
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 ON THE MERITS
FOR RESPONDENT**

TEAM LETTER: M

Counsel for Respondent
February 2, 2009

QUESTIONS PRESENTED

1. When a *Terry* frisk fails to reveal any weapons and the suspect has complied with the officer's requests and not engaged in threatening behavior, does an officer violate the Fourth Amendment by searching underneath the suspect's exterior clothes when he sees an unidentified object beneath them?
2. Does a police department violate an officer's substantive due process right to engage in private sexual activity when it fires the officer for having an extramarital affair while the officer is separated from his wife?

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OPINIONS BELOW

The judgment of the United States District Court for the District of Craven granting Petitioner's motion for summary judgment is unreported but reproduced in the Record. (R. at 2-7.) The opinion of the United States Court of Appeals of the Thirteenth Circuit reversing the decision of the district court is reproduced in the record as well. (R. at 8-12.)

CONSTITUTIONAL & STATUTORY PROVISIONS

The Fourth Amendment of the United States Constitution provides, in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" U.S. Const. amend. IV.

Section 1 of the Fourteenth Amendment of the United States Constitution provides, in relevant part: "No state shall . . . deprive any person of life, liberty, or property, without due process of law" U.S. Const. amend. XIV, § 1.

Title 42, § 1983 of the United States Code provides, in relevant part: "Every person who, under color of any statute . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . 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" 42 U.S.C. § 1983 (2006).

STATEMENT OF THE CASE

Factual Background¹

Approximately three and a half years ago, Maxwell Calloway, an officer with the Rushmore County Police Department, arrested the respondent, William Tracey. (R. at 2-3.) Unbeknownst to Calloway, Tracey was also a police officer with the same department. (R. at 2-

¹ The parties stipulated to the factual background during the summary judgment proceedings. (R. at 2.)

3.) The arrest stemmed from both officers' investigation of an illegal firearms distribution network, know as Red Tide (R-T). (R. at 2.) Calloway had been part of the investigation for eight months; Tracey, a seven-year veteran, was on the job as an undercover officer. (R. at 2.)

The actual arrest occurred on June 7, 2005, when Calloway observed Tracey sitting on a park bench in McDonough Square. (R. at 2.) At the time, Calloway was pursuing a lead that an R-T official was meeting prospective buyers in the square. (R. at 2.) Despite Tracey's not matching the description of the R-T official, Calloway decided to investigate him nonetheless. (R. at 2.) Initially, his suspicions were aroused by Tracey's closely cropped hair and nylon bomber jacket, which he thought were inappropriate for temperatures in the low seventies. (R. at 2.) He then became concerned about Tracey's apparent agitation and his surveying the land and building rooftops. (R. at 2.) Thus, Calloway approached Tracey. (R. at 3.)

After Calloway identified himself, Tracey stated his name. (R. at 3.) Shortly thereafter, Tracey stood to turn away, but since this brief exchange had not relieved Calloway's suspicions, he pursued the matter even further by grabbing Tracey's wrist. (R. at 3.) Calloway then frisked Tracey's exterior clothing to determine whether he was armed, a procedure with which Tracey complied, albeit while cursing. (R. at 3.) But the frisk turned up no weapon. (R. at 3.)

Because the frisk had "concluded," Tracey again turned to leave. (R. at 3.) Calloway then noticed a vertical leather strap beneath Tracey's jacket. (R. at 3.) Although Calloway was "unsure of the strap's purpose" and did not "get a close look at it," he thought it was "consistent with those used to carry a concealed firearm." (R. at 3.) When he asked Tracey to turn around again, Tracey complied, but as Calloway tried to open the jacket, Tracey brushed his hand aside. (R. at 3.) When Calloway tried more forcefully a second time, a police-issued pistol was revealed. (R. at 3.)

While Calloway arrested Tracey for firearms possession, Tracey explained that he was an undercover officer and that Calloway was placing the investigation in jeopardy as well as exposing Tracey to great physical danger by revealing his identity. (R. at 3.) Suspicious of the story, Calloway hauled Tracey to the precinct, where several items were seized. (R. at 3.) One item was Tracey's cell phone, which contained contact information for the police chief's daughter, Jacqueline Moore. (R. at 3.) Concerned that Moore was being targeted because of her relationship to the police chief, Calloway contacted her. (R. at 4.) Moore then disclosed that she was having an affair with Tracey, a married man, whom she identified as being undercover. (R. at 4.) Tracey was then released. (R. at 4.)

Unfortunately for Tracey, Moore and her father were not on good terms after a very public falling out. (R. at 3-4.) The next day, the police department fired Tracey for "behavior unbecoming of an officer." (R. at 4.) The police chief admitted, however, that the termination was solely because of the extramarital affair in violation of the state's adultery statute, under which there has been no prosecution in over twenty years. (R. at 4.) Notably, Tracey was never on duty when he met with Moore, and he never met with her while performing any undercover work. (R. at 4.) Moreover, Tracey has been separated from his wife for two years, and she has recently filed for divorce. (R. at 4.) Nonetheless, the department fired Tracey anyway. (R. at 4.)

Procedural History

Tracey then brought this § 1983 suit against his former employer, the Rushmore County Police Department, for violations of the Fourth and Fourteenth Amendments. (R. at 2.) He alleges that Calloway violated the Fourth Amendment by illegally searching underneath his jacket. (R. at 2.) And he alleges that the department violated the Fourteenth Amendment's substantive due process provisions when it terminated him for having an affair. (R. at 2.)

At the summary judgment stage, the United States District Court for the District of Craven held that Calloway's search was reasonable under *Terry v. Ohio*, 392 U.S. 1 (1968). (R. at 4-6.) Regarding the due process claim, the court held that there was no fundamental right to private sexual activity. (R. at 6.) Thus, using a rational basis test, the court held that Craven had a legitimate interest in regulating officer conduct. (R. at 7.) Accordingly, the district court granted the defendant's summary judgment motion. (R. at 7.)

On appeal, the Thirteenth Circuit wholly disagreed with the district court's holdings. (R. at 8-12.) On the Fourth Amendment issue, the court held that having failed to locate a weapon during the patdown search, Calloway was not permitted to extend the search beyond the exterior of Tracey's clothing. (R. at 9.) Any additional search, the court held, needed to be supported by probable cause under the plain view doctrine. (R. at 9.) Turning to the due process claim, the court held that *Lawrence v. Texas*, 539 U.S. 558 (2003), recognizes the right to engage in private sexual conduct. (R. at 10.) Employing heightened scrutiny that balances the state's interest against the individual's, the court concluded that regulating sexual conduct on moral grounds is impermissible and that the effectiveness of the Craven Police Department was not hindered in any way by Tracey's conduct. (R. at 11-12). In the face of an adverse ruling, the Craven Police Department petitioned for certiorari, which this Court granted. (R. at 13.)

SUMMARY OF THE ARGUMENT

During the investigative stop of Tracey, Officer Calloway unreasonably searched beneath Tracey's exterior clothes. His search implicates two well-recognized Fourth Amendment doctrines: the *Terry* and plain view doctrines. These two doctrines are at the heart of this case, but neither justifies Calloway's decision to search underneath Tracey's jacket. This unreasonable search then led to an arrest, which ultimately revealed that Tracey was having an

extramarital affair with the police chief's daughter. When the department fired Tracey for this affair, it violated his fundamental liberty interest in engaging in private sexual activity.

Under the *Terry* doctrine, Calloway violated this Court's mandate that an officer cannot, on the basis of reasonable suspicion alone, search underneath a suspect's exterior clothes unless an initial patdown frisk reveals the presence of a weapon-like object. Calloway found no such object but conducted a more intrusive search anyway. More importantly, neither of the traditional exceptions to the patdown requirement—a suspect who prevents a full patdown from occurring or who engages in threatening behavior—are present. Tracey allowed Calloway to fully frisk his person, and he made no dangerous or evasive movements that were threatening to Calloway. Thus, a more intrusive search was unreasonable.

This search was also unreasonable under the plain view doctrine because Calloway lacked probable cause to believe the object he saw, a vertical leather strap, was contraband. Its nature was not "immediately apparent," as this Court requires, because Calloway admitted that he was unsure of the strap's purpose. Lacking probable cause, the proper means of reasonably dispelling Calloway's suspicion while respecting Tracey's privacy rights would have been to conduct a second patdown. This additional frisk could easily have confirmed whatever suspicions Calloway had about the strap.

In addition to violating Tracey's Fourth Amendment rights, Petitioner also violated Tracey's substantive due process rights. In *Lawrence v. Texas*, this Court recognized a protected liberty interest in engaging in private, consensual sexual activity. It did so by (1) grouping this interest with other fundamental rights that the Court has recognized in its abortion and contraception cases and (2) expressly adopting a dissenting opinion from *Bowers v. Hardwick*, in which Justice Stevens recognized a right to private sexual activity. Similarly, when applying the

framework used in *Lawrence* to this case, one sees that the right to private sexual activity extends to extramarital activity. Specifically, *Lawrence* focused on the recent decriminalization of sodomy and its roots in moral legislation. Here too, there has been a widespread decriminalization of adultery laws—laws that are primarily based on morality. These laws against adultery, which formed the sole basis for Tracey’s termination, do not withstand heightened scrutiny when balanced against Tracey’s protected liberty interest. Notably, Craven’s adultery law has not been enforced in over twenty years, so whether the state has an interest is questionable to begin with. Moreover, less restrictive means can accomplish any asserted state objectives, namely protecting innocent spouses and promoting healthy marriages.

ARGUMENT

I. Calloway’s search was unreasonable and violated Tracey’s Fourth Amendment rights because neither Calloway’s reasonable suspicion nor the plain view doctrine justify moving Tracey’s jacket to search for an unidentified object.

The essential purpose of the Fourth Amendment is “to impose a standard of ‘reasonableness’ upon the exercise of discretion by government officials . . . in order to safeguard the privacy and security of individuals against arbitrary invasions.” *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (citations omitted). Thus, the constitutionality of a specific law enforcement practice is determined “by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.” *Id.* at 654.

Under this standard of reasonableness, some practices (such as brief investigatory stops) merely require that an officer believe criminal activity is afoot before detaining someone. *Terry v. Ohio*, 392 U.S. 1, 30 (1968). In these situations, officers who have reasonable suspicion that a suspect is armed and dangerous may frisk the suspect for weapons. *Id.* Other circumstances, such as when an officer has probable cause to believe an object in plain view is contraband,

allow the officer to seize that object without a warrant while staying within the bounds of reasonableness. *Horton v. California*, 496 U.S. 128, 136 (1990).

These two concepts—the *Terry* and plain view doctrines—are at the heart of this case, but neither justifies Calloway’s decision to search the interior of Tracey’s jacket. Ultimately, Calloway’s intrusions turn on the fundamental notion of reasonableness. When a frisk for weapons indicates that there are none, it is unreasonable to engage in a more intrusive search, even though additional facts may heighten an officer’s suspicions. Similarly, when an officer sees a single, unidentifiable object in plain view, the officer has no probable cause to believe it is contraband; thus moving or seizing that object is unreasonable. Therefore, applying both doctrines at issue, Calloway’s search of Tracey was unreasonable under the Fourth Amendment.

A. Calloway’s initial reasonable suspicion and patdown frisk did not justify a more intrusive search than a frisk.

In the landmark case of *Terry v. Ohio*, this Court laid the foundation for investigative stops such as the one involving Calloway and Tracey. Under *Terry*, investigatory detentions are lawful if based on reasonable suspicion. *See* 392 U.S. at 20-21. Thus, when police officers reasonably suspect that a person is engaged in criminal activity, they may stop and question that person for a limited period of time. *Id.* at 22-24.²

During an investigative detention, *Terry* allows a police officer to conduct a limited patdown frisk of the individual’s “outer clothing.” *Id.* at 27, 30. The purpose of this intrusion is to protect the officer and others in the area; thus, as a prerequisite to frisking, the officer must have a reasonable belief that the detainee poses a threat to the officer’s safety or the safety of

² Because the issue on certiorari implies that reasonable suspicion did initially exist and because there was no dispute in the courts below regarding its existence, Tracey does not contend that Calloway lacked reasonable suspicion for the initial stop.

others. *Id.* at 28. Notably, this frisk is limited to a search for weapons and must not be used to search for evidence of criminal activity. *See Adams v. Williams*, 407 U.S. 143, 146 (1972) (“The purpose of this limited search is . . . to allow the officer to pursue his investigation without fear of violence.”).

Calloway violated these requirements in two ways. First, his initial frisk did not indicate the existence of any weapons, and thus his subsequent search beneath Tracey’s outerwear went beyond the bounds of a permissible investigatory stop. Second, Tracey did not engage in any conduct that would justify bypassing *Terry*’s requirement of an initial frisk for weapons.

1. Under this Court’s precedent, Calloway’s search underneath Tracey’s jacket was unreasonable because the initial frisk failed to indicate possession of a weapon.

Although preserving officer safety has been an important factor in this Court’s Fourth Amendment jurisprudence, the Court has been careful to safeguard individual privacy by limiting the means by which officers can search detainees. *Terry*, on the one hand, rests on the simple proposition that an officer may conduct a patdown search when the officer has reason to believe that the detainee is “armed and presently dangerous.” 392 U.S. at 29-30. *Terry*’s companion case, *Sibron v. New York*, reinforces this basic premise while balancing the individual’s rights by requiring the officer to patdown the detainee before engaging in a more intrusive search. *See* 392 U.S. 40, 65 (1968).

In that companion case, a police officer saw Sibron talking with a known narcotics dealer but had no other information about him. *Id.* at 62. Upon approaching Sibron, instead of frisking him for weapons, the officer “thrust his hand into Sibron’s pocket” and confiscated the contraband. *Id.* at 65. Noting that the search in *Terry* was preceded by “a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of

assault,” the Court faulted the officer for failing to make “an initial limited exploration for arms.”

Id. Indeed, *Terry* itself recognized the importance of confirming the potential presence of a weapon before engaging in a more intrusive search:

The scope of the search in this case presents no serious problem [The officer] patted down the outer clothing of petitioner and his companions. *He did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons*, and then he merely reached for and removed the guns. He never did invade [their persons] beyond the outer surfaces of [their] clothes, *since he discovered nothing in his pat down which might have been a weapon.*”

Terry, 392 U.S. at 29-30 (emphasis added).

Following the lead of *Terry* and *Sibron*, courts consistently invalidate searches when the initial patdown fails to reveal any weapons. *See, e.g., United States v. Sanders*, 424 F.3d 768, 776 (8th Cir. 2005) (searching pockets exceeded scope of *Terry* because no reason to believe suspect was armed after patdown); *People v. Cobbin*, 692 P.2d 1069, 1072-73 (Colo. 1984) (same); *cf. State v. Smith*, 693 A.2d 749, 753 (Md. 1997) (“The fact that [the officer] detected nothing in patting down . . . is crucial to the decision in this case.”). In *Purnell v. State*, the Delaware Supreme Court reached this result in a case involving two distinct searches. 832 A.2d 714, 721-22 (Del. 2003). The first search, a legitimate patdown, was for weapons; the second search, however, was unreasonable because it occurred after the officers knew the suspect was unarmed, and the officers lacked probable cause to search further. *Id.* at 717, 721-23.

In the present situation, as in *Sibron*, Calloway failed to confirm that Tracey possessed a hard, weapon-like object prior to reaching beneath Tracey’s jacket. Although Calloway did actually frisk Tracey, this frisk revealed nothing. In fact, the record is devoid of any patdown-related evidence that would even hint that Calloway still believed that Tracey possessed a weapon. As a logical extension of *Terry* and *Sibron*, *Purnell* indicates that Calloway’s more intrusive search is unreasonable and unconstitutional.

2. Craven does not meet any of the exceptions to the patdown requirement because Tracey allowed Calloway to conduct a full initial patdown and he did not engage in any threatening evasive behavior.

While *Terry* and its progeny seem to be dispositive on this issue, several courts have recognized that there are important exceptions to the initial patdown requirement. *See generally* Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.6, at 655-59 (4th ed. 2004) (citing cases). Indeed, in staying true to *Terry*'s concern for officer safety, the Court should recognize exceptions when it would be "foolhardy for the officer to do anything short of an immediate search." *Id.* at 657; *cf. United States v. Sharpe*, 470 U.S. 675, 686-87 (1985) (noting courts should consider whether police acted "in a swiftly developing situation").

One exception, recognized by this Court in *Adams v. Williams*, looks at whether the suspect created a situation that prevented the officer from conducting a full patdown, such as disobeying an order to alight from a car. *See* 407 U.S. 143, 145-48 (1972). Another exception recognized in many jurisdictions allows the officer to forgo a patdown if the suspect engages in threatening evasive behavior. LaFave, *supra*, at 657-58. Neither of these exceptions, however, justify Calloway's departure from *Terry*'s mandate.³

a. Tracey complied with Calloway's request for an initial patdown and did not engage in any actions that prevented Calloway from conducting a full patdown.

The basis for this first exception lies in this Court's decision in *Adams v. Williams*. In that case, a person informed a police officer that an individual in a nearby car possessed narcotics and had a gun on his waist. *Adams*, 407 U.S. at 144-45. Upon approaching the vehicle, the officer tapped on the window and asked the occupant, Robert Williams, to step out

³ Professor LaFave suggests a third exception for situations in which a pat down would be inconclusive. LaFave, *supra*, § 9.6(b), at 658. No circumstances here, however, suggest that the initial pat down was inconclusive or incomplete.

of the car. *Id.* at 145. Instead, Williams rolled down the window, and so the officer reached into the car to remove the loaded gun from Williams's waistband. *Id.* In holding that the limited search was constitutional, the Court noted that Williams's refusal to follow the officer's instructions caused the hidden gun to become an even greater threat. *Id.* at 148. Thus, under the circumstances, reaching to the gun's location was a reasonable, limited intrusion designed to protect the officer's safety. *Id.*

Although *Adams* could be read as holding that a patdown is unnecessary when the officer knows the precise location of the gun, such a reading is "unsound." LaFave, *supra*, at 655-56. Indeed, if the officer suspects a gun is in a particular area, then a patdown should be highly effective in confirming or dissipating that suspicion. *Id.* Thus, the better rationale for *Adams* is expressly supported by the case itself: the suspect's failure to heed the officer's order to exit the vehicle made it impossible to conduct even a partial patdown, much less a full patdown, thereby placing the officer in a more dangerous position. *See Adams*, 407 U.S. at 148; LaFave, *supra*, at 655-56; *see also Smith*, 693 A.2d at 752 ("[W]e adopt the view that the more intrusive search in *Adams* was justified by the suspect's failure to comply with the officer's directive and the resulting inability of the officer to conduct an effective pat-down.").

Important policy reasons support reading *Adams* as a narrow exception to the patdown requirement. If officers can immediately search beneath a suspect's clothes without having first conducted a patdown, courts will face the difficult task of determining whether circumstances warranting the exception were ever even present. LaFave, *supra*, at 655-56. Such a task will likely require courts to weigh conflicting testimony: "[I]t is understandable that many suspects would claim falsely that those circumstances had not occurred, and it is less understandable but unfortunately true that some police would claim falsely that they had occurred." *Id.* Requiring a

patdown in all but the most exceptional circumstances, however, will avoid these problems. Notably, an officer will not be able to justify a search beneath the outer garments without first showing that he felt a hard, weapon-like object during the patdown—a fact that could easily be verified later by demonstrating that there was such an object. *Id.*

Turning to Tracey’s initial patdown, one sees a situation much different from *Adams*, in which the suspect actually prevented the officer from conducting a patdown, because Tracey did nothing to prevent a patdown. Although noticeably agitated with the detention, Tracey “did not physically resist” the patdown (R. at 3). Unlike Williams, he complied with the officer’s request. Indeed, nothing in the record indicates that Calloway was unable to conduct a full and effective patdown, whereas the officer in *Adams* was unable to even initially patdown the suspect. Thus, Tracey’s situation did not present a threat of danger resulting from prevention of a patdown and a failure to heed an officer’s orders.

And turning to Calloway’s decision to reach inside Tracey’s jacket, there is no evidence that Tracey was trying to prevent a patdown. When Tracey brushed aside Calloway’s hand, the movement was not an attempt to avoid a *patdown*—it was an attempt to avoid a *more intrusive search* beyond the limits of a traditional frisk. For by that point in time, Calloway had already resolved to conduct a more intrusive search. As a seven-year veteran of the police force, Tracey surely knew that Calloway was exceeding the bounds of a lawful *Terry* stop. *Cf. State v. Lopez*, 235 So. 2d 394, 401-02 (La. 1970) (permitting use of moderate force to resist an unlawful arrest).

Finally, this second, more intrusive search is not supported by *Terry*’s concern for officer safety. Because the stop had “concluded” (R. at 3), there was no further threat to the Calloway’s safety. But even assuming that Calloway still had the requisite reasonable suspicion of danger, another patdown focused on the area in question could have easily confirmed or dispelled

Calloway's concerns. This additional patdown would avoid the evidentiary problems noted by LaFave because it is entirely possible that an additional patdown would have revealed an object that Calloway believed was a gun. Instead, this Court is left to discern a whole host of problems that easily could have been avoided.⁴

b. Tracey did not engage in any threatening evasive behavior warranting a greater intrusion than a patdown.

In addition to the *Adams* exception, several courts allow exceptions for situations in which the suspect makes threatening movements. See LaFave, *supra*, at 657-58 (citing cases). Although the facts of such cases vary greatly, they share a common thread in that they “generally have . . . involved situations in which the suspect has engaged in conduct which would lead a reasonable and prudent officer not only to suspect the person detained is armed but also to apprehend that he is preparing and immediately threatening to use the weapon.” *People v. Superior Court*, 94 Cal. Rptr. 728, 730 (Cal. Ct. App. 1971), *quoted in* LaFave, *supra*, at 658.

Most of these cases involve (1) a suspect's moving for a metallic object that looks like a weapon or (2) a suspect's thrusting his hand into a pocket despite an order to keep the hands in view. LaFave, *supra*, at 657 (citing cases). For example, in *United States v. Marrero*, the Eighth Circuit rejected a defendant's constitutional challenge where the defendant “reach[ed] into his waistband as if to be reaching for a gun,” “failed to comply when ordered . . . to display his hands,” and “refused to give the officers an opportunity to conduct . . . a protective patdown search.” 152 F.3d 1030, 1033 (8th Cir. 1998); *see also State v. Heitzmann*, 632 N.W.2d 1, 9-10 (N.D. 2001) (noting suspect's nervousness and “quick evasive movements”). Similarly, some cases look to whether the officers believed the defendant had a gun. *Moore v. United States*, 468

⁴ The notion of the need for an additional pat down search is discussed more fully in Part I.A.3.

A.2d 1342, 1346 (D.C. 1983) (concluding no patdown needed when prior suspicion was that defendant had gun, bulge was seen in pocket, and defendant had his hand in that pocket).

But other cases demonstrate that when the situation presents no threat of danger, even if the suspect does not fully comply with the officer's requests, a more intrusive search is unreasonable. In *United States v. Casado*, the Second Circuit reviewed a situation in which the defendant did not comply with an officer's order to remove his hand from his pants pocket, even after the officer had drawn a gun. 303 F.3d 440, 442 (2d Cir. 2002). Once the defendant did remove his hand, the officer immediately searched the pocket without frisking the area first. *Id.* at 447-48. The court ultimately invalidated this search because nothing prevented the officer from frisking that area—neither the defendant's position nor his clothes were an obstacle, and the defendant had made no “sudden or violent movements.” *Id.* at 448. Thus, “[t]he less intrusive alternative of a frisk . . . would have been effective to achieve the sole legitimate purpose for conducting such a search—physical safety.” *Id.*

Unlike the defendant in almost all of these cases, Calloway took no action that could be construed as reaching for a weapon. During the initial patdown, like the defendant in *Casado*, he did not make any “sudden or violent movements.” Although he cursed some, he complied with the officer and “did not physically resist.” (R. at 3). In fact, his only physical contact occurred after the frisk had ended. And while he did brush aside Calloway's hand, he was hardly making “quick evasive movements,” reaching for areas that could have weapons, preventing a patdown, or disobeying orders as the defendants in *Marrero* and *Heitzman* did. Finally, because the initial patdown revealed no weapons, Calloway was in a different situation from the officer in *Moore*, who suspected that the defendant had a gun and saw a bulge in the pocket. For these reasons, Tracey's passive behavior does not warrant an exception to the patdown requirement.

3. Because the initial frisk revealed no weapons and no exceptions to the frisk requirement apply, the proper means of balancing Calloway's renewed suspicion with Tracey's privacy interests would have been to confirm that suspicion with a second frisk before conducting a more intrusive search.

Acknowledging that the hallmark of the Fourth Amendment is reasonableness, Tracey does not advocate for a bright-line rule in which officers are limited to one patdown. Indeed, there are situations, such as this, that may require an additional patdown to confirm or dispel new suspicions. As the First Circuit has recognized, prudence dictates that a second patdown is not per se unreasonable because there are “myriad factual contexts in which courts could be called upon to assess the reasonableness of multiple pat-frisks of a single suspect.” *United States v. Osbourne*, 326 F.3d 274, 278 (1st Cir. 2003). Thus, the question becomes whether, at the time of the second frisk, the officer still had a “reasonable suspicion that the suspect [was] armed and dangerous.” *Id.* at 278.⁵

In particular, in a situation such as this one where an officer suspects that a weapon may be in one area, an additional frisk of that area given the officer's new heightened sensitivity should easily confirm or dispel a weapon's existence. *Cf. Minnesota v. Dickerson*, 508 U.S. 366, 378-79 (1993) (invalidating a search where the officer manipulated jacket contents *after* determining that the contents were not weapons). This additional frisk, given the Court's concern for officer safety, would be reasonable: an officer, on the basis of sufficient post-frisk facts, should be able, as *Terry* dictates, to confirm or dispel that suspicion with an additional frisk.

The officer should not, however, be permitted to conduct a more intrusive search based solely on new information, especially when an initial patdown had already relieved the officer's initial suspicions. Indeed, it would seem more reasonable for an officer who has *not* frisked to

⁵ Tracey does not take issue with whether Calloway's seeing a vertical leather strap contributed to the suspicion because even if it did, Calloway's mere suspicion does not justify a search more intrusive than an additional frisk.

immediately search for weapons because nothing has indicated that no weapons exist. But *Terry* squarely rejected this rationale. On the other hand, where an officer has already frisked and been relieved of his suspicions, it would be entirely unreasonable to allow a more intrusive search, especially when a new patdown could confirm or dispel the new suspicion. In sum, officers should be able to do their jobs without fear of violence, but *Terry* recognized that individual liberty must be respected as well—both interests are met by a second frisk.

B. The plain view doctrine does not support Calloway’s search because he lacked probable cause to believe the object that he saw was contraband.

Having rejected the justification for Calloway’s search as being rooted in the *Terry* doctrine, the only remaining argument, which the Thirteenth Circuit rejected, is that the search is justified under the plain view doctrine. The principles of this doctrine are straightforward and largely undisputed. First, the police officer must view the incriminating object from a lawful vantage point. *Horton*, 496 U.S. at 136. Thus, officers can lawfully seize evidence in plain view when conducting a *Terry* stop.⁶ See, e.g., *United States v. Ridge*, 329 F.3d 535, 540-41 (6th Cir. 2003). Second, and most important here, the “incriminating character” of the evidence seized must be “immediately apparent,” *Horton*, 496 U.S. at 136; that is, police must have probable cause to believe an object in plain view is contraband. *Dickerson*, 508 U.S. at 375. Finally, Police may not further investigate, move, or disturb an item to discern its evidentiary value without probable cause. *Arizona v. Hicks*, 480 U.S. 321, 322 (1987).

⁶ Tracey does not dispute that Petitioner meets this prong.

1. Although an officer may have reasonable suspicion that an object is contraband, the officer must have probable cause to move or disturb that item.

Under the second prong of the plain view doctrine, a law enforcement agent may not move or disturb an object unless the agent has probable cause to believe the item is contraband. *Id.* In *Hicks*, an officer moved stereo equipment that he had reasonable suspicion, but not probable cause, to believe was stolen in order to view the equipment's serial numbers. *Id.* at 324, 326. Concluding that this movement constituted a search, this Court held that the plain view doctrine could not justify the search of the equipment because the police lacked probable cause to believe it was stolen. *See id.* at 326, 329.

Calloway's moving of Tracey's jacket mirrors the movement in *Hicks*. Here, Calloway saw a vertical strap underneath Tracey's jacket but was "unsure of [its] purpose." (R. at 3.). Like the *Hicks* officers, Calloway needed to move an item, in this case the jacket, to discern the full nature of the item that he saw. Because mere reasonable suspicion that an item is contraband does not permit an item to be displaced under *Hicks*, the most pertinent inquiry here is whether Calloway had probable cause to believe the incriminating character of the vertical strap was immediately apparent. For the reasons discussed next, he did not have probable cause.

2. Calloway did not have probable cause to believe the leather strap was contraband because he never saw a gun and he was unsure of the strap's purpose.

In *Craven* it is a crime to carry a concealed firearm. Thus, Calloway needed probable cause to believe that Tracey was carrying a firearm to justify the search underneath Tracey's jacket. Calloway, however, could not have had probable cause to believe this because he never saw the gun, and he testified that he was unsure of the strap's purpose.

Most likely, Petitioner will rely on this Court's decision in *Texas v. Brown*, 460 U.S. 730 (1983) (plurality opinion). In that case, the officer had seized "an opaque, green party balloon, knotted about one half inch from the tip." *Id.* at 733. The officer testified that based on his previous experience arresting for drug use, he was aware that narcotics frequently were packaged in balloons like the one the defendant had. *Id.* at 734. Also, he could see several plastic vials, an open bag of party balloons, and quantities of loose white powder. *Id.* For these reasons, the Court held there was probable cause to believe the balloons contained contraband. *Id.* at 744.

In contrast to *Brown*, several cases illustrate that the mere viewing of an otherwise innocent container does not constitute probable cause when the additional corroborating factors from *Brown* are not present. For example, the New Jersey Supreme Court has distinguished *Brown* on the basis that the officer failed to detail his experiences with such objects. *State v. Demeter*, 590 A.2d 1179, 1184 (N.J. 1991). And in *Davis v. State*, Texas's highest criminal court found that a lack of experience and an otherwise "innocent" object failed to support probable cause, even though the officer was in the middle of a drug investigation. 829 S.W.2d 218, 221 n.5 (Tex. Crim. App. 1992). Similarly, the Fifth Circuit held that the incriminating nature of checks was not immediately apparent because the officer had to make a telephone call to verify the checks were stolen. *United States v. Wilson*, 36 F.3d 1298, 1306 (5th Cir. 1994), *overruled on other grounds by United States v. Gould*, 364 F.3d 578, 586 (5th Cir. 2004). Finally, in *United States v. McLevain*, officers noticed a "twist tie, a cigarette filter, a spoon with residue, and a bottle." 310 F.3d 434, 442 (6th Cir. 2002). The government argued that all of these items, though intrinsically innocent by themselves, were intrinsically incriminating when taken together because of their common use in the methamphetamine trade. *Id.* The Sixth Circuit held that because there "*may* be some other explanation for the items," they do not

“immediately app[ear]” to be incriminating, and therefore cannot satisfy this requirement of the plain view exception.” *Id.* (emphasis added) (alteration in original).

Regarding the only item of evidence supporting probable cause here, a holster, several courts have recognized the importance of being able to identify the object. In *United States v. Harlson*, for example, the court held that a search based on viewing a holster was permissible because its nature was “immediately apparent” to the officer, it was “readily identifiable” from the outside, it appeared to be “bulging,” and the officer believed that the holster contained a gun. 212 F. App’x 694, 695 (9th Cir. 2006); *see also United States v. Beatty*, 170 F.3d 811, 814 (8th Cir. 1999) (noting that based on 12 years of experience, officer recognized the strap as “being part of a gun holster”).

In contrast to the well-defined and unique nature of a drug balloon in *Brown*, this case involves an unidentified vertical leather strap. Although Calloway thought the strap was consistent with a gun holster, unlike the officer in *Brown*, Calloway did not have an “opportunity to get a close look” at the strap and there was no instantaneous perception of it. (R. at 3.). And unlike the officers in *Harlson* and *Beatty*, Calloway did not think that the holster was immediately identifiable, was bulging, or held a gun. In fact, although Calloway said the strap was consistent with those used to carry firearms, he admitted that he was “unsure” of its purpose. (R. at 9.) Even though Calloway was pursuing an arms investigation, *Davis* indicates that a connection between the specific crime and a possible instrumentality of that crime does not satisfy the immediately apparent standard. In addition, like the objects in *McLevain*, the leather strap was not intrinsically incriminating. Calloway admitted that he did not know what the strap was, (R. at 9) and therefore his immediate perception was of a strap, not an intrinsically incriminating object. Indeed, the strap could have one of several things: suspenders, a satchel, a

backpack, or even a camping canteen. Finally, just as the officer in *Wilson* needed to call to verify the incriminating nature of the checks, Calloway too needed to take extra action to confirm that the leather strap was incriminating—he needed to move the jacket. That is, the incriminating nature of the strap was not apparent unless Calloway could see the gun resting in it, just as the incriminating nature of the checks was not apparent until the officer confirmed that they were stolen.

Moreover, the record fails to reflect any testimony indicating Calloway's previous experience in this area. Unlike the officer in *Brown* but like the one in *Demeter*, Calloway's level of experience is unknown. Although Calloway had been investigating the R-T private military company for eight months, the record does not indicate how long Calloway had been an officer or what experiences led him to conclude the strap was consistent with a holster.

Ultimately, when assessing whether Calloway had probable cause to believe that Tracey possessed a gun, the most relevant fact relates to the initial stop and frisk: Calloway's patdown did not reveal the existence of any objects that could be considered a weapon. Importantly, the record does not reflect that Calloway felt that this frisk was insufficient or incomplete in any manner. Thus, it is unreasonable to believe that an unidentified leather strap could create probable cause to believe that there is a weapon when a full frisk failed to reveal one. Calloway, quite simply, had no reason to believe a gun was present. He did not see a gun, and he could not even positively identify the strap as being a holster. Therefore, the alleged incriminating nature of the leather strap could not have been immediately apparent to him. Because it was not immediately apparent, Calloway did not have probable cause to believe that Tracey was violating Craven's prohibition against carrying concealed firearms.

II. The police department violated Tracey’s substantive due process rights when it fired him because it unconstitutionally infringed on one of his protected liberty interests—the right to engage in private, consensual sexual activity.

“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.” *Lawrence v. Texas*, 539 U.S. 558, 562 (2003). In *Lawrence*, this Court reached a conclusion that several other courts had long recognized: there is a protected substantive due process right to engage in private, consensual sexual activities. *Id.* at 578; *see, e.g., Post v. State*, 715 P.2d 1105, 1109 (Okla. Crim. App. 1986) (holding that private, consensual sex is protected by privacy right); *State v. Saunders*, 381 A.2d 333, 340 (N.J. 1977) (concluding that decision to have sex implicates privacy right). This right extends to include extramarital sexual activity, which the state does not have a sufficient interest in regulating in light of the protected liberty interest in private, sexual activity.

A. The Due Process Clause protects an individual’s right to engage in private, consensual sexual activity, including extramarital activity.

Lawrence v. Texas specifically asked “whether [individuals are] free as adults to engage in the private [sexual] conduct in the exercise of their liberty under the Due Process Clause.” 539 U.S. at 564. The Court undoubtedly answered yes: “[L]iberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” *Id.* at 559. In light of this conclusion, several courts recognize a protected right to privacy and choice in one’s sexual relationships. *See, e.g., Cook v. Gates*, 528 F.3d 42, 52 (1st Cir. 2008); *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 807-09 (9th Cir. 2008); *Fields v. Palmdale Sch. Dist.*, 271 F. Supp. 2d 1217, 1221 (C.D. Cal. 2003); *Doe v. Miller*, 298 F. Supp. 2d 844, 871 (S.D. Iowa 2004), *rev’d on other grounds*, 405 F.3d 700 (8th Cir. 2005); *Hudson Valley Black Press v. IRS*,

307 F. Supp. 2d 543, 548 (S.D.N.Y. 2004).⁷ Several commentators, including some of the most reputed constitutional law scholars, agree. *See, e.g.*, Donald H.J. Hermann, *Pulling the Fig Leaf Off the Right of Privacy: Sex and the Constitution*, 54 DePaul L. Rev. 909, 969 (2005); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy Desuetude, and Marriage*, 2003 Sup. Ct. Rev. 27, 39; Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1894, 1899 (2004).

Lawrence's awareness of the right to decide matters pertaining to sex, including extramarital activity, is couched in three distinct aspects of its opinion: (1) its express statements regarding the liberty interest in sexual activity and its decision to place that interest on par with other fundamental rights; (2) its decision to adopt Justice Stevens's dissent in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which recognized sexual activity as a liberty interest; and (3) its methodology for recognizing the right to engage in private sexual activity—one that frames privacy issues broadly and looks to current trends in decriminalization and nonenforcement of laws implicating protected privacy rights.

1. *Lawrence v. Texas*, like the privacy and autonomy cases it follows, establishes that private, consensual sexual activity is a protected interest under the Due Process Clause and that individuals have the right to make choices regarding intimate relationships.

A long line of this Court's substantive due process decisions establish the importance of privacy, autonomy, and personal decision-making, so perhaps the most telling aspect of Justice Kennedy's opinion in *Lawrence* was his decision to couch the issue of private sexual conduct

⁷ Petitioner will likely cite the following cases for the proposition that there is no fundamental right, but they are not on point: *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 744-46 (5th Cir. 2008) (refusing to address classification because statute was clearly controlled by *Lawrence*); and *Muth v. Frank*, 412 F.3d 808, 817 (7th Cir. 2005) (dictum) (failing to consider appropriate level of review because *Lawrence* did not apply to incest claims). Only the Eleventh Circuit holds that sexual activity is not protected and that rational basis review applies. *See, e.g.*, *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004).

within other cases that recognize fundamental protected rights. *E.g.*, Sunstein, *supra*, at 47 (noting that this assimilation of cases is the “basic reason” for finding a fundamental interest). The comparison of the fundamental rights cases and the issue in *Lawrence* necessarily leads to two intertwined conclusions: (1) those cases implicitly recognize the fundamental right to private, consensual sexual behavior, and (2) *Lawrence* explicitly recognizes this right in light of those cases. *See Lawrence*, 539 U.S. at 564-79. These fundamental rights cases, when read as one body of law, establish the importance of personal autonomy, especially in the areas of sexual and reproductive rights. *See id.*

To resolve whether individuals are “free as adults” to engage in private sexual conduct, the *Lawrence* Court retraced its landmark cases discussing and establishing fundamental rights: *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972);⁸ *Roe v. Wade*, 410 U.S. 113 (1973); and *Carey v. Population Servs. Int’l*, 431 U.S. 678 (1977). *Lawrence*, 539 U.S. at 564-67. Beginning with *Griswold*, the Court noted that its prior decisions confirmed (1) “that the protection of liberty under the Due Process Clause has a substantive dimension of *fundamental* significance in defining the rights of the person” and (2) “that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship.” *Id.* at 565-66 (emphasis added). It further noted that matters ““involving the *most intimate and personal choices* a person may make in a lifetime, choices *central* to personal dignity and autonomy, are *central* to the liberty protected by the Fourteenth Amendment.”” *Id.* at 574 (emphasis added) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)). With these cases in mind, the Court held that the “right to liberty under the Due Process Clause gives

⁸ Although *Eisenstadt*’s holding rests on Equal Protection grounds, *Lawrence* noted that *Eisenstadt* stated “the fundamental proposition that the [contraception] law impaired the exercise of . . . personal rights.” *Lawrence*, 539 U.S. at 565.

[the petitioners] the full right to engage in their [private sexual] conduct without intervention of the government.” *Id.* at 578.

This natural progression from *Griswold* to *Lawrence* in recognizing a fundamental right to private sexual activity has not escaped the eye of constitutional law scholars. In responding to Justice Scalia’s criticism of the Court’s failure to articulate a precise standard, *see id.* at 586, 599 (Scalia, J., dissenting), Professor Laurence Tribe asserts that the fundamental nature of the right follows from the Court’s declaration that *Griswold* was “‘the most pertinent beginning point’ for its analysis and then proceeding to invoke precedents such as *Roe*.” Tribe, *supra*, at 1917 (quoting *Lawrence*, 539 U.S. at 564). Thus, searching for the “magic words” proclaiming the right protected in *Lawrence* to be “fundamental” requires overlooking passage after passage in which the Court invoked the principles of substantive due process, “as in the Court’s declaration that it was dealing with a ‘protection of liberty under the Due Process Clause [that] has a substantive dimension of fundamental significance.’” *Id.* (quoting *Lawrence*, 539 U.S. at 565); *see also* Sunstein, *supra*, at 47 (noting that if *Lawrence* were referring to a nonfundamental right, then its assimilation of its issue into the reproductive fundamental rights cases would be “unintelligible”). Thus, Tribe concludes that the lack of the term “fundamental” by no means precludes the finding of a fundamental right. Tribe, *supra*, at 1916-17.

On a broader level, the protected right to “particular forms of private, consensual sexual activity” rests on two lines of cases: those concerning decisional privacy and those concerning “spatial aspects of the right to privacy.” *Bowers*, 478 U.S. at 199, 205-06 (Blackmun, J., dissenting); Hermann, *supra*, at 928. The contraception and abortion cases underlie the decisional aspect. *See, e.g., Carey*, 431 U.S. at 684 (noting that right to personal privacy includes “independence in making certain kinds of important *decisions*” (emphasis added)). And

the spatial aspect is supported by cases that protect activity within the home, such as *Stanley v. Georgia*, 394 U.S. 557, 564-65 (1969), which held that punishment for private possession of obscene materials in the privacy of the home is unconstitutional. *See Hermann, supra*, at 928. *Lawrence* concluded, therefore, that laws prohibiting sexual acts touch upon “the most private human conduct, sexual behavior, and in the most private of places, the home.” 539 U.S. at 567.

In assessing the intersection of the decisional and spatial interests, the basis for finding a right to protect private sexual activity comes into focus. *See id.* By the 1970s the Court had at least recognized that it was moving in this direction by noting that it had not yet fully defined the boundaries of statutes regulating sexual behavior among adults. *Carey*, 431 U.S. at 694 n.17. Thus, the Court at that time had realized that its contraception and abortion decisions provided “the basis for a plausible claim to a right to engage in private consensual sexual behavior.” *Hermann, supra*, at 928-29. Not until *Lawrence*, however, did this Court actually define those boundaries to encompass all private, consensual activity. *Id.* at 928.

Finally, after reviewing this Court’s contraception and abortion cases, it is not surprising that the Court reached the conclusion that there is a right to private sexual activity. That these holdings implicitly contemplate the right to privacy as encompassing the right to private sexual activity is plain from the natural consequence of those decisions: the right to contraception and abortion inherently involves avoiding the potential result of sexual intercourse, namely bearing a child. *Id.* at 932-33; Gabrielle Viator, Note, *The Validity of Criminal Adultery Prohibitions After Lawrence v. Texas*, 39 Suffolk L. Rev. 837, 846 (2006) (noting that courts have held that a right to private sexual activity is necessarily implied from the abortion and contraception decisions because without such a corresponding right, the right to make decisions regarding childbearing would be meaningless).

2. By overruling *Bowers v. Hardwick* and adopting Justice Stevens’s dissent in that case—a dissent that recognizes a right to private sexual activity—*Lawrence* firmly establishes the right to engage in private, consensual sexual activity

Because of the protected right to make private decisions regarding sexual conduct, the *Lawrence* Court was compelled to overrule the anomaly of *Bowers*, which had failed to acknowledge this right in permitting Georgia to criminalize sodomy. *Lawrence*, 539 U.S. at 578; see *Bowers*, 478 U.S. at 194-96. *Lawrence* concluded that at the time of the *Bowers* decision, the Court’s prior holdings had already made clear that individuals have a right to decide matters regarding the intimacies of physical relationships, even when not aimed at procreation. 539 U.S. at 578. The *Lawrence* Court therefore held that “*Bowers* was not correct *when it was decided* It ought not remain binding precedent.” *Id.* (emphasis added).

The adoption of Justice Stevens’s reasoning in *Bowers* only solidifies the existence of a right to private sexual activity established by earlier cases. See *id.* In recognizing the right to private sexual activity, Justice Stevens noted that the Court’s precedents had already made that conclusion “abundantly clear”: “[I]ndividual decisions . . . concerning the intimacies of the[] physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause Moreover, *this protection extends to intimate choices by unmarried as well as married persons.*” *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting) (emphasis added) (footnotes and citations omitted), *quoted in Lawrence*, 539 U.S. at 577-78.

Like *Lawrence*, the *Bowers* dissent recognized the line of cases from *Griswold* to *Carey* as not only implicating a right to sexual intimacy but also as establishing the right to sexual intimacy. 478 U.S. at 217-18 (Stevens, J., dissenting). In this vein, Justice Stevens noted that “[t]he 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.” *Id.* at 218. Thus, Justice Stevens’s dissent and the *Lawrence* Court also reach similar conclusions regarding morality. *Compare id.*, with *Lawrence*, 539 U.S. at 571 (noting the Court’s duty is not to define moral codes).

Ultimately, the impact of Justice Stevens’s dissent is quite simple but its implications are far reaching: (1) morality cannot provide a basis for legislating and (2) individuals have a right to engage in intimate sexual activity. These conclusions were expressly adopted as “controlling” by *Lawrence* and can only lead to one conclusion in the present case: Tracey had a fundamental right to engage in private sexual activity.

3. By framing liberty issues broadly and looking to recent history, as *Lawrence* does, the right to engage in private sexual activity must be defined to include extramarital activity.

While *Lawrence* expressly supports the fundamental right to private sexual activity, it also provides a framework for analyzing substantive due process rights that establishes the right to extramarital conduct. Although this Court’s decision in *Washington v. Glucksberg*, 521 U.S. 702 (1997), is often cited as governing this type of analysis, *Lawrence* indicates that its framework is not the only relevant one. *See generally id.* (finding a protected interest without citing *Glucksberg*). Indeed, *Lawrence*’s framework is more relevant because *Glucksberg* involved assisted suicide, 521 U.S. at 704-05, whereas *Lawrence* involved sexual activity—the interest at issue here. This framework requires the Court to construe privacy interests broadly and look to recent history regarding adultery legislation.

a. The right to engage in sexual activity must be framed broadly to encompass all sexual activity, including extramarital activity.

Lawrence’s primary criticism of *Bowers* was its failure to adequately frame the liberty interest at issue. 539 U.S. at 567 (“[*Bowers*] misapprehended the claim of liberty there

presented”). Bowers had approached the right to privacy through the narrow scope of whether “homosexuals [have a right] to engage in sodomy,” *Bowers*, 478 U.S. at 190, but this narrow framing disclosed the Court’s “failure to appreciate the extent of the liberty at stake,” *Lawrence*, 539 U.S. at 567. *Lawrence* explains that the proper inquiry is not whether a specific sexual act is protected but rather whether adults have a right to engage in private sexual conduct that encompasses acts of consensual sexual intimacy:

[Limiting the issue to] the right to engage in certain sexual conduct demeans the claim the individual put forward The laws involved in *Bowers* and here are, to be sure, *statutes that purport to do no more than prohibit a particular sexual act*. Their penalties and purposes, though, have more far-reaching consequences, *touching upon the most private human conduct, sexual behavior, and in the most private of places, the home*.

Id. at 564, 567 (emphasis added). This framing is consistent with this Court’s attempt to frame rights in the broad terms. *See, e.g., Carey*, 431 U.S. at 686-687 (eschewing a narrow issue of a “right of access to contraceptives” and framing the issue more broadly as the right to procreate); *see also Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 743-44 (5th Cir. 2008) (rejecting the state’s narrow framing of a sex toy statute as “the right to stimulate one’s genitals for non-medical purposes unrelated to procreation or outside of [a] relationship,” and noting that construing the rights broadly is “the only way to make sense” of the *Lawrence* holding). Thus, when confronted with potential liberty issues, especially those involving sexual privacy, courts must construe the right broadly.

Turning to adultery laws, focusing specifically on whether due process protects a right to participate in an extramarital affair too narrowly construes the issue. Instead, this Court must recognize, as *Lawrence* did, that there is a fundamental right to engage in private sexual activity. Then, the Court can proceed to assess whether the state’s interest in criminalizing the specific sexual act, extramarital activity in this case, is a sufficient government interest that overcomes

the individual's liberty interest. *See Lawrence*, 539 U.S. at 578 (holding that the statute “furthers no legitimate state interest” justifying intrusion “into the personal and private life of the individual”). While this governmental interest is lacking (as discussed below), the Court must also review the history of the country's adultery laws, as *Lawrence* did with sodomy laws, to determine the full strength of the state's and the individual's interest.

b. America's history of non-enforcement and decriminalization of adultery laws indicates that Craven has little interest in this matter and that engaging in extramarital activity falls within the bounds of the protected right to private sexual activity.

In *Glucksberg*, this Court opined that fundamental rights are “deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” 521 U.S. at 720-21 (internal citations and quotation marks omitted). *Lawrence* clarified this consideration by qualifying history and tradition as the “starting point” but not the “ending point” of the inquiry. 539 U.S. at 572. Instead, *Lawrence* looked to modern practices and trends: “[W]e think that our laws and traditions in the past half century are of most relevance here.” *Id.* at 571-22.

In discussing the history of sodomy laws, the Court began by noting that there had not been a longstanding history of laws regarding homosexual sodomy. *Id.* at 568. Justice Kennedy placed particular importance on the American Law Institute's (ALI) decision to eliminate sodomy laws in its 1955 revision to the Model Penal Code. *Id.* at 572 (citing Model Penal Code § 213.2, cmt. 2, at 372 (1980)). The ALI had made clear that it did not recommend “‘criminal penalties for consensual sexual relations conducted in private,’” because “(1) [t]he prohibitions undermined respect for the law by penalizing conduct many people engaged in; (2) the statutes regulated private conduct not harmful to others; and (3) the laws were arbitrarily enforced and thus invited the danger of blackmail.” *Id.* (quoting Model Penal Code § 213.2, cmt. 2, at 372).

Perhaps in light of the ALI's recommendation, the twentieth century saw a significant decrease in criminalization of sodomy. *Id.* (noting that only eleven states had sodomy laws when the case was decided). In addition, laws prohibiting sodomy were rarely enforced "against consenting adults acting in private." *Id.* at 569. Ultimately, Justice Kennedy concluded, this decriminalization and lack of enforcement contributed to the "emerging awareness" that liberty protects adults in deciding matters pertaining to sex. *Id.* at 572.

Laws prohibiting adultery have also had a similar history of non-enforcement and decriminalization. Perhaps the only difference is the fact that adultery statutes have a greater history than sodomy laws. *See generally* Viator, *supra*, at 840-45 (discussing the evolution of adultery laws). But even this history reflects a mixed reaction to the criminalization of adultery. *See* 2 Charles E. Torcia, *Wharton's Criminal Law* § 210, at 528 (15th ed. 1994) (noting that English common law treated adultery as a public nuisance, not a crime, and only did so when adultery was "open and notorious," and that adultery was typically enforceable only in the ecclesiastical courts); *see also* William Blackstone, 4 *Commentaries* *65 (discussing treatment of adultery at common law). In America, adultery statutes grew out of perceived "moral corruption," and colonial laws recognized adultery as a crime against community morals rather than against the spouse. Martin J. Siegel, *For Better or for Worse: Adultery, Crime & the Constitution*, 30 J. Fam. L. 45, 48 (1991); *see also* Model Penal Code § 213.6 note on adultery and fornication, at 431 (Proposed Official Draft 1962) (1980) [hereinafter MPC Note on Adultery] ("[T]he gist of these offenses is to prevent debasement of public morals.").

As in *Lawrence*, the "laws and traditions in the past half century" and the the ALI's views regarding nonenforcement and decriminalization are instructive. *Lawrence*, 539 U.S. at 571-72. In the same 1955 ALI commentary cited in *Lawrence*, the ALI cites widespread non-

enforcement in declaring adultery laws “dead-letter statutes” subject to abuse by selective enforcement and blackmail, thereby “tend[ing] to bring the penal law into disrepute.” MPC Note on Adultery, *supra*, at 434-36; *see also* Torcia, *supra*, § 211, at 531 (noting that current views suggest that “adultery should not be a crime because it is a matter of private rather than public morals, law enforcement officials and prosecutors tend to overlook such conduct, and . . . punishment of such conduct is not calculated to deter or reform the offender”).⁹ For these reasons, the ALI omitted an adultery offense from the Model Penal Code and recommended the decriminalization of adultery, taking the position that “private immorality should be beyond the reach of the penal law.” MPC Note on Adultery, *supra*, at 439. Many states followed the ALI’s recommendation by repealing their own criminal adultery statutes. *See* Viator, *supra*, at 842 (citing laws from eleven states and the District of Columbia that subsequently repealed adultery statutes). Today, less than half of the states even criminalize adultery. *Id.* at 837.

Finally, adultery laws are plagued by the same three problems that *Lawrence* identified with sodomy law. *Lawrence*, 539 U.S. at 572. First, a majority of marriages are affected by adultery. *See* Coleman, *supra*, at 339 n.2. Second, adultery laws are arbitrarily enforced and subject to blackmail. MPC Note on Adultery, at 435. Finally, adultery statutes regulate conduct not harmful to others.¹⁰ *See id.* at 438 (describing the crime as “victimless”).

Reviewing the recent history of adultery laws, one sees they are comparable with the sodomy laws in *Lawrence*: they are rarely enforced, the ALI disapproves of them, states have

⁹ Undoubtedly, these conclusions are influenced in part by the facts that most people do not recognize adultery as a criminal act, Viator, *supra*, at 839, and that adultery affects the majority of American marriages, *see* Phyllis Coleman, *Who’s Been Sleeping in My Bed? You and Me, and the State Makes Three*, 24 Ind. L. Rev. 399, 399 n.2 (1991) (noting that experts estimate that 70% of married men and 50% of married women have engaged in adulterous relationships).

¹⁰ This concept is fully developed below when discussing Craven’s interest in infringing on the right to engage in private sexual activity by enforcing adultery laws. *See infra* Part II.B.

repealed them, and their basis rests on public morality. Thus, like the sodomy laws, the adulterous conduct that Craven currently criminalizes falls with the right to private sexual activity.

B. Applying a heightened level of scrutiny, Craven does not have a sufficient interest for infringing on Tracey’s right to private sexual activity.

1. *Lawrence* dictates that laws infringing on the right to private sexual activity are reviewed under a heightened level of review.

As discussed above, *Lawrence* established a fundamental right to engage in private, consensual sexual activity. To infringe upon such fundamental rights, the state must meet the standard of strict scrutiny by offering a compelling interest for the infringement and narrowly tailoring the infringement to the least restrictive means possible. *See, e.g., Roe*, 410 U.S. at 155. Although *Lawrence* did state that the law before it “furthered no legitimate state interest,” *Lawrence*, 539 U.S. at 578, merely any state interest would not have sufficed. Instead, the Court’s reference was to a “legitimate state interest which can justify its intrusion into the personal and private life of the individual”—an intrusion the Court had already concluded was of great significance. *Id.*; Tribe, *supra*, at 1917 n.83.

The Court’s failure to use the term “strict scrutiny” does not preclude it from being the appropriate standard. *Cf.* Tribe, *supra*, at 1916-17 (“[A]nnouncing such a standard . . . is of relatively recent vintage . . . and has not shown itself worthy of being enshrined as a permanent fixture in the armament of constitutional analysis.”); *id.* (noting that *Griswold* did not announce a “standard” but that what is now “called ‘strict scrutiny’ was plainly at work”). Indeed, this level of review can still be gleaned from the Court’s opinion. As Professor Tribe recognizes, the “strictness” of the standard “could hardly have been more obvious”—it flows primarily from the Court’s decision to use *Griswold* as its beginning point when grouping the right to private sexual

activity with other fundamental rights. *Id.*; *cf.* Hermann, *supra*, at 929 (noting that the case supports strict scrutiny review and that because the state asserted *no* valid justification for the statute, using the strict scrutiny framework was unnecessary).

At the very least, however, the *Lawrence* Court's rationale for its holding is inconsistent with mere rational basis review, and its decision to overrule *Bowers* indicates that rational basis was not the standard. *Witt*, 527 F.3d at 818. If *Lawrence* had used rational basis review, then its basis for overruling *Bowers* must have been that *Bowers* failed under that standard. *Id.* at 816-17. But *Lawrence*'s criticism of *Bowers* had nothing to do with the basis for the law; instead, the Court rejected *Bowers* because of the "Court's own failure to appreciate the extent of the liberty at stake." *Id.* at 817 (quoting *Lawrence*, 539 U.S. at 567).

This rejection by *Lawrence* does not sound in rational basis review. *Id.* Under that level of review, the Court asks whether governmental action is so arbitrary that a rational basis for the action cannot even be conceived *post hoc*. *Id.* If the Court had applied that standard, then it had no reason to consider the extent of the liberty interest involved. *Id.* Yet it did just that by assessing whether the state's interest justified the intrusion "into the personal and private life of the individual." *Id.* (quoting *Lawrence*, 539 U.S. at 578). Were the Court applying rational basis review, it would not have needed to identify a legitimate state interest to "justify" the particular intrusion of liberty—any hypothetical rationale for the law would have worked. *Id.* at 818. As the Ninth Circuit concluded, "this is inconsistent with rational basis review," and thus some form of heightened review involving a balancing of government and individual interests must be used. *Id.* Notably, applying an intermediate level of review that exceeds rational basis but falls short of strict scrutiny is permissible. *See id.* (discussing the heightened level of review applied to a substantive due process claim in *Sell v. United States*, 539 U.S. 166, 179 (2003)).

Regardless of the standard, Craven fails to pass muster under both intermediate and strict scrutiny review. Craven’s interest in criminalizing adultery fails both facially and as applied to Tracey. *Cf. id.* at 819-21 (“[An as applied challenge is] the preferred course of adjudication since it enables courts to avoid making unnecessarily broad constitutional judgments.” (quoting *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 447 (1985))).

2. Craven’s interests do not pass any level of heightened scrutiny because morality cannot be a basis for regulating private acts and because the prohibition against adultery does not serve any state interest in protecting individuals or the institution of marriage.

a. *Lawrence* holds that the government’s interest in regulating moral conduct is an insufficient basis for criminalizing private, intimate conduct.

In *Lawrence*, this Court rejected morality as a basis for infringing on protected substantive due process interests, in particular those involving sexual privacy. While adopting Justice Stevens’s dissent that expressly rejected morals-based legislation, the Court also noted that its duty is not to mandate its own moral code. *See Lawrence*, 539 U.S. at 577 (citing *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)); *cf.* Arnold H. Loewy, *Morals Legislation and the Establishment Clause*, 55 Ala. L. Rev. 159, 159 (2003) (discussing *Lawrence* and rejecting morals as a basis for legislating under the Establishment Clause).

Aside from *Lawrence*’s express statements on the subject, it also rejected Texas’s sole justification for the statute: morality. Texas had explicitly relied upon public morality as a rational basis for its sodomy law.¹¹ *See Reliable Consultants*, 538 F.3d at 745 (discussing Texas’s position in *Lawrence*). But the Court rejected Texas’s argument, holding that the

¹¹ Respondent’s Brief at 48, *Lawrence*, 539 U.S. 558, 2003 WL 470184 (“The prohibition of homosexual conduct . . . represents the reasoned judgment of the Texas Legislature *that such conduct is immoral* and should be deterred. . . . [T]he Court should defer to the Texas Legislature’s judgment . . . in their effort to *enforce public morality* and promote family values through the [sodomy statute].” (internal footnote omitted) (emphasis added)).

sodomy law furthered “no legitimate state interest” justifying intrusion into personal liberty. *Lawrence*, 539 U.S. at 578. As the Fifth Circuit noted, the “interests in ‘public morality’ cannot constitutionally sustain the statute after *Lawrence*.” *Reliable Consultants*, 538 F.3d at 745.

As previously mentioned, adultery statutes are based almost exclusively on the legislature’s notion of morality. MPC Note on Adultery, at 431. Indeed, early colonial law recognized adultery as a crime against community morals rather than against the spouse. Siegel, *supra*, at 48. Thus, any moral justification that Craven proffers as an interest in its adultery statute must be rejected.

b. Craven’s adultery statute does not serve the interest of protecting spouses or the institution of marriage.

Although the lower court opinions give no hint of the state’s interest in criminalizing adultery, any asserted interest should fall into two categories: “injury to a person or abuse of an institution the law protects.” *Lawrence*, 539 U.S. at 567; *see also* Viator, *supra*, at 855-60 (discussing adultery laws within this two category framework).

As an initial matter, any interest Craven asserts is rather disingenuous. Despite the numerous divorces that the state has undoubtedly seen in the last twenty years, some surely rooted in adultery, the state has not prosecuted one case of adultery in that time. Further, its interest in protecting injured persons (i.e., the non-adulterous spouse) is not served and, on some level, undermines the law of divorce. In addition, the law does not protect the institution of marriage, especially in light of the many other, effective means by which Craven could do so.

(1) Craven’s adultery law does not sufficiently protect against injuries to the person.

The state’s asserted interest in protecting spouses is insufficient to justify an intrusion into the right to private sexual activity. First, the degree of harm, which will often depend on the

situation, is not quantifiable, and attempts to quantify it will likely be exaggerated. *See* Coleman, *supra*, at 411-12; Mark Strasser, *Sex, Law and the Sacred Precincts of the Marital Bedroom: On State and Federal Right to Privacy Jurisprudence*, 14 Notre Dame J.L. Ethics & Pub. Pol’y 753, 783 (2000) (noting some couples claim adulterous relationships have strengthened their marriages). For example, in relationships where a spouse consents to the extramarital activity, there can be no presumption of harm. *See* Coleman, *supra*, at 413. And even when there is no consent, a criminal prosecution may infringe upon the marital relationship and “the rights of the husband and wife to condone the wrongs of either toward the other.” *E.g.*, *Iowa v. Ronek*, 176 N.W.2d 153, 156 (Iowa 1970) (upholding Iowa statute allowing prosecution only upon spousal request). For this reason, “an unwanted criminal prosecution tends to increase any harm to the innocent spouse and family and reduce the chances of reconciliation.” Viator, *supra*, at 857 (citing cases). Indeed, the chance of reconciliation would likely diminish significantly after a criminal prosecution. Coleman, *supra*, at 403-04.

Moreover, trying to protect individuals through criminalization of adultery contradicts the policy underling divorce law. MPC Note on Adultery, *supra*, at 438. States have unanimously abandoned efforts to assign blame for a divorce by passing “no fault” divorce statutes. *See* Nicholas H. Wolfinger, *The Mixed Blessings of No-Fault Divorce*, 4 Whittier J. Child & Fam. Advoc. 407, 407-08 (2005). This reflects the view that the law should recognize the marital breakdown without undertaking a determination of legal fault, and so this “policy of sensible restraint should also govern in the context of criminal sanctions for adultery.” MPC Note on Adultery, *supra*, at 438. For these reasons, under a heightened level of review that balances Craven’s interest with Tracey’s, Craven’s “interest in redressing harm is likely insufficient to justify the extreme intrusion caused by [its] adultery statute.” Viator, *supra*, at 857.

Using a strict scrutiny standard, Craven fails to meet its duty of using the least restrictive means of accomplishing its objective because there are likely several less intrusive means of protecting individuals and punishing adultery. If the Craven statute allowed prosecution only upon the spouse's request, then it could ensure that it "will not infringe upon privacy except when adulterous conduct actually causes harm." *Id.* Such a provision would allow an innocent spouse to avoid additional harm of a prosecution and address the marital problems as a private matter between the spouses. *Id.* Similarly, if the statute contained exceptions for those spouses that have consented to extramarital affairs, then the statute could stand on firmer ground. But the record does not reflect that Craven's statute contains such protections. Nor does the record reflect that Tracey's wife has filed any formal complaint with the police. Thus, Craven has not used the least restrictive means possible.

Finally, as applied to Tracey, it is hard to imagine there being any harm. Tracey has been separated from his wife for eighteen months, and she recently served him with divorce papers. In this situation, there is very little harm to Tracey's estranged wife, and it is insufficient to require an intrusion into Tracey's protected liberty interest.

(2) Craven's adultery law does not sufficiently protect the institution of marriage.

Craven could assert that adultery is a crime against the institution of marriage. The state's control of the marital relationship, however, is hardly an effective means of upholding the institution of marriage, at least to the point that a fundamental right must be infringed.

Initially, one must question the deterrent value of adultery statutes when no one is prosecuted. Indeed, the ALI notes that adultery laws "do more harm than good [and] will not prevent illicit and promiscuous relations by faithless husbands or wives." MPC Note on Adultery, *supra*, at 435. Similarly, there is little that can be done to protect the institution of

marriage when the adulterous activity is a “symptom of the marital breakdown rather than its cause” because there are no absolute rules for preserving the marital institution, “and the criminal law is an exceedingly blunt instrument with which to attempt to monitor such relationships.” *Id.* at 438. If Craven aims to penalize adulterers and deter adultery, there is one obvious way to do so: punish the adulterer with an alimony award or disparate division of property. Indeed, several states already do this. *See, e.g.*, N.C. Gen. Stat. § 50-16.3A(a) (2007).

And if Craven wants to promote marriage, there are much more effective, and less restrictive, means to do so. First, it could attempt to publicize the importance of marriage and the problems with adultery by “generat[ing] public discussion of the vital role of marriage in our culture.” *See Efforts To Encourage Marriage in the District of Columbia: Hearing Before Subcomm. on the District of Columbia of the S. Comm. on Appropriations, 109th Cong. (2005)* (statement of Ron Haskins, Senior Fellow, Brookings Inst.), *available at* 2005 WL 2504843. Second, Craven could fund “healthy marriage programs” to either reduce divorce or promote healthy marriage among unmarried couples. *Id.* Similarly, states can provide marriage education for adults, incentives for marriage preparation, state funding for marriage support, and remarriage waiting periods. Karen N. Gardiner et al., *State Policies To Promote Marriage* (2002) (prepared at request of U.S. Dep’t of Health and Human Servs.), *available at* <http://aspe.hhs.gov/hsp/marriage02f/report.htm#IIIC>. Finally, states could offer marriage education in public schools or counseling programs that aim to strengthen relationships. *Id.*

Under strict scrutiny, any of these methods, and the countless others not mentioned herein, would be a more effective and less restrictive means of promoting marriage. And under either standard of review as applied to Tracey, there is little hope of protecting the institution of marriage—his wife has already filed for divorce.

c. Craven’s interest in regulating an officer’s private, off-duty behavior is insufficient to justify infringing on Tracey’s right to private sexual activity.

Although the unconstitutionality of adultery laws is dispositive on this point, several courts have addressed the issue of off-duty sexual behavior and held it insufficient to justify employment-related decisions. The rationales of these cases—namely that off-duty sexual conduct is insufficient for discipline—support the notion that Tracey’s termination was unlawful.

In one case, Briggs, a married police officer who was separated from his wife, was terminated for cohabitating with another woman. *Briggs v. N. Muskegon Police Dep’t*, 563 F.Supp. 585, 587 (W.D. Mich. 1983), *aff’d*, 746 F.2d 1475 (6th Cir. 1984). Like Tracey’s case, the parties in *Briggs* agreed that the termination was solely for adultery. *Id.* at 586. Looking to *Griswold*, much as *Lawrence* did, the court found a right to sexual privacy within the confines of the Due Process Clause. *Id.* at 588-90. Thus, the court held that any community disapproval of the officer’s activity, even disapproval that reflects poorly on the department, was insufficient to infringe upon “an important constitutionally protected right.” *Id.* at 590. In so holding, the court noted that police departments only have a legitimate interest in regulating “the personal sexual activities and living arrangements of its officers where such activities affect their job performance,” but there was no evidence of Briggs’s job performance being affected. *Id.* at 591.

For similar reasons, an officer cannot be required to answer questions of a sexual nature on a police questionnaire. *See Thorne v. City of El Segundo*, 726 F.2d 459, 468-72 (9th Cir. 1983). Thus in *Thorne*, the Ninth Circuit held that an inquiry into one’s “sex life” must be “justified by the legitimate interests of the police department [and] narrowly tailored to meet those legitimate interests.” *Id.* at 469. Like *Briggs*, *Thorne* required the department to show “that private, off-duty, personal activities of the type protected by the constitutional guarantees of privacy . . . have an impact upon . . . on-the-job performance.” *Id.* at 471.

Notably, these cases are much different than the one relied upon by the district court, *Shawgo v. Spradlin*, 701 F.2d 470 (5th Cir. 1983). *Shawgo* specifically addressed a department policy that forbade cohabitation among *fellow* police officers. *Id.* at 472-73. Under a rational basis review, the court found a “connection between the exigencies of Department discipline and forbidding members of a quasi-military unit, especially those different in rank, to share an apartment or to cohabit.” *Id.* at 483. This is similar to those military cases that permit prosecution of adultery when a Soldier has had relations with a fellow Soldier’s spouse. *See United States v. Hickson*, 22 M.J. 146, 147 (C.M.A. 1986).

Tracey’s situation falls squarely within the *Briggs* line of cases. Like the department in *Briggs*, the Craven Police Department admitted to expressly firing Tracey for involvement in an extramarital affair. All of Tracey’s conduct took place while he was off-duty and not undercover. Thus, as in *Briggs*, there is no evidence that Tracey’s job performance was in any way affected by his affair. Unlike the officer in *Shawgo*, Tracey’s affair did not involve anyone else in the department nor did it in any way affect his job performance.

CONCLUSION

Officer Calloway violated Tracey’s Fourth Amendment rights by searching underneath his exterior clothing because neither the *Terry* or plain view doctrines support the search. In addition, Tracey has a protected liberty interest in private sexual activity, and the state’s desire to regulate extramarital activity by criminalizing adultery is insufficient to infringe on this interest. For these reasons, the Court should affirm the decision of the Thirteenth Circuit.

Respectfully submitted,

Team M