that included a patdown and an investigation of the Respondent's open jacket. (R. 3). Officer

Calloway performed a valid Terry stop that balanced the Respondent's interest in privacy and Officer Calloway's need to protect himself from a potentially violent individual.

- 2. Officer Calloway had a reasonable suspicion that Respondent was engaged in criminal activity sufficient to support an investigatory stop and as well as sufficient evidence to believe that Respondent was armed and dangerous to justify his protective search of the Respondent's person.**

Officer Calloway reasonably suspected Respondent of criminal activity and was justified in performing an investigatory stop and a protective search. First, Officer Calloway had specific and articulable facts based on the totality of the circumstances and his professional judgment to suspect that the Respondent was engaged in crime. Second, the protective search of the Respondent was reasonable because Officer Calloway thought that the suspect was armed and dangerous. Under Terry, Officer Calloway's reasonable suspicions warranted an investigatory stop and protective search of the Respondent.

- a. Under a totality of the circumstances analysis, Officer Calloway had reason to believe the Respondent was engaged in criminal activity.**

The initial investigatory stop was reasonable because, in Officer Calloway's judgment, he had specific and articulable facts that supported the suspicion that Respondent was participating in criminal activity. The Respondent was present at the time and location that Officer Calloway expected an arms deal to occur and behaved suspiciously when approached for brief questioning. Since Officer Calloway is an experienced officer of the law, his assessment of Respondent's suspicious behavior merits judicial deference. Furthermore, a totality of circumstances analysis supports the conclusion that Officer Calloway's beliefs and protective actions were reasonable.

- i. Officer Calloway reasonably suspected the Respondent of criminal activity because of his**

proximity to an anticipated arms deal as well as his suspicious behavior, inappropriate dress, and hostility towards police.

The temporary detention of the Respondent was permissible because Officer Calloway reasonably suspected that the suspect was engaged in illegal arms dealing. Officers of the law are authorized to detain individuals where they have reasonable suspicion that those persons are engaged in criminal activity. United States v. Place, 462 U.S. 696, 702 (1983). An officer's reasonable suspicion derives from specific and articulable facts that give rise to rational inferences that justify the detention of an individual for potential criminal activity. Terry, 392 U.S. at 21; United States v. Cortez, 449 U.S. 411, 416 (1981). Officer Calloway detained the Respondent because he was inappropriately dressed, was repeatedly scanning the area, and refused to answer questions. (R. 2). Officer Calloway reasonably suspected that the Respondent was committing the crime of illegal gun trafficking.

Officer Calloway had reasonable suspicion of criminal activity because the Respondent's presence seemed to substantiate a tip about arms dealing. If outside sources corroborate information provided by an informant, it creates an expectation of criminal activity that can support reasonable suspicion for an investigative stop. Florida v. J.L., 529 U.S. 266, 270 (2000); Illinois v. Wardlow, 528 U.S. 119, 124-26 (2000). On the day of his encounter with the Respondent, Officer Calloway was pursuing a lead that a representative of the Red Tide military corporation was meeting prospective arms buyers in McDonough Square. (R. 2). During his surveillance of the park, Calloway spotted the Respondent sitting on a bench in the anticipated meeting place. (R. 2). Calloway noted that, despite inconsistencies between the description of the suspect and the man on the bench, the Respondent behaved like someone involved in dealing

arms or narcotics. (R. 8). The Respondent's actions contributed directly to Officer Calloway's suspicions.

As Officer Calloway observed the Respondent, he noticed particular aspects of the suspect's dress and behavior that heightened his suspicions of criminal activity. Observations relevant to reasonable suspicion include suspicious conduct, behavior, and patterns of activity. United States v. Brignoni-Ponce, 422 U.S. 873, 884-85 (1975). Officer Calloway noticed that the Respondent appeared agitated and spent an "inordinate amount of time" scanning the surrounding area and surveying the rooftops of nearby buildings. (R. 2). The Court has also considered temperature as a factor relevant to creating reasonable suspicion. Ornelas, 517 U.S. at 699-700. Officer Calloway noted that the suspect was wearing a black nylon bomber jacket despite the fact that the temperature that day was in the seventies. (R. 2). The Respondent's actions and dress warranted Officer Calloway's reasonable suspicions.

When Officer Calloway approached, the Respondent became increasingly nervous and hostile, heightening Officer Calloway's suspicions. Excessively nervous conduct in the presence of an officer furthers the inference that criminal activity is in progress. United States v. Erwin, 155 F.3d 818, 822 (6th Cir. 1998). Courts have interpreted nervousness to include a suspect's darting eyes, avoidance of questions, and attempts to flee. Id. A suspect's use of violent language and his visible hostility toward an officer during an investigative stop compound reasonable suspicion. United States v. Morton, 400 F. Supp. 2d 871, 874 (E.D. Va. 2005). When approached, the Respondent became "visibly angry" and "glanced to his left and right repeatedly." (R. 2). The Respondent then berated and cursed at Officer Calloway throughout the patdown though he did not resist. (R. 3). Additionally, the Respondent brushed Officer Calloway's hand away when he moved to inspect the strap inside Respondent's jacket. (R. 3).

Officer Calloway was reasonable to suspect the Respondent of criminal activity because of his erratic and aggressive reaction to questioning and an investigatory search.

ii. The totality of the circumstances surrounding Officer Calloway's encounter with the Respondent was sufficient to justify an investigatory stop and a protective search.

An objective reading of the circumstances surrounding Officer Calloway's stop validates his suspicions that the Respondent was engaged in criminal activity. An officer's reasonable suspicions should be analyzed under a totality of the circumstances approach that considers an officer's common sense with the particularized facts of an encounter in question. See Ornelas, 517 U.S. at 695-96; United States v. Sokolow, 490 U.S. 1, 7-8 (1989); Cortez, 449 U.S. at 418 (considering factors such as the location of suspicious activities, history and reputation of participating suspects, tips from informants, timing, and weather to evaluate the reasonableness of officers' suspicions). Officer Calloway was in McDonough Park because of an informant's tip when he observed the Respondent dressed inappropriately in the park and surveying the surrounding area. (R. 2). The Respondent appeared wary and apprehensive when approached by law enforcement. Id. In light of these circumstances, Officer Calloway's suspicions warranted a Terry stop.

Officer Calloway's professional knowledge leads to a finding that the stop was reasonable under Terry. Police officers are entitled to rely on their professional knowledge of when innocent patterns of behavior may conceal criminal activity. United States v. Michael R., 90 F.3d 340, 346 (9th Cir. 1996); Davis v. United States, 409 F.2d 458, 460 (D.C. Cir. 1969). Officer Calloway had participated in the Rushmore County Police Department's investigation into Red Tide's firearms distribution network for the eight months before his encounter with the Respondent. (R. 2). A tip connected with this investigation prompted his presence in

McDonough Park on the day of the encounter. (R. 2). His experience as an officer and with this particular criminal activity provided the lawful inference necessary to conduct a Terry stop. After months of investigating Red Tide, Officer Calloway could lawfully act upon his knowledge of the arms dealing ring to assess his suspicions.

b. The protective search of the Respondent was constitutional because Officer Calloway had reasonable suspicion to believe that the suspect was armed and dangerous.

Officer Calloway reasonably believed that the Respondent was armed, and, thus, he performed a protective search. In checking the Respondent for weapons, Officer Calloway acted as a reasonably prudent person would have done in the same circumstances. Searching the Respondent for weapons allowed Officer Calloway to secure his safety in the line of duty. Officer Calloway was justified in conducting a stop and protective search because he believed that the Respondent was armed, dangerous, and involved in criminal activity.

i. A reasonably prudent person in Officer Calloway's position would have believed Respondent to be armed and dangerous.

The validity of Officer Calloway's decision to frisk the Respondent depends on a showing of particular facts that leads to the reasonable presumption that a weapon was present. An officer may frisk an individual if he has reasonable suspicion that he is armed and dangerous. Sibron v. United States, 392 U.S. 40, 64 (1968); Terry, 392 U.S. at 22. The Court has accepted evidence of reasonable suspicion including an officer's observation that baggy clothes or clothes inappropriate for the weather may indicate an attempt to conceal weapons or contraband. United States v. Drayton, 536 U.S. 194, 199 (2002). Officer Calloway observed particular aspects of the Respondent's dress and behavior that caused him to believe that the suspect might be carrying a

weapon. (R. 3). An analysis of articulable facts proves that Officer Calloway was reasonable in fearing for his safety in dealing with the Respondent.

That fear was heightened by the sight of the strap beneath the Respondent's jacket, which gave Officer Calloway reason to believe that the Respondent was armed. Police officers are justified in relying on the sight of a characteristic shape, bulge, or other feature to conclude that a suspect may be armed or dangerous. See United States v. Hill, 545 F.2d 1191, 1193 (9th Cir. 1976) (upholding the reasonableness of an officer investigating a bulge in order to discover potential "instruments of assault"); United States v. Manuel, 64 F. App'x. 823, 826-27 (2d Cir. 2003) (holding an officer reasonable for assuming a suspect was armed and dangerous because of a characteristic bulge in his waistband). Officer Calloway saw a strap that he testified was consistent with a firearm. (R. 3, 9) Officer Calloway's glimpse of the strap underneath the Respondent's jacket heightened his reasonable suspicion that the suspect was carrying a weapon.

ii. Officer Calloway searched the Respondent for weapons because of a reasonable concern for his personal safety.

Officer Calloway's interest in his safety is relevant to measure the reasonableness of his conduct. The rationale underlying a Terry stop encompasses not only the government's interest in effective law enforcement but also the officer's interest in avoiding unnecessary risks in the line of duty. Terry, 392 U.S. at 22. Courts must be careful not to second-guess the officer's experience and judgment in developing circumstances. United States v. Sharpe, 470 U.S. 675, 687 (1985). An officer acting on his suspicions should be allowed to graduate his responses based on the demands of the situation. Place, 462 U.S. at 709. Officer Calloway used his professional judgment and experience in the conduct of his encounter with the Respondent. (R. 8). His reactions to the Respondent's behavior and the surrounding circumstances reflect his

concern for both the public and his personal safety. The constitutionality of Officer Calloway's investigatory frisk stems in part from a valid concern for his safety and that of others.

3. Officer Calloway acted within the scope of a permissible Terry stop when he stopped the Respondent to make inquiries, patted him for concealed weapons, and reached inside his jacket to confiscate a hidden gun.

Under the Terry doctrine, Officer Calloway was justified when he stopped the Respondent, searched him for weapons, and confiscated his illegally concealed firearm. The search of the Respondent was meant to ensure Officer Calloway's safety. It was minimally intrusive as required by Terry. The search was both expedient and limited in scope. Terry supports Officer Calloway's search because it was narrowly tailored to a search for weapons and not evidence. The Fourth Amendment's guarantees against unreasonable searches did not preclude Officer Calloway from conducting a second protective search of the Respondent. Officer Calloway searched the Respondent and seized the concealed gun from his jacket within the parameters of a permissible Terry search.

a. The stop was valid because Officer Calloway's purpose was to secure his own safety.

Officer Calloway's search for weapons satisfied Terry and did not violate the Respondent's Fourth Amendment rights because its primary purpose was to protect a law enforcement officer from danger in the line of duty. Although often applied as a patdown, Terry does not establish a bright-line rule for the methods employed in protective searches. Sharpe, 470 U.S. at 686. Other means of search to discover hidden weapons are within the parameters of the holding, so long as the intrusions are limited to those necessary to secure weapons. Hill, 545 F.2d at 1193; United States v. Casado, 303 F.3d 440, 448, n.4 (2d Cir. 2003). Officer Calloway moved aside the Respondent's jacket to investigate an object consistent with a gun holster. (R. 3). This

intrusion was minimal and sought only to discover weapons as authorized by the Terry exception.

The investigation of the Respondent's jacket was consistent with Terry because it was not motivated by a search for evidence. Terry prohibits officers from conducting exploratory searches for evidence once they have determined that no weapons are present. Terry, 392 U.S. at 29; see also Texas v. Brown, 460 U.S. 730, 748 (1983). Officer Calloway moved one side of the Respondent's jacket to eliminate a potential threat. (R. 5). When he moved the Respondent's jacket, Officer Calloway was engaged in a continuing search for weapons that could be used against him and not for evidence of arms dealing or any other crime.

b. Officer Calloway's search of the Respondent was constitutional under the Fourth Amendment because it was minimally intrusive.

Officer Calloway performed a valid weapons search of the Respondent with a minimal amount of intrusion and maximum efficiency to assure his personal safety and the public welfare. To stay within the scope of a constitutionally initiated Terry stop, an officer must use methods designed to dispel his suspicions quickly and efficiently. Florida v. Royer, 460 U.S. 491, 500 (1983). Officer Calloway conducted a standard patdown of the Respondent's outer garments to allay his initial suspicions. (R. 3). He then moved aside the Respondent's jacket because he saw a strap characteristic of a weapon holster within the garment. (R. 3). Officer Calloway extended his initial search to the inside of the Respondent's jacket to ensure his safety in the quickest and least intrusive way possible under the circumstances.

This stop did not rise to the level of intrusiveness that Terry sought to limit. Terry was designed to prevent the kind of police searches that probe armpits, waists, backs, between legs, and other sensitive areas on the bodies of suspects. Terry, 392 U.S. at 8, n. 13. A probe into these

areas heightens the humiliation and coercive atmosphere of an investigative stop. Id. The Respondent's jacket was unzipped and Officer Calloway reached into the side of the garment where he viewed the potential weapon. (R. 3) Officer Calloway's actions were minimally intrusive and, therefore, consistent with Terry.

The reach inside of the jacket fell within the scope of an acceptable search. Courts have found limited intrusions to be reasonable under the Fourth Amendment in a variety of factual situations. An officer conducting a Terry search may lift a shirt or jacket, United States v. Nash, 876 F.2d 1359, 1361 (7th Cir. 1989); Hill, 545 F.2d at 1193; probe a bulging waistband, Manuel, 64 F. App'x. at 826-27; or stick fingers in a suspect's shoe or boot to investigate potential weapons. United States v. Harris, 313 F.3d 1228, 1237-8 (10th Cir. 2002). Officer Calloway pushed aside an open jacket to examine an object consistent with a concealed weapon. (R. 3). Under Fourth Amendment jurisprudence, Officer Calloway performed a reasonable patdown and a limited search of the inside of the jacket that was permissible to balance his need for security with the Respondent's interest in privacy.

Officer Calloway was justified in briefly extending his protective search to investigate a possible weapon that was revealed when Respondent turned to leave. In United States v. Thompson, the Ninth Circuit upheld the conduct of a police officer who reached directly into the pocket of a suspect to look for weapons. 597 F.2d 187, 191 (9th Cir. 1979). The police officer had determined that the suspect's coat was too bulky to facilitate an effective patdown search. Id. Here, when Officer Calloway perceived a previously unnoticed strap consistent with a gun holster, he reached directly into Respondent's unzipped jacket to investigate. (R. 3). Officer Calloway was reasonable in extending his search beyond the patdown either because he could

not ascertain the contents of the jacket due to its bulk or because the sight of the strap convinced him that he needed to check the garment's interior.

c. Officer Calloway's search of the Respondent did not exceed the parameters of the Fourth Amendment.

Officer Calloway's search was minimally invasive because it did not involve any manipulation. An officer may not manipulate objects found in the course of a patdown search if it has been determined that they are not weapons. Dickerson, 508 U.S. at 378. In Dickerson, the fruits of an investigatory stop were suppressed because the police continued to push and prod the contents of a suspect's pocket once they had completed a protective patdown and eliminated the possibility of a concealed weapon. Id. Officer Calloway completed the patdown and then moved the side of the Respondent's jacket to reveal the weapon. (R. 3). Officer Calloway had not eliminated the possibility that a weapon was present after just the patdown and did not manipulate any objects on Respondent's person in the course of the protective search.

Had Officer Calloway unzipped the Respondent's jacket with the intent to search for evidence, his actions would not be authorized by Terry. For example, the D.C. Circuit noted that it was an unacceptable extension of Terry for an officer to open a suspect's zipped jacket to see if his clothing matched that of an individual wanted for burglary in the immediate neighborhood. United States v. Askew, 529 F.3d 1119, 1127 (D.C. Cir. 2008). The Court held that this intrusion was not conducted to ensure police safety but to uncover evidence of a completed crime. Id. In contrast, Officer Calloway reached into an unzipped, open jacket to verify the potential presence of a gun. (R. 4). The actions taken by Officer Calloway were authorized under Terry because he did not conduct a search for evidence, nor did he unzip the Respondent's jacket.

d. The Fourth Amendment did not prohibit Officer Calloway from performing a second protective search.

Officer Calloway did not violate the Respondent's Fourth Amendment rights by conducting a supplementary investigation into the open jacket. A secondary search is not *per se* unreasonable under the Fourth Amendment. United States v. Osbourne, 326 F.3d 274, 277 (1st Cir. 2003) (holding that a second frisk of a suspect was not unreasonable under Terry if officers could demonstrate that they believed the suspect was still armed). The Respondent's open jacket revealed a strap consistent with a weapon holster. (R. 3). The appearance of this strap aroused Officer Calloway's suspicion that the Respondent was armed despite the initial search and justified a limited investigation of the strap itself.

B. The Respondent's concealed weapon was properly seized by Officer Calloway under the "plain view" doctrine of the Fourth Amendment.

The Respondent's gun was properly seized under the "plain view" exception to warrantless searches under the Fourth Amendment. To seize evidence under the plain view exception, the incriminating nature of the object must be immediately apparent and the officer must have lawful access to it. Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971); see United States v. Hensley, 469 U.S. 221, 235-36 (1985). Officer Calloway could seize the weapon legally because the Respondent's gun was lawfully accessible to Officer Calloway and immediately apparent as a dangerous and incriminating object. Concealed weapons are illegal in Craven and so the gun in the Respondent's jacket was immediately apparent as contraband. Officer Calloway properly seized the Respondent's concealed weapon under the plain view doctrine.

1. Officer Calloway had lawful access to the weapon concealed under the Respondent's jacket.

Officer Calloway's observation of the gun strap was lawful from his position in McDonough Square. Police surveillance of conduct or objects visible from a public place is

unquestionably lawful. See Kyllo v. United States, 533 U.S. 27, 32 (2001) (noting “the lawfulness of warrantless visual surveillance of a home” when conducted by the naked eye). Officer Calloway approached the Respondent in McDonough Square, a public place, for the purposes of investigation. (R. 2). The gun strap was apparent to Officer Calloway simply from his lawful presence in the public location.

Officer Calloway was in close physical proximity to the Respondent because he was completing a lawful Terry stop and therefore viewed the strap from a lawful vantage point. An officer has lawful access to contraband where the initial intrusion that brings the police within plain view is supported by one of the recognized exceptions to the warrant requirement. Brown, 460 U.S. at 736-737. Immediately following the patdown, the Respondent turned, causing his jacket to swing open and exposing the weapon to Officer Calloway’s view. (R. 3) Officer Calloway’s access to the weapon was lawful because he could see a strap consistent with a weapon holster while conducting a constitutionally valid stop.

2. The incriminating nature of Respondent's handgun was clear because concealed weapons are illegal in Craven.

Officer Calloway had probable cause to believe that the item he viewed in the Respondent’s jacket was contraband because concealed firearms are illegal in Craven. Under the plain view doctrine, evidence is incriminating when law enforcement has probable cause to believe that it is evidence of a crime. Brown, 460 U.S. at 741-42 (quoting Payton v. New York, 445 U.S. 573, 587 (1980)); see United States v. Calloway, 116 F.3d 1129, 1133 (6th Cir. 1997). Probable cause requires that the facts and evidence available to law enforcement would lead a man of reasonable caution to believe that certain items may be contraband or evidence of a crime. Carroll v. United States, 267 U.S. 132, 162 (1925). Officer Calloway saw an item consistent with a gun strap in the interior of the Respondent’s jacket. (R. 3). Officer Calloway

noted that the Respondent's dress was like that of an armed individual participating in trafficking. (R. 8). Under Craven statute 19-166.81, it is illegal to be in possession of a concealed gun. (R. 3). Because a concealed firearm violates Craven law, Officer Calloway had probable cause to seize the item he believed to be a gun from the Respondent's jacket.

Officer Calloway was not required to be certain that the Respondent was carrying a firearm before attempting to seize the potential weapon. As probable cause is a common-sense standard, officers need not show that their belief in the criminality of the object is more likely true than false. Brown, 460 U.S. at 742 (citing Brinegar v. United States, 338 U.S. 160, 176 (1949)). Officer Calloway testified that the strap that he saw underneath the Respondent's coat was consistent with a device used to conceal a firearm. (R. 3). His observation of an object consistent with an illegal weapon satisfies probable cause.

3. The Respondent's weapon was immediately apparent as contraband.

After seeing the strap, Officer Calloway did not hesitate to seize it as contraband. During a search, the incriminating nature of an object must be readily apparent at the moment of observation without the benefit of any additional information. See United States v. Garces, 133 F.3d 70, 75 (D.C. Cir. 1998); United States v. Rutkowski, 877 F.2d 139, 142 (1st Cir. 1989); see also Arizona v. Hicks, 480 U.S. 326, 327 (1987). The Respondent was wearing a strap suggestive of a concealed weapon. (R. 3). Carrying a concealed weapon is a violation of Craven statute 19.166.81. (R. 3). Officer Calloway immediately suspected that the strap was evidence of contraband under Craven law and seized it properly.

Officer Calloway's suspicion of the strap was sufficient to constitute probable cause. The "immediately apparent" requirement cannot be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of plain

view. Brown, 460 U.S. at 741. Officer Calloway testified that though he was not certain, it appeared to him that what he saw beneath the coat was consistent with a gun strap. (R. 9). Officer Calloway's uncertainty did not overwhelm his observation, based upon his experience, that the object he saw beneath the Respondent's jacket was consistent with a gun subject to seizure within the meaning of the Fourth Amendment.

II. THE RESPONDENT'S TERMINATION WAS CONSTITUTIONAL BECAUSE THE RESPONDENT VIOLATED A LEGITIMATE STATUTE CRIMINALIZING ADULTERY IN THE STATE OF CRAVEN.

The Respondent's actions constituted conduct unbecoming an officer because he violated a valid statute criminalizing adultery. Adultery is not protected under the substantive due process right to privacy, and therefore the Respondent cannot claim that his Fourteenth Amendment rights were violated by his dismissal. As adultery does not qualify as a fundamental right, Craven's statute is subject to rational basis review under the Due Process Clause. Moreover, Craven's valid and compelling interests in regulating immorality and protecting marriage outweigh the Respondent's purported interest in his infidelity. Thus, the Rushmore County Police Department legitimately dismissed the Respondent for violating a criminal statute against adultery that did not infringe upon his substantive due process rights under the Fourteenth Amendment.

The Court should review the grant of summary judgment in a Due Process Claim under the Fourteenth Amendment *de novo*. See Air Line Pilots Ass'n v. Miller, 523 U.S. 866 (1998) (noting that appellate review of legal issues involved in the grant of summary judgment is *de novo*).

A. The right to privacy recognized under the Due Process Clause of the Fourteenth Amendment does not entitle the Respondent to engage in adulterous acts.

There is no right to commit adultery subsumed within the Fourteenth Amendment due process right to privacy. While the Respondent's adultery may involve consensual sexual acts between adults, he cannot appeal to the Due Process clause to shield his conduct because adultery does not implicate a fundamental liberty right or reflect the values embedded in American history. Furthermore, the Respondent's assertion of a right to commit adultery fails because it cannot satisfy the analysis in Washington v. Glucksberg to determine what constitutes a fundamental right or liberty. 521 U.S. 702, 720-21 (1997). In addition, the right asserted by the Respondent does not fit within the privacy framework established in Lawrence v. Texas, 539 U.S. 558, 578-79 (2003), because his marriage is a nexus between his private life and the public interest of the state. A constitutionally protected right to privacy does not and cannot include the right to commit adultery asserted by the Respondent.

1. The Respondent's actions are not protected by the Fourteenth Amendment because substantive due process guarantees are limited to fundamental rights.

Substantive due process does not protect the Respondent's conduct because the Fourteenth Amendment only secures fundamental rights recognized as ingrained in the American system of values. Under a due process analysis, the commission of adultery is neither sanctioned by American history nor fundamental to the conception of liberty, and so the Craven statute criminalizing it is constitutional. The Court would be required to engage in an impermissible extension of judicial power to create this right. Since the Respondent cannot show that it is either fundamental or traditionally protected in the American experience, his asserted right cannot be sustained under due process.

a. The Craven statute is constitutional because this Court has never held that adultery is a fundamental right protected by substantive due process.

The Craven Statute criminalizing adultery must be constitutionally valid to support the Respondent's termination for conduct unbecoming an officer. The Fourteenth Amendment states, "No person shall be ... deprived of life, liberty or property without due process of law." U.S. CONST. amend. XIV § 1. Craven is a state in the United States. (R. 1). The Respondent was employed by the Rushmore County Police Department ("the Department"). (R. 3). Although the Respondent may have had a property interest to his continued employment by the Department, the Court must review the constitutionality of the statute under the Fourteenth Amendment to determine the validity of the Respondent's termination in response to his claimed privacy right.

Since the Respondent does not dispute the manner of his termination, his claim that the Fourteenth Amendment protected his termination for adulterous conduct is properly examined under substantive due process analysis. The Fourteenth Amendment guarantees two types of protections: procedural and substantive. Before the government can interfere with an individual's rights, the Constitution requires that he or she be provided with notice, a fair hearing, and a presentation of evidence to ensure that the right to procedural due process has been protected. Santosky v. Kramer, 455 U.S. 745, 753-60 (1982). Substantive due process asks whether the government has an adequate reason for taking away a person's life, liberty, or property. County of Sacramento v. Lewis, 523 U.S. 833, 840 (1998). The Respondent does not contest the procedural manner of his termination but instead claims that his rights were violated because an alleged right to sexual privacy under due process should protect his adulterous affair.

In order for the Respondent's termination to be unconstitutional, his adulterous activity would have to be protected by a fundamental right or essential liberty interest to sexual privacy.

Under a substantive due process analysis, the term “liberty” in the Due Process Clause of the Fourteenth Amendment protects only fundamental rights and essential liberty interests. See Collins v. Harker Heights, 503 U.S. 115, 125 (1992); Casey v. Planned Parenthood, 505 U.S. 833, 851 (1992). The Respondent claims that a fundamental right to privacy protects his adultery and makes his termination impermissible. Adultery would need to be recognized as a fundamental right or liberty interest in order to merit protection under substantive due process.

The Supreme Court has not announced a fundamental right that would encompass the Respondent’s alleged right to commit adultery. The Court has granted substantive due process protection or acknowledged a fundamental liberty interest only in limited, specific instances. For example, the Court has ruled explicitly that a person has a fundamental right to marry, Loving v. Virginia, 388 U.S. 1 (1967); to have children, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942); to direct the education and upbringing of one's children, Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc’y of Sisters, 268 U.S. 510 (1925); to marital privacy, Griswold v. Connecticut, 381 U.S. 479 (1965); to use contraception, Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold, 381 U.S. at 485; to bodily integrity, Rochin v. California, 342 U.S. 165 (1952); to abortion, Casey, 505 U.S. at 833; and to refuse unwanted lifesaving medical treatment, Cruzan v. Dir., Mo. Dep’t. of Health, 497 U.S. 261, 278-79 (1990). The Respondent was terminated for adultery constituting behavior unbecoming an officer. Police Chief Patrick Malone explained that the basis for the Respondent’s termination was his involvement in an extramarital affair in which violated the state’s adultery statute. (R. 4). No fundamental right to adultery currently exists under the substantive due process protections of the Fourteenth Amendment, and therefore, the Respondent’s termination was proper.

b. The Respondent's challenge to the Craven statute is invalid because under the Constitution it is an impermissible expansion of judicial authority.

A ruling in favor of the Respondent's claim that adultery is a fundamental right would curtail Craven's police powers and stifle public debate on a contentious issue. The Court's announcement of a fundamental right removes the issue from public debate and democratic legislative procedures, and careful and deliberate analysis must be conducted before expanding the list of liberty rights. Glucksberg, 521 U.S. at 721. Because of the inherently open-ended and abstract nature of due process analysis, any new fundamental right must be grounded in the Constitution, the common law, or some other form of precedent to ensure that the Fourteenth Amendment does not allow the public policy preferences of the current Court to dominate its jurisprudence. Collins, 503 U.S. at 125; Moore v. East Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion). The Respondent petitions that his adulterous relationship is not criminal and therefore cannot be grounds for termination by the State because it is protected by a fundamental right to sexual privacy. (R. 6) A deeper and more explicit constitutional examination is necessary before allowing the Respondent's claim that adultery is protected as a fundamental right to curtail state legislatures' authority.

2. The Respondent's challenge to the Craven statute banning adultery fails to satisfy due process because it cannot meet the Glucksberg test for evaluating fundamental rights.

The right asserted by the Respondent does not pass the Glucksberg test for substantive due process rights. In Washington v. Glucksberg, the Supreme Court developed a two-prong test to determine what constitutes a fundamental right. Glucksberg, 521 U.S. at 720-21. An analysis of the Respondent's claim under Glucksberg demonstrates that his asserted right to commit adultery is neither fundamental nor historically protected. The Respondent cannot claim that

adultery falls within a general right to sexual privacy because fundamental rights must be precisely and narrowly defined. The Respondent's purported right cannot be considered fundamental or supported by the American system of liberties and thus falls short of the Glucksberg standard of substantive due process.

- a. **The Respondent's claim is neither essential to the concept of liberty nor deeply rooted in American cultural and historical traditions as required by Glucksberg.**

The Respondent's termination for adultery will violate the Due Process Clause only if the right to adultery is proven to be fundamental under the test established in Glucksberg, 521 U.S. at 721. In Glucksberg, the Court formulated a two-prong test to determine the existence of fundamental rights. Id. (applying Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)). The Respondent claims that his adulterous affair is protected under a fundamental right to sexual intimacy. (R. 6). In order to be constitutionally protected, the right claimed by the Respondent must meet the Glucksberg test.

Adultery will be considered a fundamental right, as Respondent contends, only if it can be shown to be entrenched in the laws and traditions of United States or essential to the term liberty itself. The first aspect demands that a prospective fundamental right be either "deeply rooted" in the history, laws, and traditions of the United States or of such an essential nature to the term "liberty" that liberty itself could not be said to exist without affirming the right as fundamental and protected. Glucksberg, 521 U.S. at 721; see Palko v. Connecticut, 302 U.S. 319, 325 (1937). The Respondent claims that a fundamental right to sexual intimacy protected his acts of adultery. (R. 6) The right the Respondent asserts exists only if he can show that such a right is central to American society.

Because adultery has been a criminal offense for much of American history, it cannot be considered a fundamental right as the Respondent contends. The historical criminalization of a specific act as applied supports a finding that it is not protected by a fundamental liberty interest. Lawrence, 539 U.S. at 568-69 (noting that the Court’s analytical mistake in Bowers was to apply an improper definition rather than misuse the historical test). Historically, the majority of states have criminalized adultery. Poe v. Ullman, 367 U.S. 497, 533 (1961). Nearly half of the United States still maintain adultery as a crime, including several that classify it as a felony.² Craven is one such state. (R. 6) Craven’s criminalization is paradigmatic of the historical refusal to recognize adultery as a fundamental right.

While other sexual practices have been decriminalized due to societal acceptance, counter to Respondent’s claim, adultery remains a cultural and legal taboo in the United States. Even after Lawrence noted modern trends of tolerance towards homosexuality in its analysis, no such trends exist for the practice of adultery or the devaluation of monogamous marriage. Lawrence, 539 U.S. at 568; Zablocki v. Redhail, 434 U.S. 374, 384 (1978). Popular opinion has supported legislative action such as the Defense of Marriage Act and twenty-eight individual state amendments protecting the institution of marriage. See 28 U.S.C. § 1738C (1996);³ see, e.g., Alaska Const. art. I, § 25; Ark. Const. amend. LXXXIII, § 1; Haw. Const. art. I, § 23; Miss. Const. art. XIV, § 263A; Nev. Const. art. I, § 21, Ariz. Rev. Stat. Ann. §§ 25-101C, -112C (2007); Colo. Rev. Stat. § 14-2-104(b) (2006); Fla. Stat. § 741.212 (2007); Ind. Code § 31-11-1-

² See Ala. Code 13A-13-2 (2003); Ariz. Rev. Stat. Ann. 13-1408 (West 2003); Colo. Rev. Stat. 18-6-501 (2003); D.C. Code Ann. 22-201 (2001); Fla. Stat. Ann. 798.01 (West 2000); Ga. Code Ann. 16-6-19 (Harrison 1990); Idaho Code 18-6601 (Michie 2003); 720 Ill. Comp. Stat. Ann. 5/11-7(a) (West 2002); Kan. Stat. Ann. 21-3507(1) (2002); Md. Code Ann., Crim. 10-501 (2002); Mass. Gen. Laws Ann. ch. 272, 14 (West 2000); Mich. Comp. Laws Ann. 750.30 (West 2003); Minn. Stat. Ann. 609.36 (West 2004); Miss. Code Ann. 97-29-1 (1999); N.H. Rev. Stat. Ann. 645:3 (1996); N.Y. Penal Law 2.55.17 (McKinney 2004); N.C. Gen. Stat. 14-184 (2002); N.D. Cent. Code 12.1-20-09 (1997); Okla. Stat. Ann. tit. 21, 871 (West 2002); R.I. Gen. Laws 11-6-2 (2002); S.C. Code Ann. 16-15-60 (Law. Co-op. 2003); Utah Code Ann. 76-7-103(1) (1999); Va. Code Ann. 18.2-365 (Michie 1996); W. Va. Code Ann. 61-8-3 (Michie 2000);

³ The Defense Against Marriage Act can be found in Appendix B.

1 (2007). Craven’s statute penalizes those who break their state-sanctioned marriage vows. (R. 4). The Respondent’s argument for the decriminalization of his behavior goes against popular opinion and public policy.

b. A general right to privacy for sexual acts including adultery does not exist because it cannot be defined with sufficient particularity to constitute a fundamental right under Glucksberg.

The expansive definition that would be necessary to substantiate the Respondent’s claim that adultery is a fundamental right under sexual privacy conflicts with the standards articulated in Glucksberg. The second aspect of the Glucksberg substantive due process analysis demands that fundamental rights be carefully and precisely defined. Glucksberg, 521 U.S. at 721 (quoting Reno v. Flores, 507 U.S. 292, 301-02 (1993)); see Collins, 503 U.S. 115, 125 (1992); Cruzan, 497 U.S. at 277-78. For example, in Cruzan, the Cruzan family requested the Court to recognize a fundamental “right to die” for their comatose daughter, but the Court held only that substantive due process protected the right of a mentally competent person “to refuse life-saving hydration and nutrition” when confronted with imminent death. 497 U.S. at 279. The Respondent seeks protection under a broad fundamental right to sexual privacy. (R. 6). A broad fundamental right to sexual privacy is not specific enough to satisfy the second prong of the Glucksberg test as Respondent would allege.

The Respondent cannot create a fundamental right to sexual privacy because doing so would reduce the state’s authority to legislate. Defining fundamental rights in overly broad terms provides little guidance to lower courts and renders the states powerless to exercise their police powers. Glucksberg 521 U.S. at 702. See also Lofton v. Sec’y of the Dep’t. of Children and Family Servs., 358 F.3d 804 (11th 2004) (rejecting an expansion of fundamental rights through

Lawrence as inconsistent with the standard fundamental rights analysis announced in Glucksberg). Craven has deliberately created a criminal adultery statute, which the Respondent violated. (R. 4). To overturn this statute would not only infringe upon Craven's legitimate power to legislate but would also leave the states and the lower courts adrift, and unsure of nature and definition of due process rights.

It would be erroneous to shield the Respondent's extramarital affair on the grounds that it is protected merely because it implicates personal privacy. The fact that all previous substantive due process rights focus on personal autonomy does not support the conclusion that all matters of intimacy are necessarily protected. See Glucksberg, 521 U.S. at 727; see generally San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-5 (1973) (refusing to expand due process analysis in this vein). The Respondent contends that his affair escapes criminalization because it was conducted off-duty and did not definitively harm his undercover work. (R. 4). Without more, the essential privacy underlying the Respondent's challenge is not enough to provide substantive due process protection to his conduct.

3. Lawrence v. Texas did not create a broad fundamental right to sexual privacy that would protect or legitimize the Respondent's behavior.

The attempt to apply the protections of Lawrence to the Respondent's adultery ignores the unique context of the decision and its underlying goal of protecting the dignity of an easily exploited group. Lawrence limited substantive due process protections to a distinct group that could be defined by a particular activity and presented a likely target for irrational discrimination. Lawrence, 539 U.S. at 574-75. Lawrence did not create a broad fundamental right that encompasses all private sexual activity but analyzed a specific issue: the constitutionality of anti-homosexual sodomy statutes. Id. at 584. The Respondent seeks

protection under a broad fundamental right to sexual privacy. The Respondent cannot rely on Lawrence because it did not create a broad right to sexual privacy that would encompass adulterous activities. The Respondent committed adultery with a woman and makes no claims to be a member of marginalized group. (R. 3, 4). Adulterers like the Respondent are neither an easily defined group nor have they been subject to systematic deprivation of their rights and liberties.

Since the Respondent was not terminated for acts of homosexual sodomy, Lawrence cannot extend protections to invalidate his termination. Petitioners in Lawrence specifically requested that the Court announce a new fundamental right to sexual privacy, but the court declined. See Lofton, 358 F.3d at 815-16. Instead, Lawrence limited its holding to a re-evaluation of a right for homosexuals to engage in sodomy. Lawrence, 539 U.S. at 578-579. The Respondent's termination was unrelated to any charge that he engaged in homosexual sodomy or violated any related laws. (R. 4). Adultery did not fall under the relief granted in Lawrence, and therefore the Respondent's behavior is not supported.

The Respondent's act of adultery does not merit fundamental rights protection because it is an illicit and improper act. The majority's decision in Lawrence should not be read broadly to grant a fundamental right to actions that states have considered to be "immoral and unacceptable" such as "fornication, bigamy, adultery, adult incest, bestiality, and obscenity." Lawrence, 539 U.S. at 599 (Scalia, dissenting). To do so would effectively end all morality based legislation. Id. The Respondent engaged in sexual intercourse with a woman who was not his wife while he was married. (R. 3, 4). The Respondent's criminal actions should not be protected under a fundamental rights analysis.

4. The Respondent's claim that his adulterous affair is private fails because his behavior implicates a public legal relationship with the State of Craven.

The Respondent's actions disrupted the legal relationship between a married couple and the state of Craven. Lawrence refused to address the question of sexual privacy with respect to state-regulated, marital relationships and instead only decriminalizes the private action of sodomy. Lawrence, 539 U.S. at 575. Rather, Lawrence explicitly rejected the opportunity to protect public conduct, conduct that causes injury to anyone, or conduct which abuses a state protected institution. Lawrence, 539 U.S. at 567. Despite being served with divorce papers, the Respondent's conduct was deemed "behavior unbecoming an officer" specifically because he was still married at the time of his indiscretion. (R. 4). The Respondent implicated the state when he chose to engage in an illegal sexual activity with a woman who is not his wife under the law.

B. The Craven statute under which the Respondent was terminated should be subject to rational basis review because it does not offend a fundamental right and the state has a valid and compelling interest in legislating against immoral conduct.

Due process jurisprudence suggests that the Craven adultery statute should be examined under rational basis review since it does not infringe upon fundamental rights and the state has a compelling interest in regulating moral conduct. Because the Respondent's challenge presents no fundamental right, the Craven statute cannot be evaluated under strict scrutiny. Committing adultery does not make the Respondent a member of a quasi-suspect class and cannot support the application of intermediate review. The state's interest in regulating the Respondent's conduct and the absence of a fundamental right to commit adultery require the application of rational basis review to the adultery statute.

1. The right asserted by the Respondent is not fundamental and cannot trigger strict scrutiny under the Due Process Clause.

The Fourteenth Amendment does not extend fundamental rights protections to sexual privacy and therefore the Respondent's claim subject only to rational basis review. Only those rights deemed fundamental under the Glucksberg analysis are afforded strict scrutiny review. Glucksberg 521 U.S. at 762. Any other claims of constitutional violations that threaten other rights warrant only rational basis review. See Romer v. Evans, 517 U.S. 620, 631 (1996) (“[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.”); United States v. Carolene Prods., 304 U.S. 142, 152, n.4 (1938). The Respondent premises his challenge to his termination on the ground that adultery is protected by a fundamental right to sexual privacy (R. 6). However, because there is no fundamental right to adultery, the Respondent's termination is properly judged under rational basis.

2. The Respondent's claim does not qualify for intermediate scrutiny because his behavior does not make him a member of a quasi-suspect class and adulterers are not victims of an adverse political process or historical discrimination.

As a more demanding standard than rational basis review, intermediate scrutiny is inapplicable to the Respondent's challenge because his termination and the criminal prohibition on adultery were not based on prejudice against a particular class. When the state classifies individuals according to a quasi-suspect characteristic, such as gender or illegitimacy, the state must demonstrate that its classification serves important governmental objectives that are substantially related to the classification. See, e.g., United States v. Virginia, 518 U.S. 515, 575 (1996) (applying a heightened standard to review the Virginia Military Institute admission policy

because of the historical discrimination women faced despite their political majority). In Lawrence, the Court overturned Texas’s prohibition on sodomy because the policy deprived homosexuals of dignity by prohibiting acts common to their lifestyle. See Lawrence v. Texas, 539 U.S. at 578-79 (applying a more searching form of scrutiny than rational basis without extending “suspect class” protections to homosexuals). The Respondent claims that his termination pursuant to a statutory prohibition on adultery violates his right to exercise sexual privacy. (R. 6). However, the Craven statute 11-198.01 criminalizes the act of adultery. (R. 4). The ban on adultery does not make the Respondent a member of a quasi-suspect class that suffers a disparate impact requiring intermediate scrutiny.

3. Rational basis review presumes that the Craven statute is constitutional because the right to sexual privacy is not fundamental.

Under rational basis review, the existence of any plausible reason for the state to prohibit adultery or for the police department to regulate officers’ personal lives will balance out the Respondent’s claims to sexual privacy. Under rational basis review, legislation is presumed to be valid. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985); see FCC v. Beach Commc’ns, Inc., 508 U.S. 307, 313-14 (1993) (maintaining that rational basis review “is a paradigm of judicial restraint”). Craven Statute 11-198.01 prohibits adultery. (R. 4). The Respondent admits to having an ongoing sexual relationship with Jacqueline Malone. (R. 3). However, the Respondent is still legally married. (R. 4). Any rational basis analysis of his constitutional challenge will presume the validity of the prohibition on adultery despite the Respondent’s alleged interest in his privacy.

C. Craven has a legitimate, compelling interest in protecting marriage against the threats posed by Respondent's immoral conduct and his improperly asserted right to engage in it.

Marriage is a state institution predicated on monogamy, the very nature of which is threatened by the Respondent's claim. Because marriage is the core of American culture, the general police powers of the state are properly utilized in its defense. The State of Craven is authorized to legislate against the Respondent's conduct because the making of moral judgments is a legitimate state prerogative. The Respondent conducted himself in a manner contrary to the laws he swore to uphold as a member of the police force and was promptly dismissed. Since the State of Craven had a justifiable reason for proscribing conduct like that of the Respondent, the constitutional challenge to Craven statute 11-198.01 must fail.

1. Marriage is legitimately sanctioned, endorsed, and regulated by the state as an essential societal institution.

The laws of Craven treat marriage as an essential social institution. As marriage is inseparable from state interests, it mediates the relationship between the private life of the marital union and the social order of the state. The state has constructed a legal system around the marital union. This system privileges monogamy in marriage in order to protect citizens against fraud, coercion, and immorality. It is a legitimate priority of the state to ensure that the legal and social structure of marriage remains intact.

a. Marriage is a product of the state and the fundamental organizational unit of the social and legal system.

The Craven adultery statute should not be subject to federal consideration because it does not discriminate against those who may enter into marriage. Marriage is a state-regulated activity. Loving, 388 U.S. at 7. The Court is willing to intrude upon the valid police power of

the state only when the state passes unconstitutional laws that discriminate against who may enter into a marriage. Id.; see also Zablocki, 434 U.S. at 403-04, n.4 (holding that classifications based on marital status differ fundamentally from those that determine who may lawfully enter into marriage, placing Califano v. Jobst, 434 U.S. 47, 53 (1977) in the former category and Loving in the latter). Craven statute 11-198.01 holds criminally liable only those who commit the act adultery. (R. 4). Craven's decision to criminalize adultery is a valid use of its general police powers.

The Respondent's marriage is subject to regulation by the state of Craven. A marriage is more than a bond between two people; as the third party to the marital contract, the state has a substantial interest in regulating the creation, maintenance, and dissolution of marriages. State v. Holm, 137 P.3d 746-47 (Utah 2006); see Boddie v. Connecticut, 401 U.S. 371, 376 (1971) (indicating that marriage is an institution created by the state as evidenced by the fact that only the state can grant a divorce). Although served with divorce papers, the Respondent was still legally married at the time of the affair. (R. 4). The State of Craven has an interest in the Respondent's marriage.

Extramarital sexual activity, such as the Respondent's affair, destabilizes the legal framework of a state like Craven. Marriage supports a vast network of laws exclusively based on monogamy. Potter v. Murray City, 760 F.2d 1065, 1070 (10th Cir. 1985); see, e.g., Califano, 434 U.S. at 53 (explaining that marriage marks a change in economic status and dependence); Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (linking the stability of society with the benefits and obligations derived from state sponsored marriage); Baker v. Vermont, 744 A.2d 864 (Vt. 1999) (chronicling the myriad protections and obligations that marital status grants to and imposes upon individuals, including property rights, inheritance,

benefits, adoption and custody, evidentiary privilege). While married, the Respondent was not monogamous. (R. 4). By engaging in sexual activity outside of his marriage, the Respondent showed flagrant disregard of Craven's legitimate role in the regulation of marriage.

b. American courts have defended marriage against a variety of constitutional challenges and repeatedly validated its role in protecting society from fraud, abuse, and moral harm.

Endorsing the Respondent's extramarital sexual relationship will not promote societal progress or familial relationships. Family and society are founded upon marriage, which is essential to civilization itself. Zablocki, 434 U.S. at 384 (quoting Maynard v. Hill, 125 U.S. 190, 205, 211 (1888)) (holding the right to marry as essential to the foundation of society). For example, in Michael H. v. Gerald D., the court noted that American laws have protected marital relationships against substantive due process claims such as the alleged custody right of a biological father asserted by Michael H. 491 U.S. 110, 124-25 (1989) (presuming that legal marital status supersedes biological relationships to secure the "peace and tranquility of the state and families"). The Respondent is married but is having an extramarital affair with Jacqueline Malone. (R. 4). The Respondent's behavior frustrates Craven's interest in promoting stable families and a civil society.

One of Craven's most compelling interests in support of marriage is the prevention of harm. Promoting monogamous marriage minimizes the harm caused by potential fraud or coercion. Potter, 760 F.2d at 1070 (noting the potential for abuse and fraud in bigamous relationships); see Lawrence, 539 U.S. at 567 (distinguishing its protection of sexual privacy from any case involving minors, coercion, injury, or public conduct). The Respondent's wife served him with divorce papers while he conducted an extra-marital sexual relationship. (R. 4).

Adulterous behavior like the Respondent's has the potential to harm third parties like his wife or possible children.

2. Public morality is a legitimate government interest and the State of Craven is constitutionally permitted to make moral judgments on behalf of its citizens.

Craven statute 11-198.01 criminalizes immoral behavior. States may validly base their laws on moral judgments and need not provide conclusive evidence as efficacy of such legislation. Williams v. Attorney Gen. of Ala., 378 F.3d 1232, 1238 (11th Cir. 2004) (noting that the protections to sexual privacy articulated in Lawrence do not extend to the public realm because states can rely on morality as justification for laws although not as its only protection); see Paris Adult Theatre v. Slaton, 413 U.S. 49, 62-63 (1973) (noting that showing a legislative act was based on unsubstantiated assumptions is not a sufficient reason to find it unconstitutional). The Respondent challenges Craven's adultery statute as an unconstitutional infringement on his right to privacy. (R. 2). The Craven State Legislature's decision to criminalize adultery is constitutional because it is the state's prerogative to make moral judgments for the welfare of its people.

3. The Respondent failed to meet the expectations set for a Craven police officer when he acted in an illegal and immoral manner.

The Respondent's dismissal from the police force was proper as his adulterous conduct was unbecoming of an officer of the law. The Rushmore County Police Department properly expected the Respondent, a police officer, to uphold the law in order to ensure the ongoing effectiveness and integrity of the force. The character deficiencies demonstrated by the

Respondents criminal actions justified Rushmore County's decision to terminate him for behavior unbecoming an officer.

a. Criminal conduct is a constitutionally permissible basis for the Respondent's dismissal from the Rushmore County Police Department.

Since the state of Craven has chosen to criminalize adultery, the Respondent's discharge for commission of a crime was valid. The admission of criminal conduct by a government employee is a valid basis for termination. Johnston v. U.S. Postal Serv., 756 F.2d 1461, 1466 (9th Cir. 1985); see, e.g., Piscottano v. Murphy, 511 F.3d 247, 283-84 (2d Cir. 2007) (holding that association with an organization involved in criminal activity warranted discharge of a corrections officer). The Respondent admits to committing adultery in violation of the Craven's criminal code. (R. 4). The criminal status of adultery in Craven validates the Respondent's termination for "behavior unbecoming an officer."

b. The Respondent's adulterous behavior undermined the effectiveness and integrity of the police force as a whole and thereby subverts Craven's substantial interest in protecting its citizenry.

The Respondent's infidelity was grounds for termination due to its criminal nature and potential impact on the reputation of the Rushmore County Police Department. Police regulations are presumed valid unless they are shown to have no rational connection to promoting the efficacy and integrity of the department. Shawgo v. Spradlin, 701 F.2d 470, 483 (5th Cir. 1983). The Rushmore County Police Department has a termination policy based upon "behavior unbecoming an officer." (R. 4). As a police officer, the Respondent was expected to uphold the law and maintain the dignity of Craven's police force.

As a significant relationship in conflict with his spouse and hidden from his co-workers, the Respondent's affair necessarily carries the potential to burden his own police work and that of the larger department. Maintaining efficiency, discipline, and morale in a police department, a quasi-military unit, is a significant state interest that legitimates the regulation of even the off-duty, personal conduct of an officer. Kelley v. Johnson, 425 U.S. 238, 245 (1978). The Respondent is part of the Rushmore County Police Department, a quasi-military organization, where officers are armed and expected to respond to dangerous situations. (R. 4) Respondent's own undercover work investigating weapons trafficking places him at risk and necessitates a clear chain of command in times of stress and danger. (R. 2). Respondent's illegal and immoral activity is likely to affect the efficiency, discipline, and morale of the Police Department.

The Respondent lacked the requisite character to carry out his paramount responsibility to uphold the law. The state has a compelling interest in ensuring that its officers have the physical, mental, and moral fortitude necessary to carrying their duties. See, e.g., Allen v. City of Greensboro, 452 F.2d 489, 490 (4th Cir. 1971) (citing a Greensboro regulation prohibiting conduct "unbecoming an officer and a gentleman"). Many lower courts have upheld the removal, suspension, or demotion of police officers for off-duty conduct involving such things as adultery, see, e.g., Wilson v. Swing, 463 F. Supp. 555, 564-65 (M.D.N.C. 1978) (holding that dismissal of a police officer for adultery was rationally related to the legitimate government interests in morale, discipline, effectiveness and reputation in the community of the police department), and spending the night with a co-employee, see, e.g., Shawgo, 701 F.2d at 482-83 (holding the state did not violate officer's privacy rights of the officers in proscribing such extra-marital relationships as they were prejudicial to "the good order" of the department). The Police Department terminated the Respondent for "behavior unbecoming an officer" due to his

criminally adulterous affair. (R. 4). The fact that the Respondent committed adultery demonstrated that he did not possess the personal integrity expected of a member of the Rushmore County Police Department.

CONCLUSION

For the foregoing reasons, the Rushmore County Police Department respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Thirteenth Circuit.

Respectfully Submitted,

Counsel for Petitioner

APPENDIX A

United States Constitutional Provisions

Amendment 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.

Amendment 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.

APPENDIX B

Federal Statutes

42 U.S.C.S. § 1983. Civil action for deprivation of rights

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.

1 U.S.C.S. § 7. Definition of "marriage" and "spouse"

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

The Defense Against Marriage Act, 28 U.S.C.S. § 1738C

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.