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**No. 08-31958**

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**IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 2008**

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**RUSHMORE COUNTY, CRAVEN, POLICE DEPARTMENT,**  
*Petitioner,*

**v.**

**WILLIAM R. TRACEY,**  
*Respondent.*

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

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**BRIEF FOR PETITIONER**

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**TEAM F**  
*Attorneys for Petitioner*

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## **QUESTIONS PRESENTED**

- I. Does the Fourth Amendment preclude a police officer from moving aside a suspect's unzipped jacket when the officer has a reasonable suspicion that the suspect is illegally carrying a concealed firearm?
  
- II. Does the Due Process Clause of the Fourteenth Amendment prohibit a police department from terminating an officer who violated state law and department regulations by participating in an extramarital affair?

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## OPINIONS BELOW

The unreported opinion of the United States District Court for the District of Craven appears in the record at pages 2–7. The unreported opinion for the United States Court of Appeals for the Thirteenth Circuit appears in the record at pages 8–12.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth and Fourteenth Amendments to the United States Constitution. U.S. Const. amends. IV, XIV. *See* App. “A.”

## STATEMENT OF THE CASE

This is a suit by former Officer William R. Tracey against Petitioner, Rushmore County, Craven, Police Department, alleging violations of the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment. (R. at 2.) The alleged violation of the Fourth Amendment occurred on June 7, 2005, when Rushmore County Officer Maxwell Calloway performed a search of Respondent, which resulted in the discovery of a firearm. (R. at 2.) The alleged violation of the Due Process Clause occurred when Respondent was terminated by the Police Department for participation in an extramarital affair. (R. at 2.) The Police Department filed a motion for summary judgment asserting neither constitutional rights had been violated. (R. at 2.) This motion was granted by the United States District Court for the District of Craven. (R. at 7.)

***The Search.*** On June 7, 2005, Officer Calloway was in McDonough Square, Rushmore County, pursuing a lead that an illegal firearm’s distributor was meeting potential buyers. (R. at 2.) At that time, Officer Calloway observed Respondent seated on a park bench at the north side of the Square. (R. at 2.) Although Respondent did not match the illegal firearm distributor’s description, Officer Calloway’s suspicions were raised by Respondent’s clothing and furtive movements. (R. at 2.) He was wearing a heavy black bomber jacket even though temperatures

were in the seventies and his hair was closely cropped. Additionally, over the course of twenty minutes, Officer Calloway observed Respondent continually surveying the Square and surrounding rooftops while becoming agitated. (R. at 2.) Based on his observations, Officer Calloway decided to approach Respondent to try and dispel his suspicions. (R. at 2–3.)

Officer Calloway approached Respondent, identified himself, and asked for Respondent's name. (R. at 3.) Although both Officer Calloway and Respondent were Rushmore County officers, neither one knew each other because they were from different precincts. (R. at 2.) In responding to Officer Calloway's basic query, Respondent became increasingly angry and began looking to his left and right surreptitiously. (R. at 3.) This reaction did not dispel Officer Calloway's suspicions that Respondent may be involved in criminal activity. When Respondent suddenly turned away from the conversation, Officer Calloway grasped him by the wrist, turned him so they were facing each other, and began a protective search of the exterior clothing to search for dangerous weapons. (R. at 3.) During this protective search, Respondent began using profanities and repeatedly berated Officer Calloway. (R. at 3.) But, Officer Calloway did not feel anything consistent with a weapon. (R. at 3.)

After the initial protective search was completed, Respondent began turning away during which time Officer Calloway noticed a leather strap located around Respondent's upper chest area. (R. at 3.) Although he was unsure of the strap's purpose, it was consistent with straps used to holster concealed firearms. (R. at 3.) To get a better view of the strap, Officer Calloway asked Respondent to turn around which he reluctantly did. (R. at 3.) Officer Calloway then attempted to move aside the left portion of the unzipped jacket to view the strap, but Respondent pushed the Officer's hand away. (R. at 3.) Officer Calloway then attempted to move the jacket aside a second time which revealed a .45 caliber pistol. (R. at 3.) He immediately seized the dangerous

weapon and put Respondent under arrest for violating Craven Statute 19-166.81, possession of a concealed firearm. (R. at 3.) During the arrest, Respondent disclosed he was an undercover police officer but failed to produce any identification revealing such was the case. (R. at 3.)

***The Extramarital Affair.*** After Respondent was arrested, he was taken to Officer Calloway's precinct in Charlestown, where a full search was conducted. (R. at 3.) One of the items seized during the search was the contact information for Jacqueline Malone, the Police Department Chief's daughter. (R. at 3.) Ms. Malone had recently been publically alienated from her father when she reported to a public newspaper there was corruption within the Police Department. (R. at 3-4.) Although this allegation was proven to be false, Officer Calloway feared Ms. Malone may be a target of Respondent. (R. at 4.) He decided to contact her, but before he could explain the purpose of his call, Ms. Malone affirmed Respondent was an officer while sporadically disclosing she was in a relationship with him. (R. at 4.)

Upon discovering Respondent's identity, Officer Calloway immediately called Respondent's precinct and explained the situation including Respondent's relationship with Ms. Malone. (R. at 4.) Thereafter, Respondent was released from custody. (R. at 4.) The following day Respondent was terminated by the Police Department for "behavior unbecoming of an officer." (R. at 4.) However, Police Chief Patrick Malone stated the reason for the termination was Respondent's participation in an extramarital affair. (R. at 4.) This affair violated Section 11-198.01, an adultery statute that had not been used in over twenty years. (R. at 4.) Although Respondent was separated from his wife and had been served with divorce papers, he still was legally married. (R. at 4.)

***The Federal District Court.*** After Respondent's termination, he filed a 42 U.S.C. § 1983 action alleging violations of the Fourth Amendment and Due Process Clause of the Fourteenth

Amendment. (R. at 2.) The Police Department subsequently filed a motion for summary judgment asserting there were no constitutional rights violations. (R. at 7.) In response, Respondent argued his Fourth Amendment protection against illegal searches was violated when Officer Calloway searched him, and his due process rights were violated when he was terminated for participation in an extramarital affair. (R. at 2.)

The Craven District Court (“District Court”) granted the motion and rejected each one of Respondent’s arguments. More specifically, it found Officer Calloway’s search was objectively reasonable under the circumstances, and Respondent’s due process rights were not violated because he had no fundamental right to sexual privacy. (R. at 6–7.) Additionally, the court found that because there was no fundamental right to sexual privacy, the statute was subjected to a rational basis standard which requires only that the governmental act be rationally related to a legitimate state interest. (R. at 6–7.)

***The Federal Court of Appeals.*** The Federal Court of Appeals for the Thirteenth Circuit (“Court of Appeals”) reversed. (R. at 12.) Under the Fourth Amendment challenge, Justice McGurk, joined by Justices Fischer and Blume, found the initial protective search of Respondent reasonable under the Fourth Amendment, but found Officer Calloway’s extension of the search by moving Respondent’s unzipped jacket violated Fourth Amendment protections. (R. at 8–9.) Additionally, under the Due Process Clause challenge, the court found private sexual conduct was a potential liberty interest and should be analyzed under intermediate scrutiny and not rational basis. The court then concluded the Craven adultery statute failed under intermediate scrutiny analysis thus violating Respondent’s due process rights. (R. at 12.)

*This Court.* The Police Department appealed. (R. at 13.) This Court granted review over two specific issues: the Fourth Amendment search issue and the Due Process Clause of the Fourteenth Amendment issue. (R. at 13.)

### **SUMMARY OF THE ARGUMENT**

This case involves two basic principles of the United States Constitution—the Fourth Amendment’s protection against unreasonable searches and seizures and the Fourteenth Amendment’s Due Process Clause. Because the Thirteenth Court of Appeals overextended both of these principles, this Court should reverse and reinstate the Craven District Court’s Judgment.

#### **I.**

The Court of Appeals erred in concluding that Officer Calloway’s protective search was unreasonable under the Fourth Amendment. Officer Calloway’s search did not violate the Fourth Amendment because he had a reasonable, articulable suspicion Respondent was armed and dangerous. He properly approached Respondent and performed a brief protective search of Respondent because of his clothing and furtive movements. This Court has repeatedly stated the purpose of the protective search is for the protection of officers who risk their lives on a daily basis. It was developed to allow officers to search for deadly weapons and avoid the unnecessary risk of interacting with an armed suspect. It also allows officers, who are extensively trained in the detection of crimes, to approach a suspect without having the burden of obtaining a warrant while the suspect remains on the street. Officer Calloway’s protective search was reasonable based on either *Terry*’s two-prong test or the *Bell* factor analysis.

This Court should reverse and hold Officer Calloway’s protective search of Respondent constitutional.

## II.

The Court of Appeals also erred in concluding Craven's adultery statute violated Respondent's alleged constitutional right to engage in private sexual activity. The right to engage in private sexual activity has recently come to light via this Court's decision in *Lawrence*. In *Lawrence*, the court found a Texas sodomy statute unconstitutional under a legitimate state interest test. This test uses much of the same language found in the rational basis standard of review which is used for rights that are not fundamental. The Court of Appeals, however, found *Lawrence* did not analyze the statute under rational basis, but instead used somewhat of a balancing test. Under either analysis, however, Craven's adultery statute is not unconstitutional because of its interest in regulating police officer conduct and public morality.

This Court should reverse and hold that Craven's adultery statute is rationally related to the regulation of officer conduct and public morality.

### STANDARD OF REVIEW

"Section 1983 is not a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." *Graham v. Connor*, 490 U.S. 386, 393–94 (1989). For the plaintiff to state a cause of action under section 1983, he must demonstrate two essential elements: "First, whether the conduct complained of was committed by a person acting under color of state law, and Second, whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States." *Harrison v. Sprindale Water & Sewer Comm'n*, 780 F.2d 1422, 1426 (8th Cir. 1986) (quoting *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled in part by Daniels v. Williams*, 474 U.S. 327 (1986)). Additionally, this Court reviews the grant or denial of a summary judgment de novo to determine whether there is any genuine issue of material fact and whether the moving party is

entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). A material fact is one “that might affect the outcome of the suit under the governing law.” *Id.* at 248. The evidence is viewed in the light most favorable to the nonmoving party. *Deepwater Invs., Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 110 (10th Cir. 1991).

## ARGUMENT AND AUTHORITIES

### **I. OFFICER CALLOWAY DID NOT VIOLATE RESPONDENT’S FOURTH AMENDMENT RIGHTS WHEN HE ACTED UNDER A REASONABLE SUSPICION THAT RESPONDENT WAS ARMED AND DANGEROUS AND MOVED ASIDE RESPONDENT’S UNZIPPED JACKET TO REVEAL A DEADLY WEAPON.**

The Fourth Amendment states: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Const. amend. IV. As indicated above, the Fourth Amendment does not protect against all searches and seizures but only searches and seizures that are deemed to be unreasonable. *Terry v. Ohio*, 392 U.S. 1, 9 (1968). It generally requires police officers to obtain a warrant before conducting a search, but officers may conduct warrantless searches for the protection of themselves or others nearby to discover dangerous weapons as long as the search is supported by a reasonable, articulable suspicion that the person may be armed and dangerous. *Id.* at 21, 30.

Because of the ambiguity of the actual test employed in *Terry*, two articulations of what is reasonable have emerged. *See generally id.* One determination of reasonableness requires a two-prong analysis including “whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.” *Id.* at 19–20. The other determination of what is reasonable requires courts to consider

factors such as “the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.” *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). But, in analyzing reasonableness under either test, courts should balance “the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion.” *United States v. Hensley*, 469 U.S. 221, 228 (1985).

This Court reviews the district court’s finding of facts for clear error and the lower court’s determination of reasonableness de novo. *United States v. Lopez-Moreno*, 420 F.3d 420, 429 (5th Cir. 2005). In reviewing reasonableness de novo, however, due weight must be given “to inferences drawn from those facts by resident judges and local law enforcement officers.” *Ornelas v. United States*, 517 U.S. 690, 699 (1996). In the case at hand, this Court should reverse the Court of Appeals and reinstate the District Court’s opinion because Officer Calloway had a reasonable, articulable suspicion to briefly detain and perform a protective search on Respondent.

**A. Officer Calloway Had a Reasonable, Articulable Suspicion to Briefly Detain and Perform a Protective Search of Respondent Under the Two-Prong Analysis.**

The two-prong analysis requires the court to determine “whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.” *Terry*, 392 U.S. at 19–20. Officer Calloway’s brief detention of Respondent was justified at its inception, and the subsequent searches were reasonably related in scope to the circumstances that caused Officer Calloway’s reasonable suspicions.

**1. The first prong of *Terry* analysis is met because Officer Calloway’s initial stop of Respondent was justified in view of the totality of the circumstances.**

In determining whether Officer Calloway’s action was justified at its inception, the court should consider whether the officer had a reasonable, articulable suspicion that criminal activity was afoot. *Terry*, 392 U.S. at 31. The reasonableness of the suspicion is a fact-intensive inquiry and is viewed objectively by taking the totality of the circumstances into consideration. *United States v. Cortez*, 449 U.S. 411, 417 (1981). One factor many courts use to make the reasonable suspicion determination is any nervous, evasive behavior exhibited by the person. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). Additionally, courts consider the inferences and deductions made by the officer because officers are “trained to cull significance from behavior that would appear innocent to the untrained observer.” *United States v. Bailey*, 417 F.3d 873, 877 (8th Cir. 2005). In this case, Officer Calloway had an objectively reasonable, articulable suspicion criminal activity was afoot based on the totality of the circumstances.

Here, Officer Calloway was undercover at McDonough Square pursuing a lead that an arm’s dealer was meeting prospective buyers. (R. at 2.) It was at this time he viewed Respondent wearing a heavy black bomber jacket despite temperatures in the seventies. (R. at 2.) Based on Officer Calloway’s experience, this indicated Respondent may be carrying a weapon. (R. at 8.) Over the next twenty minutes, Officer Calloway viewed Respondent becoming nervous and constantly surveying the rooftops of surrounding buildings. (R. at 2.) This behavior indicated to him that Respondent may have been waiting to conduct a firearm or narcotic’s sale. (R. at 8.) As both the District Court and the Court of Appeals concluded, these facts adequately supplied Officer Calloway with enough reasonable suspicion to approach Respondent. (R. at 5–6, 8–9.)

**2. The second prong of *Terry* analysis is met because Officer Calloway’s actions were reasonably related in scope to the circumstances justifying the search.**

Once the initial stop by law enforcement has been justified, the court should next consider whether the officer made reasonable inquires in order to confirm or dispel his suspicions. *Minnesota v. Dickerson*, 508 U.S. 366, 372–73 (1993). Officer Calloway’s suspicions were not dispelled upon initial contact but were instead heightened, allowing him to perform a search of Respondent. (R. at 3.) This is because when Officer Calloway identified himself and asked for Respondent’s name, he became visibly angry while moving around furtively before answering. (R. at 3.) As both lower courts agreed, this response did not dispel Officer Calloway’s fears and gave him enough reasonable suspicion to perform a protective search of Respondent. (R. at 5, 8–9.)

If the officer’s inquiries did not dispel his fear the person may be armed and dangerous, a search may ensue, but it must be “reasonably related in scope to the circumstances which justified the interference in the first place.” *Terry*, 392 U.S. at 20. The scope of the intrusion will vary based on the facts and circumstances of each case, but the intrusion “must be temporary and last no longer than is necessary to effectuate the purpose of the stop.” *Florida v. Royer*, 460 U.S. 491, 500 (1983). There needs to be an objectively reasonable, articulable suspicion the person may be armed and dangerous based on the totality of the circumstances. *Cortez*, 449 U.S. at 417. The officer “need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” *Terry*, 392 U.S. at 27. The District Court correctly viewed Officer Calloway’s encounter as one protective search which was related in scope to the circumstances which initiated it. (R. at 5–6.) In the alternative, if this Court finds two separate protective

searches were conducted, events between the first and second protective searches created an objectively reasonable suspicion Respondent was armed and dangerous allowing Officer Calloway to perform the second search.

***a. The District Court correctly viewed Officer Calloway's encounter as one protective search.***

The District Court correctly viewed Officer Calloway's encounter as one protective search. (R. at 5–6.) This is because Officer Calloway was never able to complete the initial protective search due to Respondent's continual interference, and, as recognized in *State v. Heitzmann*, a more intrusive search may be permissible when the suspect prevents the officer from performing an effective pat down. 632 N.W.2d 1, 9 (N.D. 2001) (citing *Adams v. Williams*, 407 U.S. 143, 148 (1972)). Here, Respondent prevented an effective pat down by continually cursing and berating the officer, trying to leave immediately after the pat down, and pushing away the Officer's hand when he tried to get a better view of a leather strap located on Respondent's chest. (R. at 3.) Because of the above actions, Officer Calloway was permitted to extend his search by moving aside Respondent's unzipped jacket revealing a deadly weapon. (R. at 3.)

This extended search was not outside the scope of the circumstances which initiated it because the search was related to the purpose of the initial encounter. In *Terry*, this Court noted that a limited search for weapons of the outer clothing constituted "a severe, though brief, intrusion upon cherished personal security," but was permissible in scope when the officer had a reasonable suspicion the person was armed and dangerous. 392 U.S. at 24–25. In the case at hand, merely moving aside Respondent's unzipped jacket is no broader in scope than a limited search of the person's outer clothing and, as noted by the District Court, should not be considered "the tipping point between proper conduct and a constitutional violation." (R. at 5.)

Officer Calloway initiated his encounter with Respondent because he suspected Respondent was waiting to conduct a sale of illegal firearms or narcotics. (R. at 8.) After commencing his initial search, Officer Calloway noticed a leather strap which, once again, was consistent with the scope of his investigation, illegal firearms. (R. at 3.) Thus, when Officer Calloway moved aside the unzipped jacket to look for weapons, he was not outside the scope of the encounter. (R. at 3.) Respondent may argue because Officer Calloway was unsure of the strap's purpose, it did not give him enough of a reasonable suspicion to further his search and the strap should not be considered. This contention, however, is unfounded because determining reasonable suspicion is an objective analysis, making Officer Calloway's beliefs less relevant. *Cortez*, 449 U.S. at 417. Because Respondent impeded Officer Calloway's protective search and because Officer Calloway located a leather strap, he had an objectively reasonable suspicion to continue his protective search which was related in scope to the initial encounter.

The Court of Appeals, however, held that moving aside Respondent's jacket went beyond the bounds of a permissible search because as stated in *Sibron v. New York*, "[t]he search for weapons approved in *Terry* consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault." (R. at 9) (citing 392 U.S. 40, 65 (1968)). Although *Sibron* is still valid, its holding in relation to the scope of *Terry* searches has been extended by the Supreme Court to include areas other than the simple patting down of a person. *Michigan v. Long*, 463 U.S. 1032 (1983).

In addition to the Supreme Court, many lower courts have also expanded the scope of searches, allowing searches which are much more intrusive than merely moving aside an unzipped jacket. *United States v. Majors*, 328 F.3d 791, 795 (5th Cir. 2003) (concluding that officer's reasonable suspicion that a bulge may be a weapon justified officer's search through

suspect's pocket); *United States v. Elsoffer*, 671 F.2d 1294, 1299 (11th Cir. 1982) (concluding that the odd shape, size, and position of bulge on suspect was enough to satisfy reasonable suspicion to search bulge); *United States v. Hill*, 545 F.2d 1191, 1193 (9th Cir. 1976) (holding that officer's viewing of a bulge in the waistband was sufficient to allow officer to lift suspect's shirt); *United States v. Poms*, 484 F.2d 919, 920–22 (4th Cir. 1973) (upholding protective search of a shoulder bag based upon tip that a gun may be in the bag). With these cases in mind, it is evident that Officer Calloway's moving aside the jacket did not run contrary to the Fourth Amendment's protection against unreasonable searches. U.S. Const. amend. IV.

***b. Even if there were two separate searches, events between the first and second search justified Officer Calloway's second protective search.***

If this Court finds there was not one protective search but rather two, then events between the first and second protective searches still created an objectively reasonable suspicion Respondent was armed and dangerous. At least one court has found that once an officer has concluded his initial search without finding any weapons, his suspicions have been dispelled and he, therefore, has no right to conduct a second search. *See United States v. Rivera*, 738 F. Supp. 1208, 1218 (N.D. Ind. 1990) (concluding that because officer's reasonable suspicions that suspect was armed was dispelled, further search exceeded the scope of a permissible frisk). With this in mind, however, other courts have found two *Terry* searches to be warranted when additional facts are discovered between the first and second search. *Balentine v. State*, 71 S.W.3d 763, 769–70 (Tex. Crim. App. 2002); *Brown v. Philadelphia*, No. 07-0192, 2008 WL 269495, at \*8 (E.D. Pa. Jan. 29, 2008).

In *Balentine*, three officers responded to a complaint that gun shots had been fired at around 2:30 a.m. 71 S.W.3d at 767. The officers did not locate any persons on the property

where the shots were heard or in the back alley, but, upon further investigation, one of the officers located a man, the appellant, walking down the street two houses away. *Id.* The appellant was acting nervous and had his hands in his pockets. *Id.* Based upon the time of day and appellant's actions, the officer decided to approach the appellant and immediately performed a protective search to make sure appellant was not armed. *Id.* At that point, the officer did not feel any weapons. Even though the search had concluded, the officer still believed the appellant may have been involved in the shots being fired. He escorted appellant to his patrol car where further questions were asked. During questioning, the appellant seemed nervous, repeatedly contradicted himself, did not have personal identification, and lied when asked if he had ever been arrested. *Id.*

Based upon the new set of facts after the first protective search, the officer decided to search the appellant once more. *Id.* at 767–68. During the second protective search, the officer felt what he thought was a knife and reached into appellant's pocket. What the officer thought was a knife turned out to be a lighter, but, while in appellant's pocket, the officer felt what he immediately recognized to be a bullet. *Id.* at 768. The bullet was a .32 caliber and matched other bullets found at the scene of a triple homicide 50 yards away from where the officer encountered the appellant. *Id.* Appellant was subsequently arrested. *Id.*

At a pre-trial suppression hearing, the district court denied the appellant's motion to suppress the bullet as an unreasonable search in violation of his Fourth Amendment rights. He then appealed directly to the Texas Court of Criminal Appeals. *Id.* The court concluded, based upon the additional facts between the first and second protective search, the officer was warranted in performing a second search of the appellant. *Id.* at 769–70. Even though there had already been a protective search, the court found the appellant's behavior led the officer to the

reasonable belief the appellant might be presently armed and dangerous. *Id.* at 770. Additionally, the court found the officer's reaching in appellant's pocket was within the scope of a protective search to look for weapons. *Id.*

*Balentine* is analogous to the present case before this Court. Both cases involved additional facts between the first and second protective searches which would lead to the reasonable belief the person may be armed and dangerous. In the present case, Respondent continually cursed and berated the officer, had a leather strap on his chest that was consistent with a holster, tried to leave, and pushed Officer Calloway's hand away. (R. at 3.) All these factors, as in *Balentine*, would lead any reasonably prudent person to believe the suspect was presently armed and dangerous. One distinction to be made between the present case and *Balentine* is in this case Officer Calloway noticed a holster strap which is directly related to a weapon, whereas in *Balentine*, all the facts indirectly related to a person being armed, but the court still found the search reasonable. 71 S.W.3d at 767. Additionally, unlike *Balentine*, Officer Calloway merely pushed aside Respondent's unzipped jacket and did not reach into any pockets, which is much more intrusive. Overall, the two cases share many similarities, with *Balentine* allowing more intrusion into the person's Fourth Amendment rights.

**B. If This Court Finds the Factor Analysis to Be the Appropriate Determination of Reasonableness, Then Officer Calloway Still Had a Reasonable, Articulate Suspicion Respondent Was Armed and Dangerous.**

Aside from analyzing reasonableness under the two-prong analysis, some courts consider factors including "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell*, 441 U.S. at 559. In assessing these factors, Officer Calloway had a reasonable, articulable suspicion Respondent may be armed and dangerous allowing him to perform a protective search.

The first factor courts consider in balancing private and public interests is the scope of the particular intrusion. *Id.* In *Terry*, this Court noted that a limited search for weapons of the outer clothing constituted “a severe, though brief, intrusion upon cherished personal security,” but was permissible when the officer had a reasonable suspicion the person was armed and dangerous. 392 U.S. at 24–25. As mentioned previously, merely moving aside Respondent’s unzipped jacket is no broader in scope than a limited search of the person’s outer clothing. Additionally, as noted by the District Court, this action should not be considered “the tipping point between proper conduct and a constitutional violation.” (R. at 5.) Many courts have deemed reasonable, searches which are much more intrusive than moving aside a jacket such as reaching into the suspect’s pocket. *See Majors*, 328 F.3d at 795. Here, the scope of Officer Calloway’s intrusion is no broader than the protective search approved of in *Terry*.

Another factor courts consider is the manner in which the protective search is conducted. *Bell*, 441 U.S. at 559. Here, Officer Calloway kept his protective search brief, used minimal force, and only used more force when Respondent prevented an effective search, which was permissible under the circumstances. *See Heitzmann*, 632 N.W.2d at 9. Aside from the manner in which the protective search is conducted, courts also consider the justification for initiating the search. *Bell*, 441 U.S. at 559. In this case, the main justifications for initiating the search included the fact that Respondent was wearing a heavy, black bomber jacket, was becoming nervous, and constantly surveyed the surrounding rooftops. (R. at 2.) As both the District Court and the Court of Appeals concluded, these facts adequately supplied Officer Calloway with appropriate justifications. (R. at 5–6, 8–9.)

The last factor courts consider is the place in which the protective search is conducted. *Bell*, 441 U.S. at 559. Here, Respondent was out in public. (R. at 2.) He was not in his home, his

vehicle, or a private building. Because Officer Calloway was out in public, any improper actions on the part of the Officer could have been witnessed by anyone in McDonough Square. (R. at 2.) This would offer more protection to Respondent because Officer Calloway would be less likely to make an unreasonable search. Overall, based on all the aforementioned factors, Officer Calloway had a reasonable, articulable suspicion Respondent may be armed and dangerous.

**C. The Nature and Quality of the Intrusion on Personal Security Is Outweighed by the Importance of the Governmental Interest in Protecting Officers and the Public.**

Throughout the course of determining reasonableness under either the two-prong or factor analyses, courts should balance “the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion.” *Hensley*, 469 U.S. at 228. The main governmental interests justifying protective searches are that they aid in effective crime detection and prevention, they protect officers, and they protect persons in the immediate area. *Terry*, 392 U.S. at 22–23. Overall, the government interest in protecting the public and officers outweighs the intrusion on Respondent’s personal security by merely moving aside the unzipped jacket.

Protective searches aid in crime detection and prevention by allowing officers to further their investigation of persons suspected of criminal activity. *Id.* at 22. Officers are extensively trained in the detection of crimes in the public and need to be able to investigate persons suspected of criminal activity. *See Bailey*, 417 F.3d at 877. If officers had to obtain a warrant in every instance they suspected a person of criminal activity, the effectiveness of crime prevention would decrease dramatically. This would, in turn, create officers that were reactive, as opposed to proactive.

Another important government interest is the protection of the officers themselves in the performance of their duties. *Terry*, 392 U.S. at 23. Officers put themselves in grave danger on a daily basis for the protection of the public. When the circumstances call for it, officers need to be able to take steps to protect themselves against a person that is presently armed. There is no need for officers to take more risk than they already undertake. If officers were not able to perform a protective search of a person to look for deadly weapons, the number of officers killed in the line of duty would increase dramatically. *See id.* Aside from protecting themselves, officers also need to perform protective searches for the safety of the public in the immediate area. Officers patrol the streets everyday to protect the city and its citizens.

In viewing these government interests, courts need to balance them against the nature and quality of personal intrusion. Performing a protective search of the person's outer clothing is a notable intrusion upon personal security and may be an "annoying, frightening, and perhaps humiliating experience." *Id.* at 24–25. With this in mind, however, courts are willing to allow this intrusion when an officer has a reasonable, articulable suspicion the person may be armed and dangerous. *Id.* at 30. In the case at hand, merely moving aside Respondent's unzipped jacket is no more intrusive than a limited search of the person's outer clothing. (R. at 5.) Additionally, many courts have deemed reasonable, searches which are much more intrusive than moving aside a jacket. *See Majors*, 328 F.3d at 795. When officers reasonably suspect a person is involved in criminal activity and may be carrying a weapon, they need to be allowed to perform a brief protective search for the detection and prevention of crime and the protection of themselves and the public.

Overall, this Court should reverse the Court of Appeals and reinstate the District Court's opinion because Officer Calloway had a reasonable, articulable suspicion to briefly detain

Respondent based on the totality of the circumstances. Additionally, the subsequent searches were reasonably related in scope to the circumstances that caused Officer Calloway's reasonable suspicions, and the nature and quality of the intrusion on Respondent's personal security was outweighed by the importance of the governmental interest in the detection and prevention of crime and protecting officers and the public.

**II. THE DISMISSAL OF RESPONDENT FOR HIS PARTICIPATION IN AN EXTRAMARITAL AFFAIR DID NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.**

The Fourteenth Amendment states: "nor shall any state deprive any person of life, liberty, property, without due process of law." U.S. Const. amend. XIV, § 1. This has come to be known as the Due Process Clause and provides for more than just "fair process." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). When addressing fundamental rights and certain liberty interests, the Due Process Clause provides heightened protection against governmental interference. *Reno v. Flores*, 507 U.S. 292, 301–02 (1993). More specifically, the Fourteenth Amendment prevents governmental infringement of fundamental rights unless "the infringement is narrowly tailored to serve a compelling state interest." *Id.* at 302.

With this in mind, however, this Court has "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." *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). This Court has exhibited reluctance in the establishment of new rights "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." *Glucksberg*, 521 U.S. at 720. Furthermore, only rights that are "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty qualify for such protection." *Chavez v. Martinez*, 538 U.S. 760, 775 (2003).

In the case at hand, participation in an extramarital affair and the more general right to private sexual activity is not “deeply rooted in this Nation’s history and tradition.” *Id.* Additionally, the right to private sexual activity is too broad and vague in description to warrant the creation of a new fundamental right. *See Glucksberg*, 521 U.S. at 721 (requiring a careful description of the alleged fundamental right with vague generalities such as “the right not to be talked to” being insufficient). Because no fundamental right is at issue here, the proper standard of review is rational basis which requires the governmental act be “rationally related to a legitimate state interest.” *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000). Here, the dismissal of Respondent for participation in an extramarital affair is rationally related to Rushmore County’s interest in regulating police conduct and public morality. In the alternative, if this Court finds the proper test to apply is not rational basis but a type of balancing test, then Craven’s interest in regulating police conduct and public morality outweighs the degree of intrusion into Respondent’s private sexual life.

**A. Rational Basis Is the Proper Standard of Review for Rushmore County’s Dismissal of Respondent for Participation in an Extramarital Affair.**

Rational basis is the proper standard of review for Rushmore County’s dismissal of Respondent for participation in an extramarital affair, and the holding in *Lawrence v. Texas* does not alter this view. 539 U.S. 558 (2003). When no fundamental rights are at issue in a government regulation, the proper standard of review to apply is rational basis. *Glucksberg*, 521 U.S. at 728 n.21. *Lawrence* did not create a fundamental right to engage in private sexual activity and instead analyzed the statute at issue under the rational basis standard. 539 U.S. at 578. In the alternative, the holding in *Lawrence* is inapplicable to the case at hand because *Lawrence* involved private and not public parties. *Id.*

**1. *Lawrence* did not recognize a new fundamental right to engage in private sexual activity and instead applied a rational basis standard of review.**

In *Lawrence*, this Court analyzed a Texas statute that criminalized adult, consensual, homosexual intimacy. *Id.* at 562–63. Two homosexual males were arrested for engaging in sexual activity and charged under this statute. *Id.* Subsequently, this Court granted certiorari to consider whether the statute was unconstitutional. *Id.* at 563–64. In considering the statute, this Court concluded that it violated substantive due process because it “furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” *Id.* at 578.

*Lawrence* did not ask whether the Texas statute furthered a “compelling state interest” which would indicate strict scrutiny review. *Id.*; *Reno v. Flores*, 507 U.S. at 302. It did not even ask whether it involved a “important government interest,” words indicating intermediate scrutiny review. *Lawrence*, 539 U.S. at 578; *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723–24 (1982) (finding government action based on sex requires the action to serve an important government objective). This Court chose to ask whether the statute furthered a “legitimate state interest,” words that undeniably involve a rational basis standard of review. *Lawrence*, 539 U.S. at 578. This rational basis standard for private sexual activity has been further affirmed by the Seventh, Eighth, Tenth, and Eleventh Courts of Appeal subsequent to *Lawrence*. See *Seegmiller v. Laverkin City*, 528 F.3d 762, 771 (10th Cir. 2008); *Sylvester v. Fogley*, 465 F.3d 851, 857 (8th Cir. 2006); *Muth v. Frank*, 412 F.3d 808, 818 (7th Cir. 2005); *Williams v. Att’y Gen. of Ala.*, 378 F.3d 1232, 136–38 (11th Cir. 2004); *Lofton v. Sec’y of Dep’t of Children & Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004).

Although there are numerous court of appeals decisions affirming rational basis as the appropriate standard for private sexual activity, Respondent may still argue *Lawrence* used a heightened scrutiny standard of review. This is because *Lawrence* only stated a portion of the rational basis standard, legitimate state interest, which was then followed by, “which can justify its intrusion into the personal and private life of the individual.” 539 U.S. at 578. This wording has been argued by some to justify employing a balancing test which is somewhere between the rational basis and intermediate scrutiny standards. See *Cook v. Gates*, 528 F.3d 42, 56 (1st Cir. 2008); *Witt v. Dep’t of Air Force*, 527 F.3d 806, 817–18 (9th Cir. 2008). This contention, however, is misguided for a multitude of reasons. See *Witt v. Dep’t of Air Force*, 548 F.3d 1264 (9th Cir. 2008) (O’Scannlain, J., dissenting). First, there was no wording that indicated *Lawrence* was applying an intermediate or strict scrutiny standard of review; second, *Lawrence* approvingly cited to a case using the rational basis standard of review; third, the Court did not explicitly state it was recognizing a new fundamental right; and finally, the majority in *Lawrence* failed to address Justice Scalia’s argument that no fundamental right had been created. 539 U.S. 558.

As mentioned previously, *Lawrence* did not use any wording consistent with an intermediate or strict scrutiny standard of review. To the contrary, the only wording used from the three standards applicable to assessing constitutional violations was “legitimate state interest,” implicating the rational basis standard. *Lawrence*, 539 U.S. at 578. In addition to the lack of wording for other standards of review, *Lawrence* also approvingly cited to *Romer v. Evans*, 517 U.S. 620 (1996), a case that used the rational basis standard of review in its analysis. 539 U.S. at 574. *Romer* found legislation directed at homosexuals as being unconstitutional on equal protection grounds. 517 U.S. at 635. In concluding the legislation was unconstitutional,

this Court applied a rational basis standard of review. *Id.* at 632. Even though *Romer* was based on an equal protection violation and not a substantive due process violation, its analysis is still telling. The fact that *Lawrence* cited to *Romer* implicitly indicates rational basis is the proper standard of review for private sexual activity under either equal protection or substantive due process.

Another reason rational basis is the proper standard of review is that *Lawrence* did not explicitly state it was recognizing a new fundamental right. 539 U.S. 558. When this Court is announcing a new fundamental right, a person would reasonably expect the Court to state so. *Cook v. Rumsfeld*, 429 F. Supp. 2d 385, 394 (D. Mass. 2006). Additionally, this Court has stated that an analysis of a substantive due process violation “must begin with a careful description of the asserted right.” *Reno v. Flores*, 507 U.S. at 302. The Court requires such a careful description to avoid liberty interests from being transformed into the policy preferences of the Members of this Court. *Glucksberg*, 521 U.S. at 720. A careful description of the right to private sexual activity is absent from the entire *Lawrence* opinion indicating the Court never intended to create a new fundamental right. *Lofton*, 358 F.3d at 816.

Lastly, rational basis is the proper standard of review because the majority failed to address Justice Scalia’s contention that no fundamental right had been created. *Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting); see *Sylvester*, 465 F.3d at 857. *But see Cook v. Gates*, 528 F.3d at 54. If the majority had created a fundamental right, they would have inevitably discussed Justice Scalia’s contentions, but by failing to do so, they are essentially acquiescing in his statement. Because multiple lower courts have applied rational basis and Respondent’s possible argument for a balancing test is ill-founded, rational basis is the proper standard of review for private sexual activity.

**2. Even if *Lawrence* applied a balancing test, that analysis is not applicable to Respondent because it involved private and not public parties.**

If this Court finds that *Lawrence* employed a balancing test to the Texas sodomy statute, that test does not apply to the case at hand because this case involves public and not private parties. More specifically, Respondent is a public police officer for the state of Craven, and, as stated in *Swank v. Smart*, a violation of the Due Process Clause is “less likely to be found so if it is a regulation of public employees than if it is a regulation of private citizens.” 898 F.2d 1247, 1252 (7th Cir. 1990) (quoting *Kelley v. Johnson*, 425 U.S. 238, 248–49 (1976)). This is because the state has more of an interest in the regulation of its employees than it does in the regulation of the public at large. *Shawgo v. Spradlin*, 701 F.2d 470, 483 (5th Cir. 1983). Additionally, when citizens join a police department, they must accept that some of the privileges and rights of an ordinary citizen will be reduced because a police force is considered paramilitary in nature. *Vorbeck v. Schnicker*, 660 F.2d 1260, 1262–63 (8th Cir. 1981).

The test to be utilized in the public employee context is whether the regulation enacted was so irrational as to be branded arbitrary. *Kelley*, 425 U.S. at 248. This standard is a very high burden to meet. In fact, this Court has allowed a police department to regulate officers’ hair length, concluding that the regulation was not arbitrary. *Id.* at 247–48. In this case, Craven’s adultery statute is not so irrational as to meet that high burden of being arbitrary. Also, Respondent was dismissed for violating a law, and when an officer violates a law, that illegality “creates a substantial barrier to his successfully asserting a privacy claim.” *Fleisher v. City of Signal Hill*, 829 F.2d 1491, 1498–99 (9th Cir. 1987).

Respondent may argue that because the sexual misconduct between he and Ms. Malone occurred while he was off-duty, the Rushmore Police Department should not have been able to

rely on that misconduct in their decision for dismissal. (R. at 4.) This reasoning, however, has been found by multiple courts to have no bearing on police department dismissals when the officer violated a statute. *See Walls v. Petersburg*, 895 F.2d 188, 193 (4th Cir. 1990) (inquiring about police candidates criminal sexual activities permissible); *Fleisher*, 829 F.2d at 1498 (punishing officer for statutory rape was permissible); *Fugate v. Phoenix Civil Serv. Bd.*, 791 F.2d 736, 741–42 (9th Cir. 1986) (punishing officer for relations with prostitutes permissible). Additionally, “a public employer may discipline tenured public employees for private activities reasonably related to the fitness of the employee to perform in his position.” *Cronin v. Town of Amesbury*, 895 F. Supp. 375, 384–85 (D. Mass. 1995), *aff’d*, 81 F.3d 257 (1996).

Here, Respondent violated a criminal statute. Regardless of whether he violated the adultery statute on-duty or off-duty, he was still hired to uphold the laws of Craven. Furthermore, the person he had the affair with was the Police Chief’s daughter. (R. at 4.) This was a woman that had been estranged by her father publically and had falsely accused the Rushmore Police Department of being corrupt. (R. at 3–4.) This directly bears on Respondent’s duties as an officer because he is a member of the Rushmore Police Department, he works directly under the Police Chief, and the Police Chief still had animosity towards his daughter. Overall, because Respondent is a public and not private party, the holding in *Lawrence* is inapplicable, and Craven’s adultery statute is not so irrational as to be branded arbitrary.

**B. Craven’s Adultery Statute Is Rationally Related to the Legitimate State Interest of Regulating Officer Conduct and the Promotion and Preservation of Public Morality.**

If this Court agrees with the numerous lower courts that rational basis is the proper standard of review for private sexual activity, then the next inquiry is whether Craven’s adultery statute is rationally related to a legitimate state interest. *Kimel*, 528 U.S. at 83. Craven’s interests

in enforcing its adultery statute include the regulation of officer conduct and the promotion and preservation of public morality. These state interests, taken together, satisfy rational basis analysis and so this Court should reverse the Court of Appeals and reinstate the District Court's granting of summary judgment.

From the outset, Respondent may contend that *Lawrence* established the rule that public morality can never be grounds to satisfy rational basis review. 539 U.S. at 582. This contention, however, is misguided for two reasons. First, although *Lawrence* did state that public morality cannot, on its own, satisfy rational basis, it did not state that public morality along with another consideration, such as the regulation of officer conduct, could not satisfy rational basis. *Id.* Second, *Lawrence* qualified its analysis of public morality as a basis for a statute to only equal protection claims and did not address public morality in relation to substantive due process claims. *Id.* In fact, it explicitly stated that their analysis was restricted to equal protection. *Id.* Additionally, other courts, in light of *Lawrence*, have stated the promotion and preservation of public morality is still an important consideration under rational basis review. *Williams v. Att'y Gen. of Ala.*, 378 F.3d at 1234. Lastly, this Court has stated that laws can be based on moral grounds. *Barnes v. Glen Theatre*, 501 U.S. 560, 569 (1991). In light of these decisions, public morality should be considered in conducting a rational basis review.

In this case, the promotion and preservation of public morality is a very important consideration. Marriage is one of the core concepts the United States was founded on and is still highly regarded among American citizens. *City of Sherman v. Henry*, 928 S.W.2d 464 (Tex. 1996). It is important to note that our country's laws and traditions have grown in the last fifty years and our citizens have gained an "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to

sex.” *Lawrence*, 539 U.S. at 572–73. But, there is a line that has to be drawn for adults and their private sexual activity. This line criminalizes the sexual activity of adults with minors, and it also criminalizes the sexual activity of adults when one of the persons is married. *See Baron v. Meloni*, 556 F. Supp. 796, 800 (W.D.N.Y. 1983), *aff’d*, 779 F.2d 35 (2d Cir. 1985). When making private sexual choices, adults need to be aware of these restrictions.

In addition to public morality, another legitimate state interest is the regulation of police officers. Officers represent the state and enforce the laws on a daily basis. Because officers enforce the laws, they are expected, even more than the average citizen, to abide by those laws because, in the eyes of the citizen, they are the law. *Vorbeck*, 660 F.2d at 1262–63. If this were not the case, the citizens respect for and confidence in the government would soon diminish. Additionally, police departments are considered paramilitary in nature. *Id.* These police departments have regulations officers are required to comport with to maintain the stability of the department. (R. at 7.) Police departments also have an interest in regulating conduct that bears on the officer’s job performance, whether or not the conduct occurred off-duty. *Fleisher*, 829 F.2d at 1498.

The Rushmore Police Department was justified in dismissing Respondent. He violated a department regulation and the law. (R. at 4, 7.) In the public’s eye, the Rushmore Police Department had already been tainted because of Ms. Malone’s false allegations of corruption. (R. at 3–4.) It needed to maintain order within the department and credibility with the citizens it protected. When Respondent had an extramarital affair with Ms. Malone, that order and that credibility, would have been severely diminished had the police department not taken action. Additionally, Respondent’s affair bore directly on his job performance. He was having an affair with a woman who had disdain for the police department which inevitably would have affected

Respondent's view of the police department. Also, Ms. Malone was the Police Chief's daughter. (R. at 3.) She was a daughter that had been publically estranged from her father, a man that was Respondent's superior. (R. at 3–4.) These facts, taken as a whole, demonstrate that there is a legitimate state interest in the regulation of its officers.

With these interests in mind, Respondent may argue that because Craven's adultery statute had not been enforced in over twenty years, it shows a trend in the Craven executive branch away from treating adultery as a crime. *See Lawrence*, 539 U.S. at 573. Therefore, because the executive branch is no longer enforcing the adultery statute, there is no longer a legitimate state interest in having the statute on the books. But, it must be noted that it is not the judiciary's function to act as a "superlegislature to determine whether judgments made by the legislature were wise or desirable." *Chambers Med. Tech. of S.C., Inc. v. Bryant*, 52 F.3d 1252, 1263 (4th Cir. 1995). Furthermore, if a statute does not violate the Constitution it must be sustained. *INS v. Chadha*, 462 U.S. 919, 944 (1983).

Here, the legitimate state interests of the promotion and preservation of public morality and the regulation of officer conduct have been asserted. Because these interests are rationally related to the Craven adultery statute, this Court should find it constitutional. If indeed the executive branch is no longer enforcing the statute, it is the legislature's function, not the judiciary, to repeal that statute. Overall, Craven's interests in the regulation of officer conduct and the promotion and preservation of public morality are rationally related to Craven's adultery statute. For these reasons, this Court should reinstate the District Court's granting of summary judgment and reverse the Court of Appeals.

**C. If This Court Finds the Proper Test to Apply Is the *Cook* Balancing Test, Then Craven’s Interest in the Regulation of Officer Conduct and the Promotion and Preservation of Public Morality Outweighs the Degree of Intrusion into Respondent’s Private Sexual Life.**

In *Cook v. Gates*, the First Court of Appeals went contrary to the majority of other courts of appeal, which employed rational basis, and applied a balancing test that fell between rational basis and intermediate scrutiny standards of review. 528 F.3d at 56. The test “balanced the strength of the state’s asserted interest in prohibiting immoral conduct against the degree of intrusion into the petitioners’ private sexual life caused by the statute in order to determine whether the law was unconstitutionally applied.” *Id.* Under this balancing test, Craven’s interest in the regulation of officer conduct and the promotion and preservation of public morality outweighs the degree of intrusion into Respondent’s private sexual life caused by the adultery statute.

*Cook v. Gates* developed this balancing test in unique circumstances. The plaintiffs in *Cook v. Gates* were former members of the United States military and brought an action claiming the “Don’t Ask Don’t Tell” (“DADT”) statute violated both their substantive due process and equal protection rights. *Id.* at 47. All of the plaintiffs were discharged for engaging in homosexual activity. *Id.* The district court heard arguments on a motion to dismiss and subsequently granted the motion concluding all of the plaintiffs’ claims failed as a matter of law. *Id.* at 47–48.

The court of appeals affirmed the district court, but, in doing so, established a new legal standard to be applied to private sexual conduct. *Id.* at 55. The court found that *Lawrence* did not apply a rational basis standard of review, and instead, employed a balancing test somewhere between the rational basis and intermediate scrutiny standards of review. *Id.* at 56. The court applied this test and found that the government’s interest in regulating the armed forces was

substantial. *Id.* at 56–57. The court went on to cite Supreme Court cases that discussed the deference the government is given in military matters because:

It is difficult to conceive of an area of governmental activity in which courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislature and Executive Branches.

*Id.* at 57 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)). Because the plaintiffs were all members of the military when the homosexual activity occurred, the court found the intrusion into their private sexual lives did not outweigh the substantial government interest in regulating the United States military. *Id.* at 60, 62.

The analysis in *Cook v. Gates* should be equally applicable to the instant case. Craven has a legitimate state interest in the regulation of their police departments. Police departments are considered paramilitary in nature because of the control, unity, and uniformity they exhibit. *Vorbeck*, 660 F.2d at 1262–63. They are, therefore, much like the United States military in many respects. They both are regulated internally by the legislature and executive branches. They both require uniforms to be worn, require its members to risk their lives on a daily basis, expect a higher degree of adherence to the laws and regulations of their jurisdiction, and subject its members to discipline for violation of those laws and regulations. The reasoning stated by this Court in *Gilligan* to allow more deference to the military applies equally to police departments. Police departments equally involve “complex, subtle, and professional decisions as to the composition, training, equipping and control” of its members. *Gilligan*, 413 U.S. at 10. In this case, Respondent was a member of the Rushmore Police Department. It, therefore, had a substantial interest in the regulation of Respondent’s conduct. As mentioned previously, Craven also has an interest in the promotion and preservation of public morality.

With these two substantial state interests in mind, this Court should next consider the degree of intrusion into Respondent's private sexual life. *Cook v. Gates*, 528 F.3d at 56. It is conceded that there is a certain degree of intrusion into Respondent's sexual life. He had a relationship with Ms. Malone while his was off-duty and kept it private. (R. at 4.) But, because the police department is considered paramilitary, deference should be given to their decisions and regulations. *Gilligan*, 413 U.S. at 10. Overall, Craven's interest in the regulation of officer conduct and the promotion and preservation of public morality outweighs the degree of intrusion into Respondent's private sexual life caused by the adultery statute.

### **CONCLUSION**

This Court should REVERSE the Court of Appeals' judgment and REINSTATE the District Court's Judgment.

Respectfully submitted,

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TEAM F  
ATTORNEYS FOR PETITIONER

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## 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.

U.S. Const. amend. IV.

#### 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.

U.S. Const. amend. XIV, § 1 (emphasis added).