

No. 08-31958

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 UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT**

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Under the Fourth Amendment, does a police officer have the right to ensure his safety by brushing aside an individual's un-zipped exterior coat when that officer reasonably suspects that the individual is armed and dangerous?

2. Under the Due Process Clause of the Fourteenth Amendment, does a police department have the right to uphold a departmental code of conduct and terminate an officer when that married officer has participated in an extramarital affair with the Police Chief's daughter?

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STATEMENT OF FACTS

This Court is being asked to reverse a decision by the Thirteenth Circuit Court of Appeals. That decision found that the Petitioner, the Rushmore County Police Department, violated the Respondent's Fourth Amendment right against unreasonable searches, and the Respondent's Fourteenth Amendment right to due process.

On June 7, 2005, Officer Maxwell Calloway of the Rushmore Country Police Department was patrolling the north side of McDonough Square. For the past eight months, Officer Calloway had been conducting an intensive investigation of Red Tide, a private military company, that was suspected of selling illegal firearms. On the day in question, Office Calloway was pursuing a tip that Red Tide officials were meeting prospective weapons buyers in McDonough Square.

While patrolling the area, Officer Calloway spotted an individual with closely cropped hair and a black nylon bomber jacket. Although the individual did not match the description of the expected Red Tide official, Officer Calloway's suspicions were aroused by the individual's attire, as the temperature was in the seventies. Officer Calloway's suspicious were not relieved after observing the individual, who appeared agitated, scan the rooftops of surrounding buildings and the layout of the square for twenty minutes. At that point, Officer Calloway, mindful of the fact that his action could compromise the Department's investigation, made the difficult decision to approach the suspicious individual.

As Officer Calloway approached the individual, he identified himself and asked the individual his name. The individual glanced around furtively before angrily answering "Bill." Officer Calloway remained suspicious that the individual was involved

in some criminal activity. As the individual began to turn away, Officer Calloway grabbed him by the left wrist and patted the individual down to determine whether he was armed. Though Officer Calloway did not feel any suspicious objects, the individual began to curse and berate the officer.

As the search concluded, the individual started to leave. At that moment, Officer Calloway spotted a vertical leather strap around the individual's chest area underneath the individual's unzipped jacket. Although Officer Calloway was not certain of the strap's purpose, he recognized it from his experience with the Police Department as a holster used to carry concealed weapons, weapons that are illegal under Craven law. As Officer Calloway attempted to move the jacket aside to get a better look, the individual brushed the officer's hand away. Officer Calloway tried again, and discovered a Glock 21 .45 caliber pistol. Officer Calloway immediately put the individual under arrest.

Only after being arrested did the individual claim that he was a police officer from a different precinct investigating Red Tide. When asked by Officer Calloway for identification, the individual could not produce any, claiming that he never carries identification when working undercover. Officer Calloway remained suspicious of the individual's actions and story and determined that the individual should be held pending further investigation.

A full search was conducted of the individual at Officer Calloway's home precinct in Charlestown. Officers discovered a cell phone containing the contact information of several Red Tide officials, as well as contact information for the Jacqueline Malone, daughter of Rushmore County Police Chief Patrick Malone. Suspecting that the arrested individual was specifically targeting Ms. Malone, Officer

Calloway called her. Upon receiving a call from the police, Ms. Malone spontaneously disclosed that she had been having an affair with the individual, who she identified as Officer William Tracey, the Respondent in this action. Officer Calloway immediately called Officer Tracey's precinct and explained that he had arrested one of their officers who was acting suspiciously, and that Officer Tracey had been having an affair with the Police Chief's daughter. Realizing that Officer Tracey was authorized to carry a concealed weapon, Officer Calloway apologized to the Respondent and released him.

On June 8, 2005, Respondent was fired by the Rushmore County Police Department for "conducted unbecoming of an officer." Police Chief Malone acknowledged that, although Respondent was not on duty, nor performing duties as a police officer during his encounters with Ms. Malone, Respondent's actions were in violation of the state's adultery statute. Though Respondent had been separated from his wife, and has recently been served with divorce papers, he was married during his affair with Ms. Malone.

The question now before the Supreme Court of the United States is whether Officer Calloway's search of Respondent was reasonable under the Fourth Amendment, and whether Respondent's due process rights were violated by the Rushmore Police Department.

SUMMARY OF THE ARGUMENT

The search conducted by Officer Calloway was reasonable and permissible under the Fourth Amendment's balancing test. In weighing the slight intrusion into Respondent's privacy against the weighty governmental interest articulated in *Terry*, brushing aside the jacket of a potentially armed and dangerous individual was well within Constitutional limits. This Court has repeatedly recognized, starting with *Terry*, that police officers conducting their duties have an important and critical interest in defending themselves from the possibility of sudden violence. No officer should wait until they are attacked, and this interest tips the balance away from an individual's concern for privacy. Officer Calloway took limited and necessary steps to ensure his safety when he searched Respondent.

Furthermore, the seizure of Tracey's weapon was valid under the "Plain View" doctrine of the Fourth Amendment. Under the "Plain View" Doctrine, an item not described in a warrant may be seized if it is immediately apparent that it is incriminating evidence or contraband. Although Calloway was not certain that the leather strap was being used to carry a concealed weapon, he did have probable cause to have such a belief given his experience as a police officer. The "Plain View" doctrine does not require certainty that an item is contraband to be seized. Additionally, the public safety concern of controlling a dangerous weapons ring such as Red Tide tilts the balancing test in favor of the government interest over the minor intrusion into privacy. The Court should find this search valid because Calloway saw the leather strap in plain view from a legitimate vantage point, and had probable cause to believe the strap was an instrumentality of a crime.

Finally, under the Fourteenth Amendment's guarantee of due process, a police department has the ability to terminate an officer for conduct unbecoming an officer, particularly when that conduct includes adulterous sexual activity. Nowhere in the history and traditions of this Nation is there any special protection for one's sexual conduct alone. *Lawrence v. Texas*, the linchpin of the Thirteenth Circuit's opinion, does not sound the end for public morality, and explicitly disclaims protecting conduct like that at issue here. While society's protection of marriage is represented in its moral condemnation of adultery, Rushmore County's termination of the Respondent represents much more. By firing Respondent, Rushmore County ensured that his conduct did not create crippling distrust for the police department in its own community, and prevented a situation in which one adulterous partner might blackmail the other. Under either degree of judicial scrutiny, whether "rational basis" or "intermediate," Rushmore County's efforts to protect the department and its integrity should be upheld by this Court.

ARGUMENT

I. Search and Seizure

a. Calloway's Stop and Frisk was valid under Terry.

The Thirteenth Circuit erred in this case in deciding that Officer Calloway's search violated Respondent's Fourth Amendment rights by brushing aside Respondent's jacket to reveal a concealed weapon. The Fourth Amendment permits reasonable searches when a police officer possesses reasonable suspicion. In determining the reasonableness of any search, a court must weigh the privacy interests of the searched individual with the legitimate government interests. Officer Calloway's search of Respondent was less invasive than the permitted stop in *Terry*, and the government objectives were just as, if not more, important than the ones in *Terry*. This Court should reverse the ruling by the Thirteenth Circuit and find that the search conducted by Officer Calloway was reasonable and permitted under the Fourth Amendment.

i. The Key to Fourth Amendment Jurisprudence is Reasonableness Determined by a Balancing Test.

The Fourth Amendment of the US Constitution provides that “[t]he 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 words of the amendment explicitly forbid unreasonable searches and seizures while implicitly allowing reasonable searches and seizures. The Supreme Court has followed this language and determined that the “touchstone of the Fourth Amendment is reasonableness.” *U.S. v. Knights*, 534 U.S. 112, 118 (2001). A reasonableness inquiry will balance “on the one hand, the degree to which it intrudes upon an individual's

privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.” *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). The question before the Court is therefore whether it was unreasonable, given the circumstances, for Officer Calloway to brush back Respondent’s exterior coat during a stop where reasonable suspicion for that stop existed. In conducting the reasonableness analysis, the Court should find that the intrusion into Respondent’s privacy was not severe, and that the search was without question needed for the promotion of legitimate governmental interests.

ii. The Search at Issue Was Not as Invasive as the Search in *Terry*.

The search conducted by Officer Calloway was significantly less invasive than the frisk that was permitted by this court in *Terry v. Ohio*. The *Terry* court allowed “a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment” when it permitted police officers to frisk individuals they had stopped under certain circumstances. *Terry v. Ohio*, 392 U.S. 1, 17 (1968). When conducting a body frisk, an officer is allowed to intrusively probe every portion of the citizen’s body. *Id.* It is difficult to imagine a more intimate intrusion. Conversely, the search at issue in this case was not as invasive as the pat-down search conduct in *Terry*. Instead of feeling every part of the individual’s body, Officer Calloway merely brushed aside Respondent’s unzipped exterior coat. To accomplish this, it was not even necessary for Officer Calloway to place his hands inside Respondent’s coat; it was possible to brush it aside by simply feeling the exterior of the coat. *Terry* explicitly stands for the proposition that touching the outer surfaces of an individual’s clothing is permissible. *Id.* at 30. Officer Calloway’s brushing was a considerably less severe intrusion of

Respondent's privacy than the "intrusion upon cherished personal security" allowed in *Terry* was. *Id.* at 34. In carrying out the reasonableness balancing test, this factor give weight in favor of the search being reasonable.

iii. The Governmental Interests Involved Were as Great as Those in *Terry*.

Officer Calloway's limited search did promote legitimate governmental interests. In *Terry*, "[t]he sole justification of the search in the present situation [was] the protection of the police officer and others nearby." *Id.* at 29. The Court wanted to make sure that a police officer, acting in the course of his duties, would not be placed in unnecessary danger by a hidden weapon that could be used without warning. *Id.* at 33 ("There is no reason why an officer...should have to ask one question and take the risk that the answer might be a bullet."). The police officer in *Terry* had stopped individuals that he, based on his years of experience, suspected of preparing to rob a store. *Id.* at 28. Fearing that the individuals might be armed, the officer quickly assured that he would be safe from a surprise attack by patting each individual down, finding several guns in that process. *Id.* The rationale of officer safety present in *Terry* applies equally well in this case. As in *Terry*, Officer Calloway had a reasonable suspicion that Respondent was armed. Officer Calloway came to that conclusion based on his experience as a police officer, and his observation of Respondent acting suspiciously, the fact that Respondent physically stopped Officer Calloway from investigating the leather strap, and the fact that Officer Calloway suspected that Respondent was a member of an illegal firearms distribution network, who would be more likely than the average citizen to be carrying a concealed

weapon. Given those facts, Officer Calloway had every right to insure his safety, and the safety of the surrounding public in the park.

iv. The Underlying Principles of *Terry* Permit the Search at Issue.

The scope of the search at issue, specifically the brushing aside of a jacket, is well within what this Court has allowed in the past. *Terry* stated that “[t]he scope of the search must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible.” *Id.* at 18. In *Terry*, the police officer initiated a frisk that was designed to find illegal weapons. Here too, Officer Calloway was merely trying to find any weapons that might threaten his life or the life of others around him. Although the initial frisk found nothing, the visible leather strap, a strap that is used to carry an illegal concealed weapon, gave Officer Calloway reasonable suspicion of illegal activity. The subsequent brush of the jacket was strictly tied to that suspicion. Officer Calloway was not randomly searching Respondent for evidence of any illegal activity, rendering this case not analogous to *Sibron v. New York*. In *Sibron*, the police officer thrust his hand into Sibron’s pocket and recovered drugs. *Sibron v. New York*, 392 U.S. 40, 45-46 (1968). Unlike this case, there was no reasonable suspicion in *Sibron*, and the officer was not acting because he feared Sibron had a weapon; the officer was merely engaging in a fishing expedition that was not reasonably limited in scope. *Id.* at 65. The scope of the search conducted by Officer Calloway was well within the scope of what the Fourth Amendment permits.

Sibron should not be understood to limit the reasoning of *Terry*. While *Sibron* states that the “search for weapons approved in *Terry* consisted solely of a limited patting of the outer clothing,” that does not mean that *Terry* forbade other searches designed to

protect officers. *Id.* The language used in the holding of *Terry* is in fact very limited, but the underlying principles are quite large. The Court “merely” decided that a specific type of search was allowed in specific circumstance, it did not foreclose other searches designed to achieve the same goal. *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

In *Michigan v. Long*, this Court used the reasoning, logic and “the principles that we have established in *Terry*” to hold that when an individual is pulled over, the armrest of his car can reasonably searched if the officer reasonably perceives that the driver is armed and dangerous. *Michigan v. Long*, 463 U.S. 1032, 1035 (1983). The search allowed the officer to open the closed armrest of the suspect’s car to search for weapons that might be immediately available to the suspect and which could put the officer’s life in danger, expanding what was explicitly allowed in *Terry*. *Id.* at 1035. The *Long* court recognized the potential danger posed to police officers if there is a weapon not just on the suspect, but within the immediate control or vicinity of the individual being questioned. *Id.* at 1048. If Respondent was a criminal intent on harm, he certainly had immediate access to his concealed weapon. This weapon would have posed a danger to Officer Calloway if he had not been allowed to discover what the leather strap held. It does not make sense to unnecessarily expose a police officer to harm. An officer should be able to “‘neutralize the threat of physical harm,’ when he possesses an articulable suspicion that an individual is armed and dangerous.” *Id.* at 1034. That is all Officer Calloway did in this case. Officer Calloway should not be punished because he did not detect the gun the first time; he did not lose the right to protect himself because he failed to discover a carefully concealed weapon beneath a thick bomber jacket. Upon seeing the strap, Officer Calloway discovered an articulable suspicion and realized that he could

still be in danger. He then took limited steps to ensure his safety. If searching through an armrest in an individual's car is a reasonable search in effectuating officer safety under the logic of *Terry*, brushing aside a jacket, which is a less intrusive search, is equally reasonable.

b. Officer Calloway's seizure of the weapon was valid under the "plain View" Doctrine because the leather strap was in plain sight, Calloway was legitimately on the premises, and Calloway had probable cause to believe that the strap was the instrumentality of a crime.

i. Warrantless Search and Seizures May be Valid under Certain Circumstances.

Under the Fourth Amendment of the Constitution of the United States, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, support by Oath or affirmation, and particularly describing the place to be search and the persons or things to be seized." U.S. Const. amend. IV.

The Supreme Court, however, has recognized that reasonableness does not require the police to obtain a search warrant before conducting every search. "When faced with special law enforcement needs, diminished expectations of privacy, minimal instructions, or the like," the Court has carved out exceptions to the warrant requirement. *Illinois v. McArthur*, 531 U.S. 326 (2001). The Fourth Amendment does not prohibit all searches, but only those that are both without a warrant and unreasonable. *Florida v. Jimeno*, 500 U.S. 248 (1991).

ii. The “Plain View” Doctrine Allows for the Seizure of Contraband in Plain View.

The Supreme Court has held warrantless searches to be reasonable under certain circumstances. In particular, under the “Plain View” doctrine, an item not described in a warrant may be seized if it is immediately apparent that it is incrimination evidence or contraband. “It is well established that, under certain circumstances, the police may seize evidence in plain view without a warrant.” *Coolidge v. New Hampshire*, 403 U.S. 443, 403 (1971).

Under the “Plain View” doctrine, warrantless seizures by the police are justified when the police are legitimately on the premises, they discover objects that have probable cause to believe are contraband or fruits or instrumentalities of crime, and they observe such evidence in plain view. *Arizona v. Hicks*, 480 U.S. 321 (1987).

This case meets all the criteria of the “Plain View” doctrine. Calloway was legitimately on the premises of the public park; he had a lawful right to be there. In *Hicks*, a search was ruled in invalid because a stereo was moved. This case is distinguishable from *Hicks* because nothing was moved to reveal the strap. The strap was exposed as the plaintiff turned away; the record states nothing about Calloway moving the jacket to expose the strap.

iii. The “Plain View” Doctrine requires probable cause, but does not require certainty that an item is contraband.

Because the strap was plainly visible to Calloway in his lawful vantage point, the only question remaining is the existence of probable cause. Calloway knew from own his police experience that a vertical leather strap was indicative of a holster used to carry a

concealed weapon. The leather strap created probable cause that a weapon was present, the instrumentality of a crime. The holster itself was an instrumentality because its purpose was to contain a concealed weapon, which would be in violation of state law if Tracey was not a police officer. Calloway had no reason to believe Tracey was a police officer, other than Tracey's own claims. Calloway proceeded appropriately in guarding his own safety and the safety of others until Tracey could produce some sort of police identification.

Calloway stated that he was not completely certain that the leather strap was part of a weapon holster. Certain knowledge that an object is incriminating evidence, however, is not necessary under the "Plain View" doctrine. *Texas v. Brown*, 460 U.S. 730 (1983). In *Brown*, a police officer observed a tied-off opaque balloon in plain sight. The Supreme Court held that the police officer legitimately seized the balloon. The court found that, based on his experience and knowledge as a policeman, the officer had probable cause to believe the balloon contained illegal drugs. Calloway's knowledge of the nature of the strap is based on his police experience. In determining the validity of a search, an officer may assess "the situation in light of his special training and familiarity with the customs of the area's inhabitants." *United States v. Arvizu*, 534 U.S. 266 (2002).

iv. Calloway had probable cause to believe that the leather strap was an instrumentality of a crime because of his experience as a police officer.

This case is distinguishable from *Hicks*, where a search was not found to be valid under the plain sight doctrine. In *Hicks*, the supposed probable cause to believe that an expensive stereo system was the fruit of a crime was its presence in a poor apartment. Rather than probable cause to believe the item was contraband, all the police had was

evidence that something was unusual. In the present case, however, the leather strap was direct evidence of the presence of a dangerous weapon. This suspicion is exasperated when placed in the context of the ongoing Red-Tide dangerous weapon ring.

v. Public policy favors law enforcement’s protection of public safety in dangerous situations, such as Red Tide’s weapons ring.

“The permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. *Delaware v. Prouse*, 440 U.S. 468 (1979). The dangerous weapons ring, the very cause of Calloway’s investigation, presents a unique circumstance of danger. Given the public policy behind both *Terry* and *Hicks*, the Court should err on the side of controlling the dangerous weapons over the minimal intrusion on one person. Indeed, a less than probable cause requirement has been used in situations of special operational necessities.

“We do not say, of course, that a seizure can never be justified on less than probable cause. We have held that it can -- where, for example, the seizure is minimally intrusive and operational necessities render it the only practicable means of detecting certain types of crime. See, e.g., *United States v. Cortez*, 449 U. S. 411 (1981) (investigative detention of vehicle suspected to be transporting illegal aliens); *United States v. Brignoni-Ponce*, 422 U. S. 873 (1975) (same); *United States v. Place*, 462 U. S. 696, 462 U. S. 709, and n. 9 (1983) (dictum) (seizure of suspected drug dealer's luggage at airport to permit exposure to specially trained dog).”

Arizona v. Hicks 480 U.S. at 327.

vi. This Court should find the search valid under the “Plain View” Doctrine.

The “Plain View” Doctrine allows for the seizure of evidence, seen by an officer legitimately on the premises, that the officer has probable cause to believe is the

instrumentality of a crime. *Arizona v. Hicks*, 480 U.S. 321 (1987). Calloway was in a legitimate location, and had probable cause to believe the leather strap was a holster for a concealed weapon, an instrumentality for violating state law. Furthermore, Calloway observed the strap in plain view. Because all of the requirements set out in *Hicks* are met, Calloway's seizure of Tracey's weapon was a valid search and seizure under the Fourth Amendment.

II. Substantive Due Process

The Rushmore County, Craven, Police Department (Rushmore County) justifiably terminated the employment of Respondent for "behavior unbecoming an officer" when he engaged in extra-marital sexual activity in violation of a criminal statute. There exists no protected liberty interest in adulterous sexual activity under the Fourteenth Amendment's guarantee of due process of law. The Thirteenth Circuit Court of Appeals erred in its substantive due process analysis, in its application of "intermediate scrutiny" and in its conclusion that Rushmore County's actions are not sufficiently justified under that standard. "Rational basis scrutiny" is the proper standard by which to review Rushmore County's actions and, even under "intermediate scrutiny," Rushmore County's interests in maintaining an effective police force are sufficient to justify terminating the Respondent.

a. Under *Washington v. Glucksberg*, the Respondent's alleged "right to adulterous sexual conduct" finds no special protection under the Fourteenth Amendment.

i. Because lower courts adopt utilize it concrete standards with great regularity, *Washington v. Glucksberg* should provide framework through which to review a substantive Due Process analysis.

While wholly ignored by the Thirteenth Circuit in the instant case, the Court in *Washington v. Glucksberg*, 521 U.S. 702 (1997) articulated a step by step framework through which every substantive due process claim should be judged under the Fourteenth Amendment. The Fourteenth Amendment’s Due Process Clause holds that no state shall “deprive any person of life, liberty or property, without due process of law.” U.S. CONST. amend. XIV, § 1, cl. 3. Under this clause, this Court has extended heightened protection only to those rights and liberty interests which it deems “fundamental.” See *Reno v. Flores*, 507 U.S. 292, 301-302 (1993) and *Collins v. City of Harker Heights*, 503 U.S. 113 (1992). While the Court has declared certain non-textual rights to be fundamental, like the right to marry, *Loving v. Virginia*, 388 U.S. 1(1967), and the right to marital privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court admits this practice is a limited one.¹

To determine whether heightened scrutiny of state action is required under the Fourteenth Amendment, the Court in *Glucksberg* articulated a substantive due process analysis with “two primary features.” *Glucksberg*, 521 U.S. at 720. First, the Due Process Clause specially protects only those fundamental rights and liberties which are “deeply rooted in this Nation’s history and traditions,” and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed.” *Id.* at 721 (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) and *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)). Second, the Court required a “careful description” of the claimed liberty interest. *Id.* (citing *Flores*, 507 U.S. at 302). Only upon satisfaction of these threshold requirements will the Court require more than “a

¹ “The doctrine of judicial self restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.” *Collins*, 503 U.S. at 125.

reasonable relation to a legitimate state interest to justify the action.” *Id.* 722. When satisfied, though, the Court requires that state action be “precisely tailored to serve a compelling governmental interest.” *Plyler v. Doe*, 457 U.S. 202, 217 (1982).

Though the Thirteenth Circuit below does not explicitly reject *Glucksberg*, nowhere in its opinion is there any consideration of the history and traditions of this Nation or any inquiry beyond this Court’s jurisprudence. Instead, the Thirteenth Circuit’s opinion accepts wholesale that *Lawrence v. Texas*, 539 U.S. 558 (2003) controls the analysis of Respondent’s alleged liberty interest. The response of lower courts since *Lawrence*, however, reflects an opposite conclusion. “Whatever substantive due process revolution *Lawrence* was intended to bring about has not come to fruition.” Brian Hawkins, Note, *The Glucksberg Renaissance: Substantive Due Process Since Lawrence v. Texas*, 105 Mich. L. Rev. 409, 443 (November 2006). In reviewing cases applying *Glucksberg*’s framework since this Court’s decision in *Lawrence*, most “ignore *Lawrence* completely; of the few cases that acknowledge *Lawrence* ... all but one eventually fall back on the *Glucksberg* Doctrine’s restricted approach.” *Id.* at 411. On the other hand, those cases which do apply *Lawrence* show that its approach “has languished on its own merits,” and break little new ground for constitutionally protected rights. *Id.* The language of the Court in *Glucksberg* explains why. “We have always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open ended.” *Glucksberg*, 521 U.S. at 720 (*citing Collins*, 503 U.S. at 125). In relying upon *Lawrence*, the Thirteenth Circuit ignored both widespread consensus and wise judicial instruction and should have adopted this Court’s approach in *Glucksberg*.

- ii. The Respondent’s asserted right should be limited to an interest merely in “adulterous sexual activity” because it is the adultery, not his sexual conduct, which Rushmore County seeks to punish.**

Though the Thirteenth Circuit defined the Respondent’s claim as a “potential” liberty interest in “private sexual conduct,” such an expansive articulation directly controverts instruction from this Court that it “restrain [its] exposition of the Due Process Clause.” Record 10; *Glucksberg*, 521 U.S. at 720. When beginning a substantive due process inquiry under *Glucksberg*, though mentioned second, a “careful description” of the liberty at stake is first required to guide any inquiry into its history and traditions. *Glucksberg*, 521 U.S. at 721 (citing *Flores*, 507 U.S. at 302). When undertaking this step, the Court focuses on the *punished* quality of the right alleged, and explicitly reference the state action or statute for guidance in framing that right. *See Glucksberg*, 521 U.S. at 723; *Flores*, 507 U.S. at 292, and *Collins*, 503 U.S. at 125. Otherwise, the alleged right “potentially encompasses a great universe of sexual activities, including many that historically have been, and continue to be, prohibited.” *Williams v. Attorney General of Alabama*, 378 F.3d 1232, 1239-1240 (11th Cir. 2004) (addressing a general right to “sexual privacy” under a law prohibiting commercial distribution of sex toys).²

In the instant case, a careful description requires reference to the Craven adultery statute. Both the District Court and Thirteenth Circuit identified the Respondent’s claim as a generalized right to “private sexual activity.” Record 6, 10. This ignores the very

² The majority in *Williams* rejected a claim by the ACLU at oral arguments that “no responsible counsel” would challenge prohibitions against pederasty and adult incest under a “right to sexual privacy” theory. *Williams*, 378 F.3d at 1240. The majority quoted Thomas Jefferson in responding that “we do not entrust constitutional limitations to human good will or self restraint,” but a quotation from counsel at oral arguments in *Lawrence* makes the same point. *Id.* In discussing whether the right claimed in *Lawrence* unleashes a “parade of horrors,” including invalidation of laws against adultery, counsel for the Petitioner ironically assured the Court that, “Your Honor, adultery is a very different case.”

reason why the Respondent was terminated in the first place. When challenging a Washington criminal statute restricting physician-assisted suicide in *Glucksberg*, the Respondents asserted a generalized “liberty to choose how to die.” *Glucksberg*, 521 U.S. at 722 (citing Brief for Respondents 7). The Court rejected this in favor of a more limited “right to commit suicide with another’s assistance.” *Id.* at 724 (citing Wash. Rev. Code § 9A.36.060(1) (1994)). *Glucksberg* did not punish the Respondents because they committed suicide, but because they assisted suicide. In the instant case, the Department did not terminate the Respondent because he engaged in a sexual relationship, but because he engaged in an adulterous sexual relationship. Just as in *Glucksberg*, *Flores* and *Collins*, “the scope of the liberty interest at stake here must be defined in reference to the scope of the statute.” *Williams*, 378 F.3d at 1241. As a result, the Respondent’s liberty interest in this case should only be defined as one in “adulterous sexual activity.”³

iii. A liberty interest in “adulterous sexual activity” suffers pervasive and longstanding disapproval and finds no protection in the history and traditions of this Nation.

The Respondent’s claimed due process right in no way merits description as fundamental under the *Glucksberg* framework because of the ancient tradition of criminal and civil restrictions upon adulterous behavior. Having defined the interest as one in “adulterous sexual conduct,” the next step is the Due Process analysis is an inquiry into the history and traditions of the United States to determine whether this right receives special protection from society. In making such an inquiry, this Court is cautioned against placing too great an emphasis on society’s “contemporary practice.” *Williams*,

³ It is important to note that this articulation of the Respondent’s right also frames the second question upon which this Court granted certiorari: “Does the Due Process Clause of the Fourteenth Amendment prohibit the termination of a police officer for his participation in an extramarital affair?” Record 13.

378 F.3d at 1243. The Eleventh Circuit warned that the contemporary practice of decriminalizing suicide “was never essential” to the Court’s assessment of the history and traditions of a right to assisted suicide. *Id.* ⁴

The Bible is, of course, the oft cited source of adultery’s criminal condemnation, particularly by those who emphasize the crime’s ecclesiastical foundation. *See Exodus* 20:14, *Leviticus* 20:10, and *Deuteronomy* 22:22. Adultery’s ancient roots, however, are not solely Biblical.⁵ The Justinian Codes in Roman law also punished adultery.

Oliverson v. West Valley City, 875 F.Supp. 1465, 1474 (D. Utah 1995). In British history, from the time people adopted monogamy, “society recognized adultery as a serious wrong that invaded a husband’s rights over his wife.” Jeremy D. Weinstein, Note, *Adultery, Law and the State: A History*, 38 *Hastings L.J.* 195, 211 (November 1986). The development of the earliest common law reveals that, during the Norman conquest of Britain in 1066, adultery transitioned from a private right of action to a public offense against the Royal peace. *Id.* (citing William Seagle, *Quest for Law* 229 (1941)). Indeed, “Norman reforms effectively established royal justice as an act taken by the state, for the purposes of the state.” *Id.*

In colonial Britain and the early United States, adultery was a crime “almost everywhere.” Lawrence Friedman, *Crime and Punishment in American History*, 13 (1993). Between 1750 and 1796, 4.3% of all criminal indictments were for sexual

⁴ Supplanted by the pervasive civil penalties for adultery in employment, divorce and family settings, however, the contemporary practice does not disfavor the condemnation of adultery as is suggested by its recent decriminalization. *See generally* Note, *Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex*, 104 *HARV. L. REV.* 1660 (May 1991).

⁵ Biblical instruction should not carry the presumption that its teachings are solely based in religious morality. In *Oliverson v. West Valley City*, the court observed that Hebraic law in the Old Testament was “in part legal codes governing the social conduct of the societies to which they applied... It would be wrong to assume the Hebraic references are merely religious commands.” *Oliverson v. West Valley City*, 875 F.Supp. 1465, 1473 (D. Utah 1995).

offenses including adultery. *Id.* at 127-128. Criminal adultery prohibitions were particularly common during and after the ratification of the Fourteenth Amendment. *Oliverson*, 875 F.Supp. at 1474 (citing Hocheimer, *Criminal Law*, § 239 (2d ed. 1904); *Clark's Criminal Law*, § 125 at 312 (1894); *May's Criminal Law*, § 195 (2d ed. 1893)). By 1888, the courts had read into United States common law the English ecclesiastical tradition of punishing adultery. *See U.S. v. Clapox*, 35 F. 575 (D. Or. 1888) As of 2006, twenty three states retain statutory punishments for adultery. Gabrielle Viator, Note, *The Validity of Criminal Adultery Prohibitions After Lawrence v. Texas*, 39 SFKULR 837, 838 (2006).

An inquiry into the deep roots of adultery laws, however, should not end with an account of solely criminal punishments. Procedural considerations, military rules and civil restrictions involving adultery are equally as widespread. Many civilian jurisdictions still recognize adultery as a justification for reducing a criminal charge of homicide to manslaughter. *Oliverson*, 875 F.Supp. at 1475. In the military, “[d]espite its archaic ring,” ‘conduct unbecoming an officer,’ and its sexual restrictions, is an active part of military law.” Elizabeth L. Hillman, *Gentlemen Under Fire: The U.S. Military and “Conduct Unbecoming,”* 26 LAW & INEQ. 1, 6 (Winter 2008). While the content of “conduct unbecoming” was long thought to refer exclusively to homosexuality, this rule for conduct is now used to prosecute “a wide range of sexual activity considered wrongful in a military context,” including adultery. *Id.* (citing Maj. William T. Barto, *The Scarlet Letter and the Military Justice System*, Army Law, Aug. 1997, at 3). Multiple civil penalties exist for adultery as well. Extramarital intercourse can result in loss of civil rights, “including the right to be tried publicly, to vote, adopt children, live

with one's ex-spouse, serve alcohol, practice law, raise one's children, and marry.” Note, *Constitutional Barriers to Civil and Criminal Restrictions on Pre- and Extramarital Sex*, 104 Harv. L. Rev. 1660, 1673 (May 1991) (*internal citations omitted*). When viewed in context of the lengthy history of both criminal and civil punishments for adultery, it is clear that an interest in adulterous sexual activity, whether described as fundamental or in need of extra protection, is worthy of no such consideration under *Glucksberg*'s strict threshold for due process claims.

b. *Lawrence v. Texas* provides inadequate guidance for Respondent's Due Process claim, and a review of the “right to privacy” jurisprudence still leaves Respondent's interest wanting of protection under the Fourteenth Amendment.

i. The holding in *Lawrence v. Texas* is distinguishable from the instant facts and the Court's opinion explicitly disclaims application to the Respondent's adulterous sexual conduct.

Though often overlooked, the Court's own limitations on its holding in *Lawrence* distinguish the Respondent's acts in the instant case and preclude the Thirteenth Circuit from relying upon *Lawrence* to protect private sexual conduct. The majority in *Lawrence* addressed whether Texas could make it a crime for “two persons of the same sex to engage in certain intimate conduct.” *Lawrence*, 539 U.S. at 562. The Court's invalidation of the law does not, however, indicate that any person may engage in whatever sexual conduct they please. The Court explicitly restricted its holding in two ways. First, the majority indicated what the criminalized action was not: “The present case does not involve minors... persons who might be injured or coerced or ... where

consent might not easily be refused... public conduct or prostitution.” *Id.* at 578.

Second, in describing what the case did involve, the Court explicitly qualified its definition of the right at issue. Invalidating a criminal sanction of homosexual sodomy, the Court cautioned further limitation of homosexual relationships only when “absent injury to a person or abuse of an institution the law protects.” *Id.* at 567.

While the Thirteenth Circuit could discern “no legally significant difference” between the conduct in *Lawrence* and that at issue in the instant case, these two caveats apply with considerable force. Adultery in a civilian setting undermines the “institution” of marriage protected by our society’s laws and traditions. Adultery in a para-military setting, particularly when involving the daughter of one’s commanding officer, presents the potential for undue pressure and blackmail and diminishes the full consent *Lawrence* requires. Furthermore, adultery was historically punished when it became “so open and notorious as to constitute a public nuisance.” Viator, *Criminal Adultery Prohibitions After Lawrence*, 840. The concerns of Rushmore County are, in part, the publicity adultery garners and the distrust for police it can foster within a community. While homosexual sodomy and adultery both share in society’s moral condemnation, contrary to the Thirteenth Circuit, this is where their similarities end. In this light, adulterous sexual conduct is of the type disclaimed by the majority in *Lawrence*.

ii. *Lawrence v. Texas*, rather than establish a right to “private sexual activity,” recognizes protection for the homosexual relationship.

Lawrence disclaimed finding a private right of individuals to engage in “certain sexual conduct,” and instead described a liberty that was more expansive. *Lawrence*, 539

U.S. at 562. Much of the majority's focus fell not on the privacy of an individual to engage in sodomy, as this would "demean" Petitioner's claims, but upon the ability of a homosexual individual to express his relationship through sexual activity. *Id.* The Texas anti-sodomy law, like that in *Bowers v. Hardwick*, 478 U.S. 186 (1986), attempts to control "a personal *relationship* that...is within the liberty of persons to choose without being punished as criminals." *Id.* at 567 (emphasis added). Otherwise, the criminal law "itself is an invitation to subject homosexual persons to discrimination," no matter how equally applied. *Id.* at 575.

At the risk of confusing equal protection with substantive due process concerns, the *Lawrence* majority notes that "[e]quality of treatment and the [substantive] due process right... are linked in important respects, and a decision on the latter advances both interests." *Id.* By overturning both *Bowers* and the Texas law, the majority signaled that, regardless of whether the state criminalized homosexual conduct between mixed gender couples or only same sex couples, both laws ultimately condemned the homosexual relationship. Even though sexual conduct "can be but one element in a personal bond that is more enduring," the state and society conflate this conduct with homosexuality itself, and as a result, make homosexuals criminals by default. *Id.* at 567 (emphasis added).⁶ This combination of substantive liberty with equal protection analysis "was as much about equal dignity and respect as it was about freedom--more so, in fact." Lawrence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893, 1897 (April 2004). For the

⁶ See also the Court's comment that banning heterosexual sodomy "in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." *Lawrence*, 539 U.S. at 575.

majority in *Lawrence*, contrary to the Thirteenth Circuit, “[i]t’s not the sodomy. It’s the relationship!” *Id.* at 1904.

This expanded focus on the homosexual relationship actually narrows the applicability of *Lawrence*’s holding and fails to delegitimize morality as legislative justification. The dissent in *Lawrence* recoils at the seemingly bold statement that moral disapproval is insufficient to support a law against homosexual sodomy. This majority’s finding, though, becomes less shocking upon realizing that the Texas law stigmatizes and isolates a distinct social group. The Alabama district court recognized this in the final remand of *Williams v. Attorney General of Alabama (Williams IV)*, 420 F.Supp. 2d, 1224 (2006). The court identified a connection between *Lawrence* and *Carolene Products*’ footnote four, finding that courts may overrule legislation when “representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility.” *Williams IV*, 420 F.Supp. 2d at 1252. The court observed that this “is precisely the concern addressed by the *Lawrence* majority.” *Id.*⁷ By expanding the right to protect the homosexual relationship, an assertion that public morality cannot justify restriction of private sexual conduct is an ill-fitting description of the actual result in *Lawrence*, and the Thirteenth Circuit erred in failing to acknowledge this distinction, creating instead a right in *Lawrence* that was never actually recognized.

iii. *Griswold v. Connecticut* and its progeny create no generalized right to “private sexual conduct.”

Though cases like *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972) and *Carey v. Population Services Int’l*, 431 U.S. 678 (1977)

⁷ “The issue is whether the majority may use the power of the State to enforce these views on the whole society through the operation of the criminal law.” *Lawrence*, 539 U.S. at 571.

have established non-textual rights to the use of contraception for married and unmarried couples alike, they do not create a general right to private sexual conduct. Whatever the Court in *Griswold* established by divining a “right to privacy,” the Court has only given such a right meaning in specific contexts. The majority found that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.” *Griswold*, 381 U.S. at 484. These penumbras do not encompass a right to privacy, but rather “zones of privacy.” *Id.* The task for the Court’s substantive due process analysis was to isolate whether the right at issue fell within this penumbral zone.⁸ *Griswold* focused not upon the right to sexual privacy or conduct, but rather the marital relationship whose protections fell within the zones of privacy created by the Bill of Rights and the Due Process Clause.⁹ Similarly, *Eisenstadt* focused on the right to determine whether to bear or beget a child inherent in the ability to obtain and use contraception. While asserting that there existed a right to privacy in the abstract, the concrete holdings of *Griswold* and *Eisenstadt* address narrower claims and posit correspondingly narrower holdings.

The Thirteenth Circuit recognizes that these cases protect specific rights, enumerating each of their holdings, but never makes explicit their connection to the protection of the type of conduct in the instant case. Rather, the Thirteenth Circuit reasons that the instant liberty finds its source in the Supreme Court’s right to privacy jurisprudence through connection to *Lawrence*. According to the Thirteenth Circuit’s incorrect view, because *Lawrence* and the Respondent share the same liberty interest, if

⁸ “The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.” *Griswold*, 381 U.S. at 485.

⁹ “We deal with a right of privacy older than the Bill of Rights – older than our political parties, older than our school system,” namely marriage. *Griswold*, 381 U.S. 486. Additionally, it is especially notable that the Court frames this right as a *kind* of privacy protected, rather than a general right to privacy.

Lawrence found such a liberty in the *Griswold* tradition, so too should the Thirteenth Circuit.¹⁰ But the Thirteenth Circuit misunderstands the right in *Lawrence*. The Respondent’s right to adulterous sexual conduct is in no way equivalent to the right to enter a homosexual relationship. As a result, the Thirteenth Circuit’s logical leap falls short. The Thirteenth Circuit must instead identify why a penumbral zone of protection encompasses more than just a broad “right to privacy.”¹¹ Each of the “right to privacy” cases reveals a kind of right that is more fundamental. While the Court protects the right to decide whether to have children, it does not permit one to do whatever he chooses in the bedroom. Because the Thirteenth Circuit depends entirely upon *Lawrence* to tie the Respondent’s claim to this Court’s tradition of protecting privacy rights, the failure in equating the instant case with *Lawrence* means the failure of the Thirteenth Circuit’s entire “right to privacy” rationale.

c. “Rational basis scrutiny” should be used to validate the termination of a police officer for adulterous sexual activity. Even if “intermediate scrutiny” is applied, Rushmore County’s actions still prove constitutional.

i. *Lawrence v. Texas* does not declare an end to all uses of public morality in state action and instead utilizes a rare, but not unheard-of, rational basis review.

The Thirteenth Circuit misapprehends the right at issue in *Lawrence*, and it joins the Ninth and First Circuits in mistakenly applying “intermediate scrutiny” to the

¹⁰ “Like *Lawrence*, the case at hand involves private sexual conduct that is prohibited by law,” and this liberty interest in private sexual conduct was first recognized “within the scope of the marital relationship [in *Griswold*].” Thirteenth Circuit, Record 11, 10.

¹¹ “The liberty interest in private sexual conduct, described as the ‘*right to privacy*,’ was first recognized within the marital relationship.” Record 10 (emphasis added).

Respondent's claim. According to the substantive Due Process analysis from *Glucksberg*, rights which are not fundamental receive a more deferential standard of review by default. "Rational basis scrutiny" requires merely a rational relationship between the government action and a "legitimate interest." *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993). Though less explicitly, the Court in *Lawrence* accomplished the same result. "The Texas statute furthers no *legitimate state interest* which can justify its intrusion into the personal and private life of the individual." *Lawrence*, 539 U.S. at 578 (emphasis added). Nowhere does the Court say that the right to a homosexual relationship is fundamental or worthy of strict scrutiny.

Because the Court invalidates morality for such discrimination, as discussed earlier, such an articulation leads many to impute a heightened level of scrutiny above that required by rational basis. The Ninth Circuit applied "intermediate scrutiny" in part because *Lawrence* relied on cases like *Griswold* that recognized fundamental rights under strict scrutiny. Furthermore, *Lawrence* appeared to balance a greater liberty against the intrusion by the state action in such a way that suggested more than just rational basis review was taking place. *Witt v. Department of Air Force*, 527 F.3d 806, 817 (9th Cir. 2008). Otherwise, "any hypothetical rationale for the law would do." *Id.* Similarly, the First Circuit found that rational basis review does not permit "consideration of the strength of the individual's interest or the extent of the intrusion on that interest caused by the law; the focus is entirely on the rationality of the state's reason for enacting the law." *Cook v. Gates*, 528 F.3d 42, 55 (1st Cir. 2008).

What these cases overlook is the emphasis that the *Lawrence* Court placed on the right it was protecting by invalidating the Texas law. While there might be a rational

basis for criminalizing homosexual sodomy, thus begging a consideration of a countervailing privacy interest contrary to the rational basis review as is suggested by *Cook* and *Witt*, *Lawrence* did not protect solely homosexual sodomy. As discussed above, its opinion was more focused on protection of the homosexual relationship. Because criminalization of sodomy was, in reality, discrimination against homosexual relationships, the Court used equal protection language to protect a substantive liberty, keeping the analysis squarely within a rational basis framework. To the Court, such restrictions failed rational basis scrutiny because the state objective itself (i.e. invidious discrimination) is wholly invalid. As the Alabama district court finally reasoned in *Williams IV*, “[t]he rational-basis review applied in *Lawrence* is rare, but it is not ‘unheard-of.’” *Williams IV*, 420 F.Supp. 2d at 1252.

ii. While this Court should give credence to the moral justifications for the Respondent’s termination, Rushmore County’s actions were not motivated by moral concerns alone.

Contrary to the Thirteenth Circuit, not only does a “rational basis” standard of review apply to the actions of Rushmore County, but Rushmore County’s actions withstand such scrutiny even if they would not when applied to a civilian. This Court has stated, prior to *Lawrence*, that there is a “substantial government interest in protecting order and morality.” *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991). In addition to public indecency, laws against obscenity, *Miller v. California*, 413 U.S. 15 (1973), polygamy, *Reynolds v. U.S.*, 98 U.S. 145 (1878), and even the death penalty, *Gregg v. Georgia*, 428 U.S. 153 (1976) are all steeped in society’s moral judgments. The distinction made by the Court in *Lawrence* is that society’s moral justifications cannot be

used as an oppressive tool against a distinct social group. As a result, the Thirteenth Circuit errs in applying *Lawrence* to merely sexual conduct because it ignores Justice Kennedy's equal protection emphasis. In the instant case, any concern for an insular social group is wholly absent. Adulterers share no coherent political or social interests, nor any unifying characteristic, aside from simply the wish to engage in sexual conduct outside their marriage. State action against such a group, like termination of employment, would no more represent discrimination than would a law punishing thieves for stealing or nudists for exposing themselves in public. As a result, public morality is a rational justification that this Court ought to recognize when reviewing Rushmore County's actions.

Even if this Court found such moral justification insufficient to submit a civilian to punishment under an adultery statute, the government interests for punishing a police officer present a greater justification under rational basis scrutiny. Individuals do not forego or diminish their constitutionally protected rights upon entering public employment. *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). But, an individual joining a police agency

must recognize that acceptance of such an important and sensitive position requires the individual to forego certain privileges and even some rights that an ordinary citizen often exercise without restrictions or thoughts of sanctions, because a police force is a para-military organization with all the attendant requirements and circumstances.

Vorbeck v. Schnicker, 660 F.2d 1260, 1262, 1266-67 (8th Cir. 1981). As a result, police departments are given even greater deference under rational basis review that might otherwise be afforded when restricting members of the general population. All that is required is to ask whether a complainant can demonstrate "that there is no rational

connection between the regulation,” and its interests. *Kelley v. Johnson*, 425 U.S. 238, 247 (1976).

In *Kelley*, this Court upheld a police department regulation that restricted the length of officers’ hair. In doing so, the Court defined the liberty interest not as one held by the general populace, but rather questioned whether the liberty interest in one’s appearance was fundamental to a police officer. “The hair-length regulation here touches respondent as an employee of the county and, more particularly, as a policeman.” *Kelley*, 425 U.S. at 245. In this light, the restriction was deemed rationally related to the police department’s interests in a uniform and orderly police force. Similarly in *Zalewska*, the Second Circuit held that “safety, professionalism and a positive public image are legitimate interests for the county to pursue” in its requiring female employees to wear pants instead of skirts. The District Court in the instant case briefly describes the Rushmore County interests as “regulating officer conduct,” but one can easily see other interests served by preventing police officers from committing adultery, outside of those which the Respondent might describe as moral. Because adultery is made a criminal violation in Craven, the Rushmore County Police Department has a legitimate interest in ensuring its members are not violating the law, whatever its content. Rushmore County has a further interest in ensuring that police conduct maintains public perceptions of trust and confidence in its police force. *See Baron v. Meloni*, 556 F.Supp. 796 (W.D.N.Y. 1983) and *Sherman v. Henry*, 928 S.W.2d 464 (Tex. 1996).

iii. Under “intermediate scrutiny,” Rushmore County’s termination of the Respondent represents the important

**governmental objective of curbing blackmail, undue pressure
and the perception of impropriety.**

Even when viewed under the inappropriate lens of “intermediate scrutiny,” Rushmore County’s justification for terminating the Respondent passes constitutional muster. Rushmore County’s interest in maintaining an efficient and lawful police force is surely important. But, the interest preventing blackmail, undue pressure and maintaining a public appearance of impropriety within the police department truly legitimize Rushmore County’s actions. The clearest articulation of the “intermediate scrutiny” standard relied upon by the Thirteenth Circuit emerges in *Witt*. Record 10. In *Witt*, the Ninth Circuit stated that “the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest.” *Witt*, 527 F.3d at 819 (citing *Sell v. United States*, 539 U.S. 166, 180-181 (2003)). Clarifying its third prong, “a less intrusive means must be unlikely to achieve substantially the government’s interest.”¹² *Id.*

While Respondent claims that his termination was caused by purely off-duty, private conduct, his conduct off-duty posed grave potentials for harm when on duty, and under the wider grant of authority given to police agencies, such conduct threatens important governmental interests pursued by Rushmore County. The District Court in Pennsylvania reflected that an officer’s sexual behavior is typically beyond department investigation, because of the “tenuous relationship between such activity and job

¹² The Thirteenth Circuit did not explicitly articulate these three prongs, and instead, took *Witt* together with *Cook* to mean that “intermediate scrutiny” called for a balancing of the state’s asserted interest against the intrusion of the state’s action. Record 11. Because the Thirteenth Circuit focused solely on the moral justification for Respondent’s termination, it is unclear whether this balancing test is more or less demanding than that advanced by the Ninth Circuit in *Witt*. With no real guidance, Petitioners argue under the seemingly stricter test articulated in *Witt*, with the caveat that the Thirteenth Circuit may not, in reality, be so demanding.

performance.” *Shuman v. City of Philadelphia*, 470 F.Supp. 449, 459 (D.C.Pa. 1979). When an officer's private life affects his on-duty performance, however, “the Police Department would have an interest in regulating, and concomitantly, investigating such activities.” *Id.* at 460. In the instant case, the Respondent is not simply engaged in an adulterous relationship, but rather an adulterous relationship with the daughter of the police department chief. While Respondent may be separated from his existing wife, nothing yet prevents repair of his marriage and the potential for domestic disputes amongst the three parties involved. Furthermore, adultery with the daughter of a police chief, who in this case alleged corruption charges against her father, might stifle effective chain of command while on duty and arouse suspicion within the department towards its chief and the Respondent.

The effectiveness of a police force, however, depends on the confidence it receives from its community. The Second Circuit validated such a concern when affirming a police department regulation under intermediate scrutiny. *Eisenbud v. Suffolk County*, 841 F.2d 42 (1988). The Second Circuit found that a police department regulation requiring financial disclosure “plainly further[ed] a substantial, possibly even a compelling, state interest.” *Eisenbud*, 841 F.2d at 46 (*citing Barry v. New York*, 712 F.2d 1554 (1983)). Specifically, the department regulation sought to “deter corruption and conflicts and interest among City officers and employees, and to enhance public confidence in the integrity of [City] government, [and to gain] the benefits widely felt to be derived from openness and from an informed public.” *Id.* (*citing Barry*, 712 F.2d at 160). Such interests can be easily analogized to those in the instant case. Rushmore County seeks to maintain its credibility within the community by preventing situations in

which citizens might question its internal operations. Moving the Respondent out of the undercover department would reduce the danger to the police chief and his daughter should such a connection be revealed while under cover. Rushmore County can only maintain its openness and integrity, however, by firing the Respondent. Terminating the Respondent sends a public signal to the community that laws should be followed by everyone, including the police, and that Rushmore County will not tolerate conduct that jeopardizes its ability responsibly and safely protect its community. Under *Witt*, only firing the Respondent substantially serves these important interests, and this Court should uphold Rushmore County's decision even under such heightened scrutiny.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the United States Court of Appeals for the Thirteenth Circuit, and find that the Fourth Amendment rights and Fourteenth Amendment rights of William F. Tracey were not violated.

Respectfully submitted,

Team E

CERTIFICATE OF SERVICE

This document certifies delivery of an electronic copy of the foregoing brief via e-mail to Jeff Lewis and Sarah Oettinger.

Team E

APPENDIX A

Fourth Amendment of the United States Constitution:

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.

APPENDIX B

Fourteenth Amendment of the United States Constitution, Section 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.