

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 RESPONDENT

TEAML

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fourth Amendment prohibits a police officer, acting under reasonable suspicion, from moving aside an exterior garment of a suspect.
2. Whether the Due Process Clause of the Fourteenth Amendment prohibits the termination of a police officer for his participation in an extramarital affair.

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OPINIONS BELOW

This appeal arises from the judgment of the United States Court of Appeals for the Thirteenth Circuit, decided April 29, 2007, which reversed the judgment of the United States District Court for the District of Craven, dated February 19, 2006. The opinions of the Court of Appeals for the Thirteenth Circuit [Docket No. 06-6436] and the District Court for the District of Craven [Docket No. 05-1947] are included in the Transcript of Record.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Const. amend. IV is set forth in Appendix A.
2. U.S. Const. amend. XIV is set forth in Appendix B.
3. 42 U.S.C. § 1983 (2000) is set forth in Appendix C.

STATEMENT OF THE CASE

On June 7, 2005 in McDonough Square, Respondent William Tracey, a seven year veteran of the Rushmore County Police Force in the State of Craven, conducted his duties in an undercover operation targeting the sale of illegal firearms in Rushmore County. (R. at 2). As he served in an undercover capacity, Mr. Tracey wore a black nylon bomber jacket, despite temperatures in the low seventies. (R. at 2). Officer Maxwell Calloway, an officer for Rushmore County affiliated with a precinct different from Mr. Tracey, was also conducting an investigation in McDonough Square on the day in question. (R. at 2). Officer Calloway's investigation was based on an unspecified lead relating to Red Tide, a private military company involved with the sale of illegal firearms. (R. at 2). Although Mr. Tracey did not match the description of the lead, Officer Calloway's suspicions were first aroused when he observed Mr. Tracey's closely cropped hair and jacket. (R. at 2). Based on these facts, Officer Calloway observed Mr. Tracey for twenty minutes, noticing that Mr. Tracey appeared agitated and

continuously scanned the layout of the square and the rooftops of surrounding buildings. (R. at 2).

Despite failing to observe any clear indication of criminal activity, Officer Calloway approached Mr. Tracey. (R. at 2, 3). After Officer Calloway introduced himself and asked Mr. Tracey his name, Mr. Tracey became angry, but nevertheless ultimately and truthfully told Officer Calloway his name was “Bill.” (R. at 3). As Mr. Tracey tried to leave, Officer Calloway grabbed him by the wrist and began to pat down the exterior surface of Mr. Tracey’s clothing to search for weapons. (R. at 3). Mr. Tracey did not physically resist at any time during the pat down, although he did express some anger. (R. at 3). Officer Calloway did not feel anything consistent with a weapon during the search and, once again, Mr. Tracey attempted to leave. (R. at 3).

At this point, Officer Calloway noticed a leather strap protruding from Mr. Tracey’s jacket. (R. at 3). Officer Calloway was unsure about the nature of the strap and he did not get a close look at it. (R. at 3). Nevertheless, Officer Calloway believed the strap to be consistent with those used to carry concealed firearms. (R. at 3). Again, Officer Calloway ordered Mr. Tracey to turn around and Mr. Tracey complied. (R. at 3). Officer Calloway attempted to lift Mr. Tracey’s jacket to see what was underneath, but Mr. Tracey brushed his hand away. (R. at 3). More forcefully, Officer Calloway pulled the exterior of Mr. Tracey’s jacket to the side and revealed a “Glock 21” .45 caliber pistol and placed Mr. Tracey under arrest. (R. at 3). Mr. Tracey then explained that he was an undercover police officer and that Officer Calloway was putting his investigation in jeopardy, as well as exposing him to physical danger. (R. at 3). Mr. Tracey was unable to produce identification upon Officer Calloway’s request because he never carried any identification that would tie him to law enforcement while working undercover. (R.

at 3). Officer Calloway did not believe Mr. Tracey and subsequently decided to detain him pending further investigation. (R. at 3).

Mr. Tracey was then taken to a precinct and subject to a full search, during which Mr. Tracey's cell phone was seized. (R. at 4). In the cell phone, Officer Calloway discovered the contact information for Ms. Jacqueline Malone, the daughter of the Rushmore County Police Chief Patrick Malone. (R. at 4). Ms. Malone had recently been in the news for accusing the police department of corruption. (R. at 4). Still believing Mr. Tracey to be a member of Red Tide, Officer Calloway immediately contacted Ms. Malone to warn her that she could be a target. (R. at 4). Alarmed at being contacted by local law enforcement, Ms. Malone immediately declared that she had been involved in a relationship with Mr. Tracey and confirmed that he was an undercover police officer. (R. at 4). In turn, Officer Calloway called Mr. Tracey's precinct and informed them of the affair between Mr. Tracey and Ms. Malone. (R. at 4).

The following day, Mr. Tracey was fired by the Rushmore County Police Department for "behavior unbecoming a police officer." (R. at 4). The Police Chief ultimately conceded that Mr. Tracey's termination stemmed from his extra-marital affair in violation of Craven Statute 11-198.01, a statute that prohibits adultery but under which no prosecutions have been brought for over twenty years. (R. at 4).

Mr. Tracey never met with Ms. Malone in the course of performing any of his duties as a police officer. (R. at 4). Further, although Mr. Tracey is married, he has been separated from his wife for the past eighteen months and has recently been served with divorce papers. (R. at 4). Ms. Malone is not married. (R. at 4).

Mr. Tracey brought a claim against Rushmore County, Craven, Police Department pursuant to 42 U.S.C. § 1983 for violations of the Fourth Amendment and the Due Process

Clause of the Fourteenth Amendment. (R. at 5). The District Court found for Rushmore County on a Motion for Summary Judgment, holding that Mr. Tracey's constitutional rights were not infringed. (R. at 5). On appeal, the Thirteenth Circuit reversed the district court's decision. (R. at 12). Rushmore County now appeals to this Court; Respondent Mr. Tracey asks the Court to sustain the decision of the Thirteenth Circuit.

SUMMARY OF THE ARGUMENT

I. This Court should uphold the Thirteenth Circuit's ruling that Officer Calloway exceeded the boundaries of Terry v. Ohio in his search of Mr. Tracey because Terry established a per se boundary at the exterior of a suspect's clothing, or, in the alternative, hold that Officer Calloway's search was unreasonable under the Fourth Amendment.

Officer Calloway exceeded Terry's explicit established limits on searches based on reasonable suspicion to the exterior of a suspect's clothing. Furthermore, even if the Court determines that Terry does not establish a per se boundary, Officer Calloway's methods were unreasonable because his initial search revealed no weapon, he failed to use the least intrusive methods available when searching Mr. Tracey, and Mr. Tracey's actions justified no additional search.

The Court should adhere to the balancing test applied in Terry. There, the Court determined that the interests of officer safety and individual privacy would be best served by allowing the strict minimal intrusions described in Terry. The lower courts are not free to strike a new balance. Accordingly, the decision of the Thirteenth Circuit should be upheld.

II. The Court should also uphold the Thirteenth Circuit's ruling because the plain view doctrine cannot be relied upon to justify Officer Calloway's actions. First, Officer Calloway did not have probable cause to seize the weapon from Mr. Tracey, as required by this Court.

Second, the incriminating nature of the strap was not immediately apparent until Officer Calloway manipulated Mr. Tracey's jacket. Accordingly, the Court should sustain the decision of the Thirteenth Circuit.

III. This Court should uphold the decision of the court below and find that Mr. Tracey's termination from the Rushmore County Police Department for his participation in an extramarital affair violated the Fourteenth Amendment. The State of Craven may not proscribe adultery because Lawrence recognized a protected liberty interest in consensual sexual privacy. The liberty interest in sexual privacy reaches only consensual sexual conduct between adults, which includes adultery.

The Craven adultery statute does not survive the heightened scrutiny required by Lawrence. Also, the Rushmore County Police Department's termination of Mr. Tracey impermissibly burdened his right to sexual privacy. The police interest in regulating its members is insufficient to survive heightened scrutiny. Further, the Police Department lacked any reason to terminate Mr. Tracey. In the absence of a nexus between poor work performance and the sexual conduct at issue, the state cannot impermissibly burden the protected liberty interest in sexual privacy.

ARGUMENT

I. THE COURT SHOULD SUSTAIN THE DECISION OF THE THIRTEENTH CIRCUIT BECAUSE PETITIONER VIOLATED RESPONDENT'S FOURTH AMENDMENT RIGHTS BY EXCEEDING THE BOUNDARIES OF TERRY V. OHIO.

A. Officer Calloway exceeded the established boundaries of the Fourth Amendment in his search of William R. Tracey because the Supreme Court established a per se boundary at the exterior of a suspect's clothing.

The Fourth Amendment plainly prohibits the unreasonable search and seizure of persons without warrant or probable cause. See U.S. CONST. amend. IV.; see also Terry v. Ohio, 392

U.S. 1, 30-31 (1968); Sibron v. New York, 392 U.S. 40, 63-65 (1968); 3 Wayne LaFave, Search and Seizure § 9.1 (4th ed. 2004). This Court has expressly held that searches conducted without the prior approval by a judge or magistrate or without probable cause are per se unreasonable, subject to a few jealously and carefully drawn exceptions. See, e.g., Schneckloth v. Bustamonte, 412 U.S. 218, 227-28 (1973) (allowing consent-based searches without warrant or probable cause); United States v. Ramsey, 431 U.S. 606 (1977) (allowing border searches without warrant or probable cause); Terry, 392 U.S. at 30-31.

The only exception that applies in the case at hand is a Terry search, designed by the Court to balance the interests of preserving police safety while also limiting warrantless intrusion on a suspect's person. See Terry, 392 U.S. at 30-31. This Court has carefully drawn explicit boundaries to limit the scope of a Terry search in order to prevent police officers from going beyond what is reasonable under the Fourth Amendment. Id. In lifting Mr. Tracey's jacket, Officer Calloway exceeded those boundaries, invaded Mr. Tracey's privacy, and, thus, violated the Fourth Amendment. See id. Accordingly, the Court should sustain the decision of the Thirteenth Circuit and find for Mr. Tracey. See id.

Mr. Tracey's body, and the clothing he wore on his body, are constitutionally protected areas. See, e.g., Terry, 392 U.S. at 30. Nevertheless, the Court has recognized the need of police officers to "protect themselves" and "others around them." Terry, 392 U.S. at 31. Thus, if Officer Calloway possessed reasonable suspicion that Mr. Tracey may have been armed and dangerous, Officer Calloway was entitled to briefly "conduct a *carefully limited search of the outer clothing of*" Mr. Tracey. Terry, 392 U.S. at 30 (emphasis added). In lifting Mr. Tracey's jacket, Officer Calloway extended his search beyond those boundaries, and, thus, unreasonably invaded Mr. Tracey's privacy. Id.

The courts since Terry have held that a Terry search is to be limited to the exterior of a suspect's garments. See United States v. Askew, 529 F.3d 1119, 1134 (D.C. Cir. 2008) (en banc); United States v. Sanders, 424 F.3d 768, 776 (8th Cir. 2005); United States v. Casado, 303 F.3d 440, 446 (2d Cir. 2002). Similar to the lifting of Mr. Tracey's jacket, the D.C. Circuit has held that police officers violated a suspect's Fourth Amendment rights by partially unzipping the suspect's outer jacket when conducting a Terry search. See Askew, 529 F.3d at 1134; see also People v. Aviles, 21 Cal. App. 3d 230 (5th Dist. 1971) (holding that flipping up a suspect's coat to be impermissible under Terry). Likewise, a series of cases have prohibited reaching into a suspect's pocket or looking under a suspect's hat because Terry prohibits searching beyond the exterior of a suspect's clothing. See Minnesota v. Dickerson, 503 U.S. 366, 378 (1993) (holding that search exceeded the scope of Terry when officer reached into a pocket after pat-down search revealed no weapons); Sanders, 424 F.3d at 776 (searching pockets exceeded scope of Terry because there was no reason to believe suspect was armed after pat-down search); Casado, 303 F.3d at 446 (inserting hands into defendant's pocket during stop, rather than patting, exceeded scope of Terry). Accordingly, in the case at hand, to extend Terry searches to the lifting of Mr. Tracey's jacket would violate the Fourth Amendment. See Terry, 392 U.S. at 30.

B. Even if Terry and its progeny do not establish a per se boundary in the exterior layer of Mr. Tracey's garments, Officer Calloway's search nevertheless unreasonably invaded Mr. Tracey's privacy.

1. The "reasonableness" approach adopted by the Craven District Court mischaracterizes the Fourth Amendment.

This Court should invalidate the "reasonableness" approach adopted by the Craven District Court because it allows the Terry frisk exception to engulf the Fourth Amendment, contrary to the Constitution and Supreme Court decisions. See (R. at 5); see also Dickerson 508 U.S. at 374; Terry 392 U.S. at 24-25. According to the Craven District Court, and also espoused

by Petitioner, “as indicated by the text of the Fourth Amendment and confirmed by the Supreme Court, the Fourth Amendment does not proscribe all warrantless searches, but only *unreasonable* searches.” See (R. at 4).

In making such an assertion, the courts wholly ignore that the right to be free from warrantless searches and seizures is so fundamental that “[n]o right is to be held more sacred, or is more carefully guarded, by the common law, than the right of every person to the possession and control of his own person, free from all restraint or interference of other, unless by *clear and unquestionable* authority of law.” Terry, 392 U.S. at 8-9 (quoting Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891)). Accordingly, reasonable suspicion did not allow Officer Calloway to search beyond the exterior of Mr. Tracey’s garments. See id. at 8-9.

In support of this approach, the Craven District Court erroneously relied on Florida v. Jimeno. See 500 U.S. 248, 250-51 (1991). Jimeno established the legality of a consent-based search, entirely distinct from the facts and law of the case at hand. See 500 U.S. at 250-51. In no way did Mr. Tracey consent to Officer Calloway’s search. See id. The lower court also relied on United States v. Knights, which provides no credence to the argument that Terry permits a search beyond the exterior of a suspect’s clothing. See 534 U.S. 112 (2001). Knights, again, refers to facts and law entirely distinct from the case at hand. See 534 U.S. at 120-21. There, the suspect was a probationer who signed a probation order in which he agreed to submit himself, his property, and his home to searches at any time, with or without a warrant or probable cause. See id. Because of the suspect’s status on probation, he was entitled to a “significantly diminished expectation of privacy.” See id. In the case at hand, Mr. Tracey was not a probationer and therefore should enjoy the expectation of any citizen to be free from searches without warrant or probable cause. See U.S. CONST. amend. IV.; Knights, 534 U.S. at 120-21.

Therefore, the Court should hold that Officer Calloway's search of Mr. Tracey violated the Fourth Amendment. See Knights, 534 U.S. at 120-21.

2. Officer Calloway's search was unreasonable after examining the totality of the circumstances because he failed to use an obvious, less intrusive method.

In order for Officer Calloway's Terry search to be reasonable, not only must the search be based upon reasonable suspicion, but Officer Calloway also should have used the least intrusive method available to protect himself under the totality of the circumstances. See Ohio v. Robinette, 519 U.S. 33 (1996); Terry, 392 U.S. at 24, 26; LaFave, supra §9.6. Officer Calloway clearly could have conducted another pat-down search of Mr. Tracey if he suspected that the strap he viewed on Mr. Tracey was consistent with those used to carry concealed firearms. See, e.g., Terry, 392 U.S. at 24, 26; LaFave, supra, § 9.6. In spite of this obvious, Supreme Court-sanctioned option, Officer Calloway chose to unreasonably invade Mr. Tracey's privacy by reaching under his clothing. See, e.g., Terry, 392 U.S. at 24, 26; LaFave, supra, § 9.6.

The case at hand is distinguishable from Adams v. Williams, where the Court found an exception to the initial pat-down requirement. See 407 U.S. 143, 144-45 (1972). There, the Court upheld a search for a weapon that was not preceded by a pat-down when an officer reached through a car window and into a suspect's waistband to seize a gun. See Adams, 407 U.S. at 145-46, 148. Unlike the case at hand, the no-frisk approach espoused by the Court in Adams can be justified by the fact that it would have been difficult or dangerous to frisk a man through the window of a car. See Adams, 407 U.S. at 145-46, 148; Thomas K. Clancy, Protective Searches, Pat-downs, or Frisks?: The Scope of a Permissible Intrusion to Ascertain if a Detained Person is Armed, 82 Marq. L. Rev. 491, 500 (1999). Furthermore, the police officer learned from a credible informant just moments earlier that the gun would be in the suspect's waistband. See Adams, 407 U.S. at 145-46. In the case at hand, Officer Calloway had no such

information as to the location of a gun on Mr. Tracey's person. See id.

The totality of the circumstances demonstrate that Officer Calloway was no longer in danger when he finished his initial pat-down of Mr. Tracey, thus making the search unreasonable under the Fourth Amendment. See, e.g., Robinette, 519 U.S. at 33; Dickerson, 508 U.S. at 374; Schneekloth, 412 U.S. at 226. Mr. Tracey was walking away from Officer Calloway when the second search was conducted. See Dickerson, 508 U.S. at 374. Furthermore, Officer Calloway testified that he was uncertain of the strap's purpose and did not get a closer look at it. See id. To extend Terry to allow such a search would strike at the heart of the Fourth Amendment and enable police officers to fully search suspects without probable cause. See Terry, 392 U.S. at 24, 26; Coolidge v. New Hampshire, 403 U.S. 443, 454 (1971); Wayne A. Logan, An Exception Swallows a Rule: Police Authority to Search Incident to Arrest, 19 Yale L. & Pol'y Rev. 381 (2001).

To find that Officer Calloway failed to adhere to the strictures of the Fourth Amendment by not first conducting a pat-down search would not be engaging in the "unrealistic second-guessing" of alternative means of investigations that this Court has warned about. See United States v. Sharpe, 470 U.S. 675, 686-87 (1985). Primarily, engaging in a frisk would have been an "equally effective means of ensuring" Officer Calloway's safety. See United States v. Place, 462 U. S. 696, 715-16 (1983); Florida v. Royer, 460 U.S. 491, 511 (1983); Michigan v. Long, 463 U.S. 1035, 1055 (1983) (Brennan, J., dissenting). Furthermore, holding true to the letter and spirit of Terry and the Fourth Amendment, Terry searches are limited to pat-downs, with an intrusion underneath the surface permitted only if something that could be a weapon is detected during the pat-down. See, e.g., Dickerson, 508 U.S. at 374. To hold otherwise would greatly expand the holding of Terry and rob the Fourth Amendment of meaning. See Terry, 392 U.S. at

24, 26; Coolidge, 403 U.S. at 454; Wayne A. Logan, An Exception Swallows a Rule, *supra*, at 381.

The state courts and circuit courts have time and again¹ held that a Terry search requires a “carefully limited pat-down of the outer clothing of the suspect” followed by an intrusion beneath the surface of the clothing “only if something feels like a weapon.” *See, e.g., Parker v. State*, 697 N.E.2d 1265, 1267 (Ind. Ct. App. 1998) (citing Terry for the proposition that an officer “may perform a carefully limited pat-down of the outer clothing of the suspect”); State v. Newton, 489 S.E.2d 147, 149 (Ga. Ct. App. 1997) (holding that Terry pat-down is generally “two-step process” with “pat down first” followed by an intrusion beneath the surface only if something feels like a weapon). In the case at hand, Officer Calloway did not observe or feel anything that could be a weapon.² *See, e.g., Parker*, 697 N.E.2d at 1267; Newton, 489 S.E.2d at 149.

This is significantly different from cases where the courts have allowed a departure from Terry’s pat-down requirement. *See, e.g., United States v. Baker*, 78 F.3d 135 (4th Cir. 1996). For example, in Baker, the Fourth Circuit held that an officer did not violate the Fourth Amendment when he ordered a suspect to lift his shirt during a Terry search because the officer observed a bulge under the suspect’s shirt consistent with a gun. *See* 78 F.3d at 138. The court reasoned that the officer’s actions were appropriate because he accounted for his own safety by not coming within close proximity of the suspect. *See id.* Also, the officer respected the

¹ *See also State v. Smith*, 693 A.2d 749, 751 (Md. 1997) (protective search is, in most instances, limited to a pat-down of the outer surface of the suspect’s clothing); Hodges v. State, 667 So. 2d 145, 147-48 (Ala. Crim. App. 1995), *rev’d*, 678 So. 2d 1049 (Ala. 1996); State v. Crook, 485 N.W.2d 726, 729 (Minn. Ct. App. 1992) (search permitted in Terry limited to pat of outer areas of a person’s clothing unless an object thought to be a weapon is felt); State v. Andrews, 565 N.E.2d 1271, 1274 (Ohio 1991) (protective search approved of in Terry limited to pat-down), *cert. denied*, 501 U.S. 1220 (1991); Alfred v. State, 487 A.2d 1228, 1239 (Md. Ct. Spec. App. 1985) (“only a pat-down of the exterior of the clothing surface is permitted”); People v. Collins, 463 P.2d 403, 406 (Cal. 1970) (*en banc*) (limiting search to pat-down of exterior of suspect’s clothing).

² At best, Officer Calloway observed something that may have been consistent with a gun holster; however, he testified that he was unsure as to what he saw.

suspect's privacy by asking him to lift the shirt. See id. In stark contrast, in the case at hand, not only did Officer Calloway approach the suspect in close proximity (demonstrating a lack of fear for his safety), he also lifted the suspect's jacket without warning or order. See id. Accordingly, Officer Calloway violated Mr. Tracey's rights under the Fourth Amendment. See id.

C. After the pat-down search did not uncover any weapon, Officer Calloway violated the Fourth Amendment when he again searched Mr. Tracey.

Although the initial pat-down was justified by reasonable suspicion, this reasonable suspicion was dissipated when the pat-down did not reveal a weapon. See, e.g., Dickerson, 508 U.S. at 573; Long, 463 U.S. at 1052. The right to conduct a frisk did not give Officer Calloway the right to make absolutely certain that no weapon was present. See, e.g., Dickerson, 508 U.S. at 573; State v. Smith, 693 A.2d 749, 754 (Md. 1997). The limited search permitted by Terry is to find weapons "for the assault of the police officer," not merely to find weapons; thus, there is no reason to cover every square inch of the suspect's body. See Terry, 392 U.S. at 24, 26; LeFave, supra, § 9.6. The need is only to find implements which could readily be grasped by the suspect during the brief face-to-face encounter, not to uncover items which are cleverly concealed and which could be brought out only with considerable delay and difficulty. See Terry, 392 U.S. at 24, 26; LeFave, supra, § 9.6.

Once Officer Calloway's pat-down search produced no weapons, Mr. Tracey was entitled to be released and to be free from further searches, unless Mr. Tracey's conduct justified a further search or Officer Calloway felt or observed something that could be a weapon during the initial pat-down search. See, e.g., Dickerson, 508 U.S. at 573. To hold otherwise would extend Terry searches into exploratory searches of unlimited length and scope, clearly contrary to the Fourth Amendment. See Ybarra v. Illinois, 444 U.S. 85, 93–94 (1979) (noting that "[n]othing in Terry can be understood to allow a generalized 'cursory search for weapons' or indeed, any

search whatever for anything but weapons”); Thornton v. United States, 541 U.S. 615, 629 (2004) (Scalia, J., concurring).

1. Officer Calloway felt or observed no object that could be a weapon during the pat-down search, making any further search or detention a violation of the Fourth Amendment.

Officer Calloway’s search of Mr. Tracey violated the Fourth Amendment once he continued the search after his pat-down and visual inspection of Mr. Tracey revealed no object that could be a weapon. See, e.g., Dickerson, 508 U.S. at 374. In order for Officer Calloway to extend his search beyond the initial pat-down, he must have possessed probable cause for believing that an object felt in the clothing was contraband or other criminal evidence subject to seizure. See id. Because Petitioner has admitted the absence of probable cause, a search further than the exterior of Mr. Tracey’s clothing is contrary to Fourth Amendment. See id. Accordingly, this Court should sustain the decision of the Thirteenth Circuit and find for Respondent. See id.

The facts in the case at hand are similar to those in Dickerson. See 508 U.S. at 372. There, a police officer conducted a valid frisk of a suspect, during which he felt a “small lump,” which he realized was not a weapon, but which he could not otherwise immediately identify. See id.; see also United States v. Russell, 655 F.2d 1262, 1264 (D.C. Cir. 1981) (officer “unavoidably” felt the outline of a gun in a paper bag); United States v. Ocampo, 650 F.2d 421, 429 (2d Cir. 1981) (federal agent was able “readily to identify” bagged bundles of wrapped currency that were “easily discernible” by lawful touch). The officer continued to manipulate the object with his fingers until he determined it was crack cocaine, leading him to reach into the suspect’s pocket and retrieve a small bag of cocaine. See Dickerson, 508 U.S. at 372. The Court found that both the manipulation of the object and reaching into the suspect’s pocket violated the Fourth Amendment. Dickerson, 508 U.S. at 374.

The actions of Officer Calloway are even more invasive than those of the officer in Dickerson. See 508 U.S. at 374. Here, Officer Calloway had no basis from his initial frisk of Mr. Tracey to proceed any further. See id. Even if the strap on Mr. Tracey’s back did look similar to a gun holster, Officer Calloway testified that he was not certain of the strap’s purpose. See id. Furthermore, Officer Calloway certainly did not possess the probable cause required to extend a search beyond the exterior of a suspect’s clothing. See id. Accordingly, the Court should find for Respondent and sustain the decision of the Thirteenth Circuit. See id.

2. The Craven District Court erroneously held that Mr. Tracey’s conduct justified an extended search.

This Court has recognized that a pat-down frisk is a “serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment.” Terry, 392 U.S. at 17. The Court has further described a pat-down search as an “annoying, frightening, and perhaps humiliating experience.” Id. at 25. Accordingly, the Court accounts for the very behavior exhibited by Mr. Tracey when he was searched by Officer Calloway, including Mr. Tracey’s slow (but nevertheless eventual and truthful) identification of himself, Mr. Tracey’s cursing and berating of Officer Calloway during the pat-down, and Mr. Tracey pushing aside Officer Calloway’s hand. See id. These factors do not give rise to a more invasive search premised on Terry. See id.

The *sole justification* for a search following a Terry stop and frisk is the protection of police officers and others who are nearby. Dickerson; 508 U.S. at 573; Terry, 392 U.S. at 29. If a frisk or pat-down produces nothing, then the officers have no reason to be concerned about their safety or the safety of others. Dickerson; 508 U.S. at 573; Terry, 392 U.S. at 29. When Mr. Tracey pushed Officer Calloway’s probing hand away from his jacket, “he was merely giving vent to his Fourth Amendment right to avoid an unwarranted search of his person.” See United

States v. Askew, 482 F.3d 532, 557 (D.C. Cir. 2007) (Edwards, J., dissenting), rev'd en banc, 529 F.3d 1119 (D.C. Cir. 2008). He had already been frisked, so Officer Calloway was not entitled to pursue a further search of his person. Id. Terry and its progeny make it clear that Officer Calloway was forbidden from attempting to lift Mr. Tracey's coat without his permission. Id.

The case at hand is entirely dissimilar from State v. Heitzman, which the District Court relies upon to support the assertion that Mr. Tracey's conduct justified an extended search. See 632 N.W.2d 1, 9 (N.D. 2001). There, the suspect behaved nervously, failed to comply with the officer's requests, and ultimately attempted to flee the scene. See 632 N.W. 2d at 5. The officer was finally required to hold on to the suspect to finally frisk him. See id. The court found this extra measure reasonable because the suspect's vast non-compliance made it necessary to effectuate the search. See id. In contrast, Mr. Tracey complied with all of Officer Calloway's requests and never made an attempt to flee. See id. In fact, Mr. Tracey allowed Officer Calloway to frisk him without much aggravation. See id. When Officer Calloway extended his search beyond the exterior of Mr. Tracey's clothing, Officer Calloway acted unreasonably and therefore violated the Fourth Amendment. See id.

D. The balancing test applied by the Supreme Court in Terry v. Ohio should govern.

This Court has warned that “illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure.” Boyd v. United States, 116 U.S. 616, 635 (1886). The balancing test applied by the District Court and espoused by Petitioner is wholly inappropriate and should not be endorsed by this Court. See id. Because the Supreme Court has already weighed the interests relevant to determining whether a Terry search is reasonable under the Fourth Amendment, the lower courts are “not free to strike a

new and different balance.” Askew, 529 F.3d 1119 at 1126; see Terry, 392 U.S. at 24-25; Sibron, 392 U.S. at 63-65. The Court in Terry and Sibron authorized a strictly circumscribed search limited to the exterior of a suspect’s clothing because the Court determined that the “weighty interest in the safety of police officers” justified this intrusion on personal security. New York v. Class, 475 U.S. 106, 116 (1986); Terry, 392 U.S. at 24-25; Sibron, 392 U.S. at 63-65. Accordingly, this Court should continue to rely on the balancing test already applied in Terry. Terry, 392 U.S. at 24-25; Sibron, 392 U.S. at 63-65.

The District Court erroneously relies on United States v. Hensley to strike an entirely new balance. See (R. at 5); 469 U.S. 221, 228 (1985). Hensley can be easily differentiated from the case at hand. See 469 U.S. at 228. First, the Court in Hensley held that investigating a completed crime versus a crime in progress involved different government interests than those in Terry and thus required a different balancing test. See id. Unlike, Hensley this is not a case of first impression; Officer Calloway was investigating what he believed to be a crime in progress. See id. Second, even though the Court in Hensley applied a balancing test different from that in Terry, this did nothing to extend the scope of a Terry search. See id. Likewise, in the case at hand, the Court should not extend Terry to allow for “slightly extended” searches beyond the exterior of a suspect’s clothing. See Terry, 392 U.S. at 24-25; Sibron, 392 U.S. at 63-65.

Accordingly, the Court should sustain the decision of the Thirteenth Circuit. See Terry, 392 U.S. at 24-25; Sibron, 392 U.S. at 63-65.

II. THE PLAIN-VIEW DOCTRINE DOES NOT APPLY TO OFFICER CALLOWAY’S ACTIONS BECAUSE HE INVADED MR. TRACEY’S REASONABLE EXPECTATION OF PRIVACY IN VIOLATION OF THE FOURTH AMENDMENT.

A. The plain-view doctrine does not apply to Officer Calloway’s actions because he did not have probable cause to believe Mr. Tracey possessed contraband or a weapon.

The plain-view doctrine does not serve as an exception to the warrant requirement, unlike other areas of Fourth Amendment jurisprudence. See, e.g., Arizona v. Hicks, 480 U.S. 321, 324-25 (1987); Texas v. Brown, 460 U.S. 730, 742 (1983) (plurality opinion); Payton v. New York, 445 U.S. 573, 587 (1980); Coolidge, 403 U.S. at 470 (plurality opinion); see also Lafave, supra, § 9.1. Instead, the plain-view doctrine serves to allow police officers to forego obtaining a warrant so long as the officer has probable cause that something he or she observed is contraband.³ See, e.g., Coolidge, 403 U.S. at 470; Elsie Romero, Fourth Amendment -- Requiring Probable Cause for Searches and Seizures Under the Plain View Doctrine, 78 J. Crim. L. & Criminology 763, 785-790 (1988). In the case at hand, Officer Calloway, at best, had reasonable suspicion to believe the strap protruding below Mr. Tracey's jacket was evidence of contraband. See, e.g., Coolidge, 403 U.S. at 470. To allow the plain-view doctrine to allow the seizure of an object with mere reasonable suspicion instead of probable cause or warrant would warp the meaning of the Fourth Amendment and ignore over thirty years of Supreme Court precedent. See, e.g., Hicks, 480 U.S. at 324-25; Coolidge, 403 U.S. at 470, Romero, supra, at 785-790.

Since announcing the doctrine in Coolidge, the Court has never allowed the plain-view doctrine to extend to cases where the police officer only had reasonable suspicion that the object he or she viewed was contraband. See, e.g., Hicks, 480 U.S. at 324-25; Coolidge, 403 U.S. at

³The plurality in Coolidge established the "plain view" doctrine, permitting warrantless seizure by police where three requirements are satisfied. 403 U.S. at 470. First, the police officer must lawfully make an "initial intrusion" or otherwise properly be in a position from which he can view a particular area. Id. at 465-468. Second, the officer must discover incriminating evidence "inadvertently," which is to say, he may not "know in advance the location of [certain] evidence and intend to seize it," relying on the plain-view doctrine only as a pretext. Id. at 470. Finally, it must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure. Id. at 466. As for the first requirement, it is assumed that Officer Calloway was properly in a position from which he could view Mr. Tracey's person. See (R. at 4.) The "inadvertency" requirement has been overruled by Horton v. California, 496 U.S. 128, 138 (1990). The third requirement will be discussed in subsequent portions of this brief. Horton also further modified the plain-view doctrine to require: (1) a prior valid intrusion; (2) observing an object in plain view; and (3) the incriminating character of the object must be immediately apparent. See 496 U.S. at 136-37.

470. In Hicks, the Court made this truth abundantly clear:

We now hold *that probable cause is required*. To say otherwise would be to cut the "plain view" doctrine loose from its theoretical and practical moorings. ... Dispensing with the need for a warrant is worlds apart from permitting a lesser standard of *cause* for the seizure than a warrant would require, i.e., the standard of probable cause. No reason is apparent why an object should routinely be seizable on lesser grounds.

480 U.S. at 328 (emphasis added).

The intrusion made by Officer Calloway is quite distinct from the minimal intrusion or the operational necessities that the Court has found acceptable under the plain-view doctrine or some variation thereof with less than probable cause. See, e.g., Hicks, 480 U.S. at 327 (describing circumstances and rationale where a seizure can be justified on less than probable cause). For example, in Place, the Court allowed the seizure of a suspected drug dealer's luggage at the airport to permit exposure to a specially trained dog because of operational necessity and the minimal intrusion occasioned by the police action. See 462 U.S. 696, 707 (1983). Similarly, in United States v. Brignoni-Ponce, the Court allowed the investigative detention of a vehicle suspected of transporting illegal aliens due to operational necessity. See 422 U.S. 873, 881-882 (1975).

In the case hand, the intrusion made by Officer Calloway was neither minimal nor required by operational necessity. See, e.g., Hicks, 480 U.S. at 327; Place, 462 U.S. at 707; Brignoni-Ponce, 422 U.S. at 881-882. Officer Calloway shoved his hand underneath the exterior of Mr. Tracey's clothing. See, e.g., Hicks, 480 U.S. at 327; Place, 462 U.S. at 707. Furthermore, no operational necessity for this type of invasion is even fathomable. See, e.g., Hicks, 480 U.S. at 327; Brignoni-Ponce, 422 U.S. at 881-882.

Instead, the facts here are more analogous to Hicks, where the Court found an officer's search not in accordance with the plain view doctrine because the officer lacked probable cause

that the item seized was contraband. See 480 U.S. at 327. In Hicks, the Court found that a police officer lacked probable cause to record the serial number from a stereo system and therefore could not justify the search under the plain view doctrine. Id. at 325. Although the officer had a right to be in the place where he first viewed the stereo, he had to take additional steps beyond merely viewing the stereo to bring about probable cause. Id. These steps amounted to a search without probable cause or warrant and therefore is repugnant to the Fourth Amendment. Id. at 327.

Likewise, in the case at hand, Officer Calloway had a right to be in McDonough Square when he first viewed the strap protruding from Mr. Tracey's jacket. See Hicks, 480 U.S. at 327. Nevertheless, Officer Calloway did not have probable cause when he took the additional step of lifting Mr. Tracey's jacket to discover the concealed police-issued firearm. See id. Accordingly, because Officer Calloway lacked probable cause to search Mr. Tracey and seize his weapon, the Court should find for the Respondent and hold Officer Calloway's actions repugnant to the Fourth Amendment. See, e.g., Place, 462 U.S. at 707; Brignoni-Ponce, 422 U.S. at 881-882.

B. The plain-view doctrine does not apply to Officer Calloway's actions because he had to disturb Mr. Tracey's jacket in order to discover the nature of the item he believed to be contraband.

The plain-view doctrine does not apply to Officer Calloway's actions because the incriminating nature of the evidence seized was not immediately apparent. Coolidge, 403 U.S. at 466. Police officers who lawfully find themselves in one place or another need not "shield their eyes." Kyllo v. United States, 533 U.S. 27, 32 (2001) (quoting California v. Ciraolo, 476 U.S. 207, 213 (1986)). In fact, police officers are free, and perhaps even under a duty, to be vigilant for anything that seems suspicious or dangerous. See Horton, 496 U.S. at 138 (1990) (removing the "inadvertence" requirement for application of plain-view doctrine). Nevertheless, the plain-

view doctrine assumes that there is no incremental invasion of privacy, and it does not authorize any expansion of the scope of the otherwise authorized activity that has put an officer in a particular position in the first place. See, e.g., Horton, 496 U.S. at 141; Dickerson, 508 U.S. at 378-79.

The case at hand is far different from the facts in Texas v. Brown, where the officer immediately realized the illicit nature of the item seized and therefore properly conducted the seizure under the plain-view doctrine. See 460 U.S. at 742. In Brown, during a proper traffic stop, the officer observed balloons in the suspect's automobile that he immediately knew to contain drugs. See id. The officer made no further intrusion into the suspect's car or person than he would have to effectuate the lawful traffic stop. See id. Accordingly, the Court upheld the search under the plain-view doctrine. See id.

Conversely, Officer Calloway testified that he was unclear as to the purpose or nature of the strap that protruded from Mr. Tracey's jacket. See Horton, 460 U.S. at 742. Consequently, he only discovered the illicit nature of the strap after invading Mr. Tracey's person by lifting his jacket. See id.

Instead, Officer Calloway's actions are more analogous to those exhibited by the officer in Dickerson. 508 U.S. at 378-79. There, the officer felt something in a suspect's pocket of an uncertain nature. Id. Only after manipulating the object with his fingers could the officer determine that the object was consistent with illegal drugs. Id. Because the illicit nature of the object was not immediately apparent, the Court found that the search exceeded the scope of the Fourth Amendment. Id. Likewise, in the case at hand, Officer Calloway could not determine the nature of the object until he invaded Mr. Tracey's privacy and lifted the jacket. See id. Accordingly, the Court should hold Officer Calloway's search outside the scope of the plain-

view doctrine and repugnant to the Fourth Amendment. See Dickerson, 508 U.S. at 378-79; Romero, supra, at 785-790. To hold otherwise would rob the Fourth Amendment of meaning and expand the plain-view doctrine into unprecedented arenas. See Dickerson, 508 U.S. at 378-79; Romero, supra, at 785-790.

III. THIS COURT SHOULD UPHOLD THE DECISION OF THE COURT BELOW AND FIND THAT MR. TRACEY’S TERMINATION FROM THE RUSHMORE COUNTY POLICE DEPARTMENT FOR HIS PARTICIPATION IN AN EXTRAMARITAL AFFAIR VIOLATED THE FOURTEENTH AMENDMENT.

A. Mr. Tracey’s consensual affair with Ms. Malone is protected by the right to consensual sexual privacy recognized by this Court in Lawrence v. Texas.

In Lawrence v. Texas, the Supreme Court recognized a pre-existing liberty interest in sexual intimacy between consenting adults. See 539 U.S. 558, 567 (2003). In Lawrence, the Court invalidated a morals-based Texas statute that proscribed same-sex sodomy. Id. at 562, 578. That statute “[touched] upon the most private human conduct, sexual behavior, and in the most private of places, the home.” Id. at 567. The sexual relationship between the petitioners in Lawrence is similar to the relationship between Mr. Tracey and Ms. Malone. In both instances, the sexual relationship was but one facet of a larger personal bond. The Craven adultery statute, like the Texas anti-sodomy statute, violates Mr. Tracey’s constitutional interests in liberty and privacy protected by the Due Process Clause. See id. The Court in Lawrence reasoned that “adults may choose to enter upon [sexual relationships] in the confines of their homes and their own private lives and still retain their dignity as free persons.” Id. at 567. Further,

When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows...persons the right to make this choice.

Id. at 567. Specifically, the anti-sodomy statute in Lawrence furthered no legitimate state interest which could “justify intrusion into the personal and private life of the individual.” 539

U.S. at 578. Clearly, the term “sexual privacy” is nowhere to be found in the Constitution. However, the Court examined its long line of substantive due process cases and found that “freedom extends beyond spatial bounds.” Id. at 562. To be clear, “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.” Id. The Court re-affirmed the primary lesson of its long line of substantive due process cases by stating that “[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.” Id. at 578 (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847 (1992)).

Mr. Tracey’s liberty interest in sexual privacy under the Due Process Clause gives him the full right to engage in private sexual conduct with another consenting adult. See Lawrence, 539 U.S. at 578 (“Their right to liberty under the Due Process Clause gives them the full right to engage in their [private sexual] conduct without intervention of the government”). Therefore, his termination from the Rushmore County Police Department for engaging in an extramarital affair was prohibited by the Fourteenth Amendment.

1. Lawrence recognized a protected liberty interest because it relied heavily on substantive due process cases, used language consistent with protected liberty interests, and overruled Bowers v. Hardwick.

i. Lawrence recognized a protected liberty interest because it relied heavily on substantive due process cases involving personal sexual decisions.

In deciding Lawrence, this Court relied heavily on prior substantive due process cases that confirmed the privacy rights of persons to make certain decisions regarding sexual conduct. See Lawrence, 539 U.S. at 564-66; see also Cook v. Gates, 528 F.3d 42, 52 (1st Cir. 2008); Williams v. Attorney General of Alabama, 378 F.3d 1232, 1237 (11th Cir. 2004). Although the Court in Griswold v. Connecticut initially recognized a protected privacy interest in the marital relationship, it later extended that right beyond the marital relationship in Eisenstadt v. Baird.

See Lawrence, 539 U.S. at 564-65; Eisenstadt, 405 U.S. 438, 447 (1972); Griswold, 381 U.S. 479, 485-86 (1965). This Court has found that some decisions “are so fundamental and central to human liberty that they are protected as part of a right to privacy under the Due Process Clause.” Williams, 378 F.3d at 1252 (Barkett, J. dissenting) (discussing a right for American citizens “to be left alone in the privacy of their bedrooms and personal relationships”); see also Roe v. Wade, 410 U.S. 113 (1973) (right to obtain abortion); Eisenstadt, 405 U.S. 438 (1972) (right to contraception); Loving v. Virginia, 388 U.S. 1 (1967) (right to marry); Prince v. Massachusetts, 321 U.S. 158 (1944) (control of family relationships); Skinner v. Oklahoma, 316 U.S. 535 (1942) (decisions relating to procreation); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (child rearing); Meyer v. Nebraska, 262 U.S. 390 (1923) (education).

All of the substantive due process cases relied upon by the Lawrence Court “resulted in the Supreme Court recognizing a due process right to make personal decisions related to sexual conduct.” Cook, 528 F.3d at 52; see also Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (listing protected liberty interests, including the right to marry, right to bear children and direct the education of one’s children, enjoy marital privacy, choose to use contraceptives, choose to have an abortion, to maintain bodily integrity, and to refuse unwanted medical treatment). These decisions are personal in nature, and should be free from unwarranted governmental intrusion. Lawrence, 539 U.S. at 565 (citing Eisenstadt, 405 U.S. at 453). Accordingly, the right of two adults to engage in consensual sexual behavior is a liberty interest protected by the Due Process Clause.

ii. Lawrence recognized a protected liberty interest because it used language consistent with liberty interests protected by the Due Process Clause.

The language used throughout Lawrence “supports the recognition of a protected liberty interest.” Cook, 528 F.3d at 52. The Lawrence Court placed sexual privacy on par with freedom

of thought, belief, and expression. 539 U.S. at 562. Further, the Court stated that “liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” Id. at 572. The Court ultimately concluded that the right to liberty under the Due Process Clause protected private sexual conduct because “[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.” Id. at 578 (quoting Casey, 505 U.S. at 847). Accordingly, the protected liberty interest recognized in Lawrence is one of consensual sexual privacy, and is on par with protected liberty interests which require some form of heightened scrutiny. Id. This liberty interest, recognized by Lawrence, prohibits the Rushmore County Police Department from terminating Mr. Tracey for his participation in a private, consensual, extramarital relationship.

iii. Lawrence recognized a protected liberty interest because it overruled Bowers and adopted Justice Stevens’ dissent in that case as the controlling precedent.

The Lawrence Court found it necessary to overrule Bowers v. Hardwick, concluding that it was not correct when it was decided and not correct at the time of Lawrence. Lawrence, 539 U.S. at 578; see also Bowers, 478 U.S. 186 (1986) (upholding constitutionality of anti-sodomy statute). Furthermore, Lawrence’s holding relied heavily on Justice Stevens’ dissent in Bowers, finding that his opinion “should have been controlling in Bowers and should control here.” Lawrence, 539 U.S. at 578. In Bowers, Justice Stevens concluded, among other things, that individual decisions concerning the intimacies of physical relationships are a form of “liberty” protected by due process. 478 U.S. at 216 (Stevens, J., dissenting). Justice Stevens went on to conclude that the privacy cases dealt with an “individual’s right to make certain unusually important decisions that will affect his own, or his family’s, destiny. The Court has referred to such decisions as implicating “basic values,” as being “*fundamental*,” and as being dignified by history and tradition.” Id. at 216 (emphasis added). Although Bowers and Lawrence both

concerned the constitutionality of statutes proscribing sodomy, the findings in Lawrence and Justice Stevens' dissent in Bowers make it clear that the liberty interest at stake was broader and encompassed not only sodomy, but every individual's right to make decisions relating to sexual privacy. Bowers, 478 U.S. at 218 (Stevens, J. dissenting) ("The essential 'liberty' that animated the development of the law in cases like Griswold, Eisenstadt, and Carey surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral"). Accordingly, Lawrence recognized a protected liberty interest in sexual privacy that protects adult decisions regarding consensual sexual behavior, including sodomy and adultery.

2. The protected liberty interest recognized in Lawrence, though not boundless, protects private conduct between consenting adults, including adultery.

Adultery is a form of consensual sexual privacy protected by the Fourteenth Amendment's Due Process Clause. See generally Lawrence, 539 U.S. at 558-578. The Lawrence Court's conclusion was based on a careful analysis of previous substantive due process cases recognizing a right to be free from regulations on certain decisions related to sexual activity. Id. at 564-66. While not all sexual activity is protected by the Due Process Clause, the contention that all activity involving sex is protected misunderstands the claims at issue in the present case. See e.g., Cook, 528 F.3d at 56 ("Lawrence did not identify a protected liberty interest in all forms and manner of sexual intimacy"); Williams, 378 F.3d at 1236 (noting that "the mere fact that an activity is sexual and private" does not automatically entitle it to protection as a fundamental right). The present case involves a protected liberty interest because the Craven adultery statute attempts to regulate the most private of human sexual behavior: sex between two consenting adults in the privacy of their home. Essentially, Lawrence "recognized only a narrowly defined liberty interest in adult consensual sexual intimacy in the confines of one's home and one's own private life." Cook, 528 F.3d at 56. Although Craven considers

adultery immoral, it is precisely the type of consensual sexual behavior protected by the Fourteenth Amendment. See Lawrence, 539 U.S. at 564-78; Cook, 528 F.3d at 56.

Courts have expressed concern over the end-point of any right to sexual privacy. See Lawrence, 539 U.S. at 590 (Scalia, J., dissenting); Williams, 378 F.3d at 1239-40. For instance, lower courts have struggled to decide whether to invalidate laws criminalizing prostitution, incest, child pornography, and statutory rape. Williams, 378 F.3d at 1255-56 n.12. The liberty interest in sexual privacy recognized in Lawrence concerns consenting adults; it does not encompass activity involving minors, coercion, bestiality, or situations in which consent might not easily be refused. Lawrence, 539 U.S. at 567 (“It suffices for us to acknowledge that *adults* may *choose* to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as *free persons*.”) (emphasis added); Williams, 378 F.3d at 1255-56 n.12. Those situations which fall outside of the boundaries of the liberty interest recognized in Lawrence are properly regulated by the state; for example, laws proscribing prostitution are valid because of the potential for harm and its implicit relationship with other crime. See Williams, 378 F.3d at 1255-56 n.12. Laws proscribing incest are also valid because incest poses a threat to the family and involves relationships where consent might not easily be refused. See id. Likewise, laws proscribing bestiality are legitimate because the sexual conduct at issue does not involve relations between two consenting adults. Id.

The right at issue in this case is not the right to commit adultery, but rather a more general right to consensual sexual privacy. The Lawrence Court noted that Bowers “misapprehended the claim of liberty there presented to it” by analyzing whether there was a “fundamental right to engage in consensual sodomy.” Lawrence, 539 U.S. at 567. This low level of generality “fail[ed] to appreciate the extent of the liberty interest at stake.” Id. at 567.

Lower courts have struggled with fundamental rights analyses in part because of an ongoing debate regarding the level of generality under which rights should be analyzed. Williams, 378 F.3d at 1241-43 (finding that a sexual privacy analysis was over-broad). The right at issue here is not a right to commit adultery, in the same way that the right at issue in Lawrence was not the right to engage in same-sex sodomy. See Lawrence, 539 U.S. at 567-68. Lawrence expressly overruled Bowers because it failed to correctly frame the implicated right. Id. at 567-78. The correct framework to analyze the criminalization of private, sexual activity is to determine whether a particular statute or policy impermissibly burdens an individual's liberty interest in sexual privacy. Id. at 566-67; see also Williams, 378 F.3d at 1256 (Barkett, J. dissenting).

As in Bowers, it would be a mistake to state that the issue here is simply adultery, instead of the broader right to engage in certain intimate conduct implicit in liberty. See Lawrence, 539 U.S. at 562, 567. Through legislative action, the people of Craven have expressed their moral disapproval of adultery. Craven Statute 11-198.01. However, statutes criminalizing private, consensual sexual behavior impermissibly burden every individual's protected liberty interest in sexual privacy. The adultery statute here, like the anti-sodomy statute in Lawrence, seeks to control a personal relationship that is within the liberty of the individual to choose. Lawrence, 539 U.S. at 567.

B. Because private sexual conduct between consenting adults is a protected liberty interest, the Craven adultery statute does not survive the heightened scrutiny required by Lawrence.

1. The Lawrence Court applied a form of heightened scrutiny that balanced the strength of the state's interest with the intrusion into individual liberty.

The Lawrence Court applied heightened scrutiny when it struck down the Texas statute proscribing homosexual sodomy. See 539 U.S. at 567, 572, 575, 578. Although the Court at no point expressly stated what level of scrutiny it was applying, it is apparent from the Court's

language, the Court's resolution, and subsequent cases, that it was applying some form of heightened scrutiny. See generally Lawrence, 539 U.S. 558; Witt v. Dept. of the Air Force, 527 F.3d 806, 814 (9th Cir. 2008). As detailed above, the Lawrence Court relied heavily on Griswold, Eisenstadt, Roe, and Carey, all of which are fundamental rights cases. Witt, 527 F.3d at 814. Further, Lawrence itself constantly refers to sexual privacy in terms strongly suggesting it is applying heightened scrutiny. Lawrence, 539 U.S. at 572 (“[L]iberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex”).

Witt correctly notes that what the Court actually did in Lawrence cannot be reconciled with rational basis review for three reasons. Witt, 527 F.3d at 816. First, Lawrence overruled Bowers, which had employed rational basis review. Id. at 816-17. If Lawrence was applying rational basis review, then Bowers would have been wrong because it lacked a rational basis for the classification, not because it failed to appreciate the liberty interest at stake. Id. at 816-17. Further, had Lawrence been applying rational basis review, considered a “paradigm of judicial restraint,” it would have had no reason to consider the extent of the liberty interest involved. Id. at 817. Rational basis review focuses entirely on the rationality of the state's classification, not the strength of the individual liberty interest. Cook, 528 F.3d at 55. The Lawrence Court analyzed both. Second, Lawrence based its decision on Due Process cases such as Griswold, Roe, and Carey. Id. at 817. These cases all applied some form of heightened scrutiny to an issue concerning some aspect of sexual privacy. Id. Finally, the Lawrence Court's analysis was inconsistent with rational basis review. Id. at 817. Lawrence framed the issue as one involving justifications for an intrusion into the personal and private life of the individual, not one involving a rational connection to a legitimate interest. 539 U.S. at 578. The Lawrence Court

did not apply strict scrutiny, which involves narrow tailoring and compelling state interests. Witt, 527 F.3d at 817-18. Instead, the Lawrence Court applied the same level of scrutiny it applied in Sell v. United States, a 2003 decision involving the forcible administration of antipsychotic drugs to mentally-ill defendants. Witt, 527 F.3d at 818 (citing Sell v. United States, 539 U.S. 166 (2003)). In both Lawrence and Sell, the Court balanced individual liberty interests against “legitimate” and “important” state interests in order to determine if the state could “justify its intrusion” into the private life of the individual. Witt, 527 F.3d at 818 (citing Lawrence, 539 U.S. at 578, and Sell, 539 U.S. at 178).

Therefore, the Lawrence Court “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.” Cook, 528 F.3d at 56. The word “justify” clearly suggests that the Court engaged in this balancing. Id. at 56.

2. Craven Statute 11-198.01, which criminalizes adultery, is unconstitutional because it fails the Lawrence balancing test and therefore impermissibly burdens Mr. Tracey’s liberty interest in consensual sexual privacy.

i. The state’s asserted interest in morality impermissibly burdens Mr. Tracey’s liberty interest in consensual sexual privacy.

The Craven adultery statute, like the anti-sodomy statute in Lawrence, is morals-based legislation. After Lawrence, such considerations are no longer considered grounds for upholding a law that burdens the right to sexual privacy. See 539 U.S. at 560. The Thirteenth Circuit has stated that no legally significant difference can be discerned between the conduct at issue in Lawrence and the conduct in the present case. Tracey v. Rushmore County, Craven, Police Dep’t., No. 06-6436, slip op. 8, 11 (13th Cir. Apr. 29, 2007). As a result, the adultery statute impermissibly burdens Mr. Tracey’s liberty interest in sexual privacy.

ii. All adult individuals in the United States, including Mr. Tracey, have a protected liberty interest in regulating their private, consensual sexual affairs; those cases where courts have elected to apply rational basis review are situations that the Court excluded from the Lawrence holding.

Some lower courts have claimed that Lawrence applied rational basis review and have therefore chosen to give deference to the asserted state interest in regulating sexual behavior. Sylvester v. Fogley, 465 F.3d 851, 858 (8th Cir. 2006); Muth v. Frank, 412 F.3d 808, 817 (7th Cir. 2005); State v. Limon, 122 P.3d 22, 29 (Kan. 2005). However, many sexual privacy cases where courts have applied rational basis review involve situations that Lawrence specifically excluded from its holding. See Lawrence, 539 U.S. at 560; Sylvester, 465 F.3d at 858; Muth, 412 F.3d at 817; Limon, 122 P.3d at 29. Justice Kennedy wrote in Lawrence, “This case does not involve minors, persons who might be injured or coerced, those who might not easily refuse consent, public conduct, or prostitution. It does involve two adults who, with full and mutual consent, engaged in sexual practices...” 539 U.S. at 560. Laws proscribing statutory rape, sodomy with minors, sex with vulnerable individuals, such as victims of incest or crime victims, all fall outside of the conduct protected by Lawrence; namely, private, consensual sexual intimacy between two adults. Id.; see also Muth, 412 F.3d at 817 (holding that plaintiff who had committed incest could not claim that Lawrence announced a new fundamental right to engage in all manner of sexual conduct); Limon, 122 P.3d at 29 (holding that statute criminalizing sexual contact between an adult and a minor was constitutional); Williams, 378 F.3d at 1250 (holding that there is no due process right to distribute or use sexual devices). These cases did not implicate the protected liberty interest in sexual privacy between consenting adults that was recognized in Lawrence. As such, the courts’ application of rational basis review was appropriate. See Lawrence, 539 U.S. at 560. Mr. Tracey’s private, intimate, consensual relationship with Ms. Malone constituted none of the aforementioned offenses. As a result, his

termination from the Rushmore County Police Department was prohibited under his Fourteenth Amendment liberty interest in sexual privacy.

The present case is also distinguishable from Lofton v. Secretary of the Department of Children and Family Services, 358 F.3d 804, 817 (11th Cir. 2004). There, the statute at issue, which prohibited adoption of children by homosexuals, did not criminalize any behavior. Id. Moreover, adoption, unlike private sexual conduct, involves the state recognition of a relationship. Id. at 809, 811 (“Under Florida law, ‘adoption is not a right; it is a statutory privilege’”) (citing Fla. Dep’t of Health & Rehab. Servs. v. Cox, 627 So.2d 1210, 1216 (Fla. Dist. Ct. App. 1993), aff’d in relevant part, 656 So.2d 902, 903 (Fla. 1995)). Adoption is unlike criminal law, where the paramount substantive concern is unwarranted intrusion into an individual’s liberty interest. See id. at 809-810. Rather, in the context of adoption, the state’s interest in the welfare of the child is so overriding that “the state can make classifications for adoption purposes that would be constitutionally suspect in many other arenas.” Id. As such, the holding in Lofton should be confined to state civil adoption statutes. Id. It does not cover the present case where Mr. Tracey’s private relationship with Ms. Malone was criminalized by an unconstitutional statute. See generally Lawrence, 539 U.S. at 567; Lofton, 358 F.3d at 809-811.

C. The police department’s actions in terminating Mr. Tracey impermissibly burdened his liberty interest in sexual privacy because the state interest in regulating the conduct of its police officers is insufficient to justify interference in Mr. Tracey’s protected conduct and because there was no nexus between his private relationship with Ms. Malone and poor job performance.

1. The state’s interest in regulating the conduct of police officials is greater than that of its interest in regulating the general public, but does not rise to the level of the military in regulating its members.

While the state does have some interest in regulating the conduct of its police officers as they go about their duties, this interest does not rise to the level commanded by the military.

Cook, 528 F.3d at 60; Witt, 527 F.3d at 821. Cook and Witt are both federal appellate cases that examined the constitutionality of the federal Don't Ask, Don't Tell (DADT) statute as applied to service members accused of homosexuality. Cook, 528 F.3d at 45; Witt, 527 F.3d at 809. Courts have applied heightened scrutiny to such challenges because they concern the liberty interest in sexual privacy recognized in Lawrence. Lawrence, 539 U.S. at 567; Cook, 528 F.3d at 52; Witt, 527 F.3d at 819. The First Circuit was “persuaded that Lawrence did indeed recognize a protected liberty interest for adults to engage in private, consensual sexual intimacy and applied a balancing of constitutional interests that defies either the strict scrutiny label or rational basis label.” Cook, 538 F.3d at 52.

Cook outlined the unique context and high deference given to military affairs. It found that DADT satisfied the requirements of heightened scrutiny because “the Act was necessary to preserve the military’s effectiveness as a fighting force.” Id. at 60. Relying on General Colin Powell’s testimony to Congress, the court concluded that it would be extremely difficult to incorporate a group of individuals who prefer a homosexual lifestyle and ask them all to share “the most private facilities together, the bedroom, the barracks, latrines, and showers.” Id. at 46 (citing S.Rep. No. 103-112 at 283 (1993)). The court further explained that since any member of the armed forces might be deployed to a combat area at a moment’s notice, it is critical to maintain the moral and unit cohesion that the military deems necessary. See id. The court granted judicial deference to Congress’s findings because of their important governmental interest in maintaining effective armed forces. The weighty matters at issue “unquestionably surpass[e]d the government interest that was at stake in Lawrence.” Id. at 60.

The Ninth Circuit held in Witt that when the government attempts to intrude on the lives of homosexuals in a manner that implicates the rights identified in Lawrence, 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. 527 F.3d at 819. This test was distilled from Sell, a case where the Supreme Court described a “significant” liberty interest in an individual being free from the forcible administration of medication. 539 U.S. at 179; Witt, 527 F.3d at 818-19. While the holding in Sell is specific to the context of forcibly administering anti-psychotic drugs to a defendant in order to render him competent for trial, the scrutiny applied by the Court is instructive. 539 U.S. at 179; Witt, 527 F.3d at 818-19. The Court applied a balancing test consistent with the application of heightened scrutiny, indicating that when a liberty interest is involved, rational basis inquiry is not appropriate. Witt, 527 F.3d at 818. This was the same type of balancing conducted by the Lawrence Court when it recognized a liberty interest in consensual sexual privacy. See 539 U.S. at 574-79.

However, the Witt court held that it was clear that the government advanced an important interest; namely, that “DADT concerns the management of the military, and ‘judicial deference to...congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules for their governance is challenged.’” Witt, 527 F.3d at 821 (citing Rostker v. Goldberg, 453 U.S. 57, 70 (1981)). The court remanded the case for analysis under a heightened standard. Id. In its analysis, the court specifically noted that DADT cases should be analyzed on their individual merits in order to “give meaning to the Supreme Court’s conclusion that ‘liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.’” Id. at 819 (quoting Lawrence, 539 U.S. at 572).

Unlike the military, police officers do not have to share as many facilities or abdicate as many of their personal freedoms when they join the force. See Cook, 528 F.3d at 46. Police

officers also do not run the risk of being deployed at any moment to a combat area. See id. at 60. DADT cases involve the administration of an Act of Congress which was passed after much fact-finding and debate. Cook, 528 F.3d at 59. As a result, the courts offer great deference to the judgment of Congress in passing statutes that regulate the military. Cook, 528 F.3d at 60; Witt, 527 at 821. Furthermore, the military regulates itself and has its own courts and justice system. Police officers, on the other hand, are subject to the same criminal and civil courts as other civilians in society. As a result of these differences, the state governmental interest in regulating the private sexual behavior is far less than that of the military interest described in DADT cases; therefore, Mr. Tracey's termination for engaging in a private consensual relationship with Ms. Malone, during his off-duty personal time, was prohibited by the Fourteenth Amendment. See e.g., Witt, 527 at 821, Briggs v. North Muskegon Police Department, 563 F. Supp. 585, 587 (W.D. Mich. 1983); Swope v. Bratton, 541 F. Supp. 99, 108 (W.D. Ark. 1982); Shuman v. City of Philadelphia, 470 F. Supp. 449, 459 (E.D. Pa.1979).

2. In the absence of a nexus between poor work performance and the sexual conduct at issue, the state cannot impermissibly burden the protected liberty interest in consensual sexual privacy.

“When the state acts as an employer, it may not without substantial justification condition employment on the relinquishment of constitutional rights.” Briggs, 563 F. Supp.at 587 (citing Pickering v. Board of Education, 391 U.S. 563 (1968)). Briggs involved the cohabitation of a married police officer with a married woman who was not his wife. 563 F. Supp. at 586. The Briggs court rejected the notion that “an infringement of an important constitutionally protected right is justified simply because of general community disapproval of the protected conduct. The very purpose of constitutional protection of individual liberties is to prevent against such majoritarian coercion.” Id. at 590-91. The court concluded that

the evidence relating to plaintiff's job-performance and the argument that he violated the cohabitation and the adultery statutes are pretextual. The Court is of the opinion that the "real" reason for the discharge of plaintiff is that his conduct did not conform with what the defendants perceived to have been the morals of the community. He was discharged because of what defendants anticipated the reaction of the community would be. Even if this is a relevant consideration, there is no evidence as to what, in fact, that reaction was. Constitutional rights should not depend upon popularity polls or the whims of public opinion.

Id. at 592. The off-duty sexual conduct of public employees is protected by the constitutional right to privacy. E.g., Briggs, 563 F. Supp. 592; Shuman, 470 F. Supp. at 459. The situation in Briggs is analogous to the present case. See 563 F. Supp. at 592. Even if adultery is frowned upon by the general community, it is not grounds for Mr. Tracey's termination, any more than the court in Briggs found it to be legitimate cause for the termination of the plaintiff in that case. See id.

Swope involved another situation that bears a striking resemblance to the facts of the present case: a police officer separated from his wife and in the process of filing for divorce developed a close relationship with a police dispatcher. 541 F. Supp.at104-07. The Swope court found that the record in that case supported the inference that much of the disciplinary action directed at the plaintiff was due to the Chief of Police's personal animosity towards that individual and his desire to terminate his services with the police department. Id. at 106. Similarly, in the present case, Mr. Tracey was terminated after Patrick Malone, the Chief of the Rushmore County Police Department, discovered that Mr. Tracey was involved in a relationship with his estranged daughter, Jacqueline Malone. The record supports an inference that Mr. Tracey's termination for violating the Craven adultery statute was, in actuality, a pretext for terminating him for his relationship with Ms. Malone in particular.

The plaintiff in Swope was disciplined twice and then harassed until he finally resigned his position. Id. at 106-07. The Swope court held that "police officers are possessed of and

entitled to enjoy the same Constitutional rights and privileges that all other persons in the United States possess and enjoy.” Id. at 108 (quoting Smith v. Price, 446 F. Supp. 828 (M.D.Ga. 1977)). The opinion also cites Griswold in support of its contention that the Constitution affords a right to privacy and states that “the interest the plaintiff asserts involving his relationship...is one that is within the ‘zone of privacy.’” Id.

Since the privacy rights of police officers must be balanced with the legitimate interests of police departments in maintaining effective discipline and achieving effective law enforcement, this zone of privacy is smaller for police officers than it is for private citizens. E.g., Swope, 541 F. Supp. at 108; Shuman, 470 F. Supp. at 459 (E.D.Pa.1979). Nonetheless,

[a]n officer has the right to a private life free from intrusion unless it interferes with his work performance or the efficiency of the governmental service...The Court would agree that the police department has an interest and may investigate some areas of the personal sexual activities of its employees if the activities have an impact on job performance. In the absence of a nexus between the personal, off-duty activities and poor job performance, inquiry into these activities violates the Constitutionally protected right of privacy; a party’s private sexual activities are within the ‘zone of privacy’ and protected from unwarranted government intrusion.

Swope, 541 F. Supp. at 108. The nexus test described by the Swope court is the appropriate inquiry when determining if an officer’s off-duty sexual behavior should be subject to examination by the state. Id. The use of a nexus test enables the balancing inquiry required by Lawrence and Sell when determining whether or not it is permissible to burden a liberty interest recognized by the Court. See Lawrence, 539 U.S. at 578; Sell, 539 U.S. at 178. The nexus test allows a sensitive, case-by-case analysis that can maximize the protection of the liberty interest in sexual privacy that has been recognized by this court while still taking account of any critical state interest in regulation. See Lawrence, 539 U.S. at 578; Sell, 539 U.S. at 178.

There must be a nexus between poor work performance and the sexual conduct at issue. Swope, 541 F. Supp. at 108. Mr. Tracey’s private relationship with Ms. Malone did not affect

his job performance, and in fact, was unsuspected by anyone in the police force prior to Officer Calloway calling Ms. Malone. The facts on the record support the inference that Mr. Tracey's termination by Patrick Malone was motivated by the existence of a private intimate relationship between Mr. Tracey and Ms. Malone. As no nexus can be shown between poor work performance by Mr. Tracey and his termination from his position as a police officer, the termination was prohibited by his liberty interest in private, consensual sexual conduct recognized in Lawrence. See 539 U.S. at 567; see also Briggs, 563 F. Supp. at 590-92; Shuman, 470 F. Supp. at 459.

Those situations in which the government's interest in regulating the private activities of a police officer rises to the requisite level of importance occur when the private activities of the officer affect his or her work duties. See e.g., Lucio v. City of Los Angeles, 169 Cal.App.4th 793 (Cal. App. 2008) (holding that termination of a police officer was justified where the officer responded to an attempted suicide call and used the opportunity to begin a sexual relationship with said woman); Seegmiller v. LaVerkin City, 528 F.3d 762 (10th Cir. 2008) (holding that a police officer did not have a fundamental liberty interest in engaging in a private act of consensual sex when she was reprimanded for engaging in an off-duty sexual encounter with a fellow officer during an out-of-town training conference); Sylvester, 465 F.3d at 851 (holding that: 1) a police force had a compelling interest in precluding a criminal investigator from having sexual relations with witnesses or victims; and 2) the investigation into the investigator's activities was narrowly tailored to serve that interest because it focused on whether the officer had sexual relations with a crime victim while in the process of conducting a criminal investigation involving that victim); Mercure v. Van Buren Tp., 81 F. Supp. 2d 814 (E.D. Mich. 2000) (holding that privacy right of a police officer was not violated when he was discharged for

engaging in an adulterous relationship with the wife of a fellow officer because his discharge for such conduct was not so irrational as to be deemed arbitrary); Shawgo v. Spradlin, 701 F.2d 470 (C.A. Tex. 1983) (holding that a police department had an important interest in maintaining unit cohesion and thus in preventing the cohabitation of members of the same police force and sharing an apartment and expenses with a subordinate officer).

All of the aforementioned cases satisfy the nexus test and therefore any discipline meted out to the officers was not prohibited by the Fourteenth Amendment. See e.g., Sylvester, 465 F.3d at 854 (where police officer's sexual encounter with victim and witness completely compromised a \$300,000 embezzlement investigation, resulting in all charges being dismissed). Conversely, Mr. Tracey's relationship with Ms. Malone did not in any way affect his job performance. At the time of his termination, Mr. Tracey was involved in an undercover operation targeting illegal sales of firearms in Rushmore County. None of his encounters with Ms. Malone occurred while Mr. Tracey was on duty, nor was he in the course of performing any of his duties as an undercover officer. Mr. Tracey's termination for his participation in consensual, private sexual conduct with an individual unaffiliated with his functions as a police officer is prohibited by the Due Process Clause of the Fourteenth Amendment. See e.g., Briggs, 563 F. Supp. at 590-92; Swope, 541 F. Supp. at 108; Shuman, 470 F. Supp. at 459.

D. Even if the Court in Lawrence applied rational basis review, private sexual conduct between consenting adults cannot be prohibited on moral grounds.

1. A private citizen's liberty interest trumps any prohibition based on moral considerations because moral considerations are not a legitimate state purpose.

Even if one accepts the Williams court's assertion that Lawrence applied rational basis review, Craven Statute 11-198.01 is unconstitutional because moral considerations are not a legitimate state reason to burden a protected liberty interest. See Lawrence, 539 U.S. at 566-67.

Lawrence made it clear that morality alone is not a legitimate state interest that can be used to justify proscription of private sexual behavior between consenting adults. Id. at 577-78. This case fails rational basis review because Craven Statute 11-198.01, like the statute held unconstitutional in Lawrence, is based on moral considerations alone and furthers no legitimate state interest. Id. Since this Court has already held that morality alone is an insufficient basis for the exercise of the state's police power, Mr. Tracey's termination for violating a statute based entirely on illegitimate moral considerations is prohibited by the Fourteenth Amendment. See id.

2. Moral grounds do not satisfy rational basis review because they do not bear a rational relationship to a legitimate state purpose.

Under the rational basis test, a law will be upheld if the court finds that it is rationally related to a legitimate government purpose. See e.g., Romer v. Evans, 517 U.S. 620, 631 (1996), 631; Heller v. Doe, 509 U.S. 312, 319-20 (1993). The Court has stated that if a law neither burdens a fundamental right nor targets a suspect class, that it will uphold the legislative classification so long as it bears a rational relation to some legitimate end. See e.g., Romer, 517 U.S. at 631.

While the rational basis test is deferential to the government, there have been occasions where laws have been declared unconstitutional for failing to meet this level of review. See e.g., City of Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 432 (1985) (holding that city ordinance requiring special permit for operation of a group home for the mentally disabled was unconstitutional because indulging private biases against the disabled was not a legitimate government purpose); Zobel v. Williams, 457 U.S. 55 (1982) (holding that there was no legitimate state interest in rewarding people solely based on their length of residence in a state); United States v. Moreno, 413 U.S. 528 (1973) (holding that discrimination against "hippies" could not constitute a legitimate governmental purpose).

Romer concerned an Equal Protection challenge to an amendment to the Colorado State Constitution that prohibited any state legislation protecting homosexuals. 517 U.S. at 623-24. The Court stated that the amendment utterly failed rational basis inquiry and seemed “inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.” Id. at 632. This is another example of this Court holding that moral justifications do not satisfy the requirement of a legitimate state interest for the purposes of the rational basis test. Id. As a result, it follows that Mr. Tracey’s termination based on his participation in an extramarital affair was prohibited by the Fourteenth Amendment because it was based on illegitimate moral concerns that do not satisfy the rational basis requirement. Id.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court sustain the judgment of the U.S. Court of Appeals for the 13th Circuit.

Respectfully Submitted
This 2nd day of February, 2009,
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APPENDIX A

U.S. Const. amend. IV.

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

APPENDIX B

U.S. Const. amend. XIV, § 1

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

APPENDIX C

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

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