

No. 08-31958

IN THE SUPREME COURT OF THE UNITED STATES

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 RESPONDENT

[light red]

Team Letter Designation: N

Counsel for Respondent

QUESTIONS PRESENTED

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

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OPINIONS BELOW

The court of appeals' opinion (R. 8) is unreported. The order of the district court (R. 2) is unreported.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the Fourth Amendment reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

The Fourteenth Amendment 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.

STATEMENT OF THE CASE

The Rushmore County, Craven, Police Department violated Mr. Tracey's Fourth Amendment right to be secure from unreasonable searches and seizures and Mr. Tracey's right to sexual autonomy and freedom of association under the Due Process Clause of the Fourteenth Amendment. Mr. Tracey brought suit in the United States District Court for the District of Craven pursuant to 42 U.S.C. § 1983. (R. 2, 8). Mr. Tracey urges that Rushmore County Police officer M. Calloway violated his Fourth Amendment rights by performing an illegal search resulting in the discovery of a concealed firearm. *Id.* Mr. Tracey also urges that the Rushmore County Police Department violated his rights under the Due Process Clause by terminating his employment based on his private, off-duty dating decisions. *Id.* The Rushmore County Police Department filed a motion for summary judgment contending it did not violate Mr. Tracey's Fourth or Fourteenth Amendment rights, and that it was entitled to judgment as a matter of law. *Id.* The District Court granted defendant's motion for summary judgment, (R. 7), and Mr. Tracey

appealed to the United States Court of Appeals for the Thirteenth Circuit. (R. 8). The Court of Appeals reversed the District Court's grant of summary judgment and remanded for further proceedings. (R. 12). The parties stipulated to the facts set out below. (R. 2).

Mr. Tracey, a seven-year veteran of the Rushmore County Police Department, was arrested on June 7, 2005, while operating undercover. *Id.* Mr. Tracey was investigating an illegal firearms distribution network associated with Red-Tide, "R-T," a private military company. *Id.* Though both Mr. Tracey and the arresting officer were involved in this investigation, the arresting officer was not aware of Mr. Tracey's undercover duties, in part because Mr. Tracey's lengthy undercover operations began shortly after the Rushmore County Police Department hired the arresting officer. *Id.*

Mr. Tracey was arrested in McDonough Square, where the arresting officer was investigating information suggesting that an "R-T official was meeting with prospective buyers." *Id.* Although Mr. Tracey's appearance did not match the description of the R-T official, the arresting officer's suspicions were aroused by Mr. Tracey's "closely cropped hair" and "black nylon bomber jacket," although temperatures were in the low seventies. *Id.*

The arresting officer had been watching Mr. Tracey for nearly twenty minutes while Mr. Tracey sat on a park bench and waited to meet with a suspected arms dealer. *Id.* The arresting officer believed Mr. Tracey was "agitated," and he grew concerned as Mr. Tracey appeared to observe the park's layout and surrounding rooftops. *Id.* Despite the lack of resemblance between Mr. Tracey and the targeted arms dealer, the arresting officer compromised the undercover investigation and approached Mr. Tracey. *Id.* The arresting officer identified himself and asked for Mr. Tracey's name. (R. 2-3). Although, Mr. Tracey appeared agitated, and glanced from left to right, Mr. Tracey responded to the request and said his name was "Bill." (R. 3).

As Mr. Tracey attempted to resume his undercover investigation, by standing up and turning away, the arresting officer “grabbed” Mr. Tracey by “the left wrist and turned [Mr. Tracey] so that he was facing [the arresting officer].” *Id.* The arresting officer then began to “pat down the exterior surface” of Mr. Tracey’s “clothing in order to determine whether [Mr. Tracey] was armed.” *Id.* Mr. Tracey did not physically resist the arresting officer’s pat down search, but Mr. Tracey did curse at the arresting officer. *Id.* While conducting this initial, pat-down style search, the arresting officer “did not feel any object that was consistent with a weapon.” *Id.*

Once the pat down was complete, and the arresting officer did not feel any weapons, Mr. Tracey again turned away to resume his undercover activities. *Id.* While turning, the arresting officer glimpsed “what appeared to be a vertical leather strap underneath [Mr. Tracey’s] unzipped jacket, located in the upper chest area.” *Id.* While the strap was consistent with something used to conceal a gun, the arresting officer did not get a close look at the strap and was “unsure of the strap’s purpose.” *Id.* Uncertain about what he had glimpsed, the arresting officer requested that Mr. Tracey turn back around. *Id.* Although annoyed by the persistent disruptions to his undercover operations and fearing for his physical safety if his identity was revealed, Mr. Tracy complied with the arresting officer’s request, and turned back around. *Id.*

The arresting officer next reached toward Mr. Tracey in an effort “to move aside the left exterior portion” of Mr. Tracey’s jacket and “get a better view of the strap.” *Id.* Mr. Tracey responded by “brushing” the arresting officer’s hand. *Id.* At this point the arresting officer’s conduct escalated, and he again reached towards Mr. Tracey, but “this time more forcefully.” *Id.* With his outstretched hand, the arresting officer “moved” the outside of Mr. Tracey’s jacket and revealed a pistol. *Id.* The arresting officer then seized the pistol, arrested Mr. Tracey for possessing a concealed weapon and transported Mr. Tracey to the arresting officer’s precinct where Mr. Tracey was searched, and his cell phone was seized. *Id.*

While examining Mr. Tracey's cell phone, the arresting officer recognized phone numbers for several R-T officials, but was "surprised" to notice contact information for the Police Chief's estranged daughter, Jacqueline Malone. *Id.* The arresting officer was aware of the estranged relationship because local newspapers widely reported on Ms. Malone's falsified allegations of police corruption. (R. 3-4). The arresting officer immediately contacted Ms. Malone out of fear that Mr. Tracey was targeting her. (R. 4). Ms. Malone confirmed Mr. Tracey's identity, but also revealed that she had been dating Mr. Tracey. *Id.*

Although Mr. Tracey was released from the arresting officer's precinct that day, fully one day later, on June 8, 2005, the Police Department terminated Mr. Tracey. *Id.* The Police Department's immediate explanation was "behavior unbecoming of an officer." *Id.* However, given time to dust off Craven's criminal statutes, Police Chief Malone eventually asserted that Mr. Tracey was fired because his conduct violated an adultery provision that, according to court records, had not been used in over twenty years. *Id.* The Chief of Police opted to use this explanation for Mr. Tracey's termination despite the fact that Ms. Malone was not married, Mr. Tracey and his wife had been separated for eighteen months, and Mr. Tracey had been served with divorce papers. *Id.* Moreover, Mr. Tracey's relationship with the Police Chief's estranged daughter, Ms. Malone, occurred only off-duty, and the relationship did not interfere with his duties as a police officer. *Id.*

SUMMARY OF ARGUMENT

Fourth Amendment Issue: *Terry v. Ohio* limits a search based upon a reasonable suspicion to a minimally intrusive patting over a suspect's clothing, because this search is reasonably necessary to uncover only weapons. Mr. Tracey's Fourth Amendment guarantees were violated because the arresting officer exceeded the permissible scope of a search under *Terry v. Ohio* by forcefully moving aside Mr. Tracey's jacket and searching beneath his outer

garments. The plain view exception does not justify this search, because the incriminating character of the vertical leather strap was not immediately apparent. Mr. Tracey's conduct does not justify this more intrusive search because he complied with the arresting officer's requests and did not prevent the officer from conducting a thorough pat-down search.

Due Process Issue: A citizen, separated from his wife and served with divorce papers, choosing to form a new relationship does not offend the common morals of the people of the United States, and harms to person or institution. Failure to rule in Mr. Tracey's favor would allow public employers to terminate employees for violating the personal, unwritten moral standards of each individual employer. Such arbitrary action stings at the heart of this Court's protections on due process of law. This is especially true when such firing impinges upon a person's right to choose whom to date, a decision central to the development of human personality. It is even further repugnant to due process of law when such a decision is done without any notice or opportunity to appear. Therefore, this Court should hold that petitioner's firing of Mr. Tracey violated his due process rights under the Fourteenth Amendment.

ARGUMENT

I. THE FOURTH AMENDMENT PROHIBITS A POLICE OFFICER, ACTING UNDER A REASONABLE SUSPICION, FROM MOVING ASIDE AN EXTERIOR GARMENT OF A SUSPECT

A. SEARCH: Moving Aside Mr. Tracey's Jacket is a Search Under the Fourth Amendment

The Fourth Amendment, made applicable to the States through the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643 (1961), assures "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A search is an invasion of a displayed expectation of privacy that society is prepared to recognize as reasonable. *See Katz v. Ohio*, 389 U.S. 347, 351, 361 (1967). This court

has long upheld the sanctity of the person, recognizing that “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.” *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (citing to *Union P. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)). In *Terry* this Court “emphatically” explained “it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person’s clothing all over his body in an attempt to find weapons is not a ‘search.’” 392 U.S. 1, 16 (1968). The question in this case, however, is whether the movement of an outer layer of clothing to expose what is underneath constitutes a search.

Here, Mr. Tracey exhibited an expectation that what he kept beneath his jacket would stay private and this expectation was reasonable. (R. 3). Thus, the arresting officer’s act of forcefully moving aside Mr. Tracey’s exterior jacket, violated Mr. Tracey’s reasonable expectation of privacy and constituted a search under the Fourth Amendment. *See Katz*, 389 U.S. at 351, 361 (1967).

B. *TERRY v. OHIO*: Moving Aside Mr .Tracey’s Jacket Exceeded the Bounds Marked by *Terry v. Ohio*, Because Such a Search is not Reasonably Necessary to Determine if a Suspect is Armed and Dangerous

This Court has consistently maintained that “searches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well delineated exceptions.” *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993) (quotations omitted). In *Terry*, this Court recognized such an exception: “where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity is afoot . . .” the investigating officer may briefly cause the suspect to stop and make “reasonable inquiries” designed to confirm or dispel his suspicions. *See* 392 U.S. at 30. When the officer’s reasonable

inquiries do not dispel his suspicions of criminal activity, and if the officer “is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous,” the officer may conduct a pat-down search limited to the outer clothing of the suspect for weapons. *Terry*, 392 U.S. at 25. By applying these long “settled” principles of law to the stipulated facts this Court should conclude that Mr. Tracey’s Fourth Amendment guarantees were violated by forcefully moving aside his jacket to search beneath. *See Dickerson*, 508 U.S. at 373.

1. A Protective Search of a Suspect Based Upon Reasonable Suspicion is Solely Limited to a Patting Over Exterior Garments for Hard Objects

Terry, together with its companion case, *Sibron v. New York*, 392 U.S. 40 (1968), establishes the limitations governing a protective search “permitted without a warrant and on the basis of reasonable suspicion less than probable cause.” *Dickerson*, 508 U.S. 373 (citing to *Terry*, 392 U.S. at 26). A protective search “must be strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.” *Id.* This Court endorsed this minimally intrusive search by striking a balance between the need to assure police officer safety and the “serious intrusion upon the sanctity of the person which may inflict great indignity and arouse strong resentment.” *Terry*, 392 U.S. at 17. While limited, the pat-down search of outer clothing used by Officer McFadden in *Terry* may still be an “annoying, frightening, and perhaps humiliating experience,” *id.* at 25.

The search in *Terry* illustrates the constitutional limitations on pat-down searches:

Officer McFadden patted down the outer clothing of petitioner and his two 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 Katz’ person beyond the outer surfaces of his clothes, since he discovered nothing in his patdown which might have been a weapon. Officer McFadden confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons. He did not conduct a general exploratory search for whatever evidence of criminal activity he might find.

392 U.S. at 29-30. In *Sibron*, this Court explained, *arguendo*, that “[t]he search for weapons approved in *Terry* consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault.” *Sibron*, 392 U.S. at 65. This outer garment threshold is not arbitrary, but rather ensures that the scope of the search is strictly limited what is minimally necessary to discover hard objects, or weapons, which could be used to harm the officer or the public. *See Terry*, 392 U.S. at 30. A protective search that exceeds these strict bounds “violates the guarantee of the Fourth Amendment.” *Id.* 65-66. While these principles were settled over 25 years ago, the strictly limited *Terry* search, a pat-down of a suspect’s outer clothing, remains the constitutional threshold for a protective search for weapons during a stop. *See Dickerson*, 508 U.S. 373.

Here, the arresting officer’s forceful search beneath Mr. Tracey’s jacket violated Mr. Tracey’s Fourth Amendment guarantees because lifting an outer garment was not strictly confined to what was minimally necessary to learn if Mr. Tracey was armed. *See Terry*, 392 U.S. at 29-30. Instead, moving aside Mr. Tracey’s jacket risked exposing what Mr. Tracey reasonably believed would be kept private beneath his jacket. *See Katz*, 389 U.S. at 351, 361 (1967). Accordingly, because the search underneath Mr. Tracey’s jacket went beyond a limited patting of Mr. Tracey’s outer clothing, and thus invaded more of Mr. Tracey’s privacy than was reasonably necessary to determine if he was armed and dangerous, Mr. Tracey’s Fourth Amendment Guarantees were violated. *See Sibron*, 392 U.S. at 65.

2. The Arresting Officer’s Search Underneath Mr. Tracey’s Jacket was not Supported by Specific Facts and Rational Inferences Necessary to Reasonably Warrant the More Intrusive Search

The protective pat-down search of a suspect’s outer clothing required by *Terry*, *Sibron* and their progeny, is constitutionally permissible because such a search is “confined in scope to an intrusion reasonably designed to discover guns, knives, clubs or other hidden instruments for

the assault of the police officer.” *Terry*, 392 U.S. at 29. The sole justification for a *Terry* frisk is officer protection, but “in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry*, 392 U.S. at 21. Here, where the specific actions taken by the arresting officer exceeded the constitutionally permissible scope of a *Terry* style pat-down frisk, the question then becomes whether the specific, articulable facts and their supported rational inferences warrant the arresting officer’s more intrusive search.

In the instant case, the arresting officer engaged in two separate stops and searches. *See Pennsylvania. v. Mimms*, 434 U.S. 106, 111 (1977) (*per curiam*); (R. 3). In *Mimms*, this court provided a model for a bifurcated search analysis: first addressing the constitutionality of an order to exit a stopped vehicle, then analyzing the *Terry* style pat-down search. 434 U.S. at 109-11. Here, the initial stop of Mr. Tracey was based upon reasonable suspicion that Mr. Tracey was engaged in criminal activity. (R. 8). When the arresting officer’s questions and Mr. Tracey’s responses and actions did not alleviate the arresting officer’s concerns for his safety, the arresting officer was justified in conducting a limited, pat-down search of Mr. Tracey’s outer clothing to determine if he was carrying a weapon. (R. 8-9). After the arresting officer’s pat-down search ended, and no weapons were revealed, the arresting officer’s reasons to suspect that Mr. Tracey was armed and dangerous ended as well. *See Ybarra v. Illinois*, 444 U.S. 85, 90-92 (1979) (where no articulable facts to suspect Ybarra possessed a weapon, including a frisk that revealed no weapons, subsequent search violated Ybarra’s Fourth Amendment guarantees); *also Dickerson*, 508 U.S. at 368 (where pat-down search revealed no objects which could reasonably be considered a weapon continued search of suspect’s pockets violated Fourth Amendment).

Following the analytical framework set forth by this Court in *Mimms*, the arresting officer’s second stop and more intrusive search, must entail a recalibration of the specific facts

and rational inferences to determine whether additional facts and inferences warrant the enhanced intrusion. *See* 434 U.S. at 109-11. After Mr. Tracey's pat-down, two additional facts emerge. (R. 3). First, the arresting officer's pat-down search over Mr. Tracey's outer clothing revealed no weapon. *Id.* This fact strongly supports the rational inference that Mr. Tracey was not armed and reduces any available justification for a subsequent intrusive search.

However, a second fact appeared shortly after the initial pat-down: the arresting officer glimpsed a vertical leather strap in Mr. Tracey's upper chest area. *Id.* While the officer was uncertain of the strap's purpose, he inferred that the strap might have concealed a firearm. *Id.* This new fact and inference rationally reintroduced the possibility that Mr. Tracey was armed, but must be mitigated by the results of the pat-down frisk, which revealed no weapon. *Id.* Further, Mr. Tracey's lack of resistance to frisk and compliance with the officer's order to stop, support the inference that Mr. Tracey would cooperate with another *Terry*-style frisk. *Id.*

These facts do not reasonably warrant a search more intrusive than the outer clothing pat-down solely authorized by *Terry*. *See* 392 U.S. at 22, 29-30. Rather, these facts warrant only the performance of a subsequent *Terry*-style stop and frisk, but Mr. Tracey was not afforded this Fourth Amendment guarantee. *See Sibron*, 392 US. at 65-66. Though the facts suggest that Mr. Tracey was responsive to the arresting officer's inquiries, (R. 3), the arresting officer did not ask what the strap was or what purpose it served, despite the opportunity to perform this minimally intrusive, yet essential component of a *Terry* stop. *See Terry*, 392 U.S. at 23; *United States v. Oates*, 560 F.2d 45, 63 (2nd Cir. 1977) (holding the right to interrogate during a stop is the essence of *Terry* and its progeny). Nor did the arresting officer attempt to perform a *Terry*-style frisk, (R. 3), another reasonably necessary and constitutionally appropriate alternative intrusion warranted by facts and inferences confronting the arresting officer. *See Terry*, 392 U.S. at 22. Instead, the arresting officer reached for Mr. Tracey's jacket and "forcefully" moved it aside,

constituting conduct outside the limited patting of outer clothing solely approved by *Terry*. *Sibron*, 392 U.S. at 65. Accordingly, the Court of Appeals properly concluded that the arresting officer conducted an illegal search in violation of Mr. Tracey’s Fourth Amendment guarantees. (R. 10).

C. The Plain View Exception to a Warrantless Search and Seizure does not Justify the Arresting Officer’s Search Because the Incriminating Character of the Leather Strap was not Immediately Apparent

In *Dickerson*, this court analogized the plain view doctrine of *Arizona v. Hicks*, 480 U.S. 321 (1987), to contraband felt in the course of a *Terry*-style pat-down search. 508 U.S. at 374-75. Under the plain view doctrine, if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right to the object, they may seize it without a warrant. *See Hicks*, 480 U.S. 321; *Michigan v. Long*, 463 U.S. 1032, 1050 (1983). Facing a similar set of facts, to those now before this Court, the *Dickerson* court addressed the “dispositive question” of “whether the officer who conducted the search was acting within the lawful bounds marked by *Terry* at the time he gained probable cause to believe that the lump in respondent’s pocket was contraband.” 508 U.S. at 377. Thus, the dispositive question now before the Court is whether the arresting officer acted within the lawful bounds marked by *Terry* when he developed probable cause that Mr. Tracey possessed a concealed weapon.

The dispute in *Dickerson* involved a “small, hard object wrapped in plastic,” felt during the course of a lawful stop and frisk. 508 U.S. at 377. The officer conducting the search “determined that the lump was [crack cocaine] only after squeezing, sliding and otherwise manipulating the contents of the defendant’s pocket – a pocket which the officer already knew contained no weapon.” *Id.* at 378 (quotations omitted). The *Dickerson* court rejected the object’s seizure because “the officer’s continued exploration of respondent’s pocket after having

concluded that it contained no weapon was unrelated to the sole justification of the search under *Terry*: the protection of the police officer and others nearby.” 508 U.S. at 378 (quotations and brackets omitted) (citing to *Terry*, 392 U.S. at 29).

However, to fully resolve the admissibility of the evidence under the plain-view doctrine, this Court analogized its plain feel facts, in *Dickerson*, to those in *Hicks* where:

this court held invalid the seizure of stolen stereo equipment found by police while executing a valid search for other evidence. Although the police were lawfully on the premises, they obtained probable cause to believe the stereo equipment was contraband only after moving the equipment to permit officers to read its serial numbers. The subsequent seizure of the equipment could not be justified by the plain view doctrine, this Court explained, because the incriminating character of the stereo equipment was not immediately apparent; rather, probable cause to believe that the equipment was stolen arose only as a result of a further search – the moving of the equipment – that was not authorized by a search warrant or by any exception to the warrant requirement.

508 U.S. 378-79 (citing to *Hicks*, 480 U.S. 321). The *Dickerson* court concluded that its facts were “very similar” to those confronted in *Hicks*, and held that the search of the *Dickerson* suspect’s pocket was not constitutional under the plain view exception because, “[a]lthough the officer was lawfully in a position to feel the lump in respondent’s pocket, because *Terry* entitled him to place his hands upon the respondent’s jacket[,] . . . the incriminating character of the object was not immediately apparent.” 508 U.S. at 379 (citing to *Horton v. California*, 496 U.S. 128, 136-137, 140 (1990) (holding unconstitutional the further search of an object if its incriminating character is not immediately apparent)).

The facts today are also very similar to those before this Court in *Hicks* and *Dickerson*. After the arresting officer completed a pat-down search of Mr. Tracey, and did not feel any object that was consistent with a weapon, the arresting officer noticed “what appeared to be a vertical leather strap underneath” Mr. Tracey’s jacket. (R. 3). Thus, although the arresting officer was lawfully in a position to view the vertical leather strap, (R. 8), by completing an “entirely proper” pat-down of Mr. Tracey’s outer clothing, (R. 9), the incriminating character of the

vertical leather strap was not immediately apparent. (R. 3). The stipulated facts reveal that the arresting officer was “unsure of the strap’s purpose and did not have the opportunity to get a close look at it.” *Id.* Though the arresting officer suspected that the object “was consistent” with an object used to “carry a concealed weapon,” his suspicion was confirmed only by conducting a further search, a search outside the bounds set by *Terry*, a search requiring the arresting officer to move aside Mr. Tracey’s jacket and view a concealed weapon beneath the jacket. Thus, the court of appeals properly concluded that the plain view doctrine does not apply, and that moving aside Mr. Tracey’s Jacket, before obtaining probable cause, constituted an illegal search in violation of the Fourth Amendment. (R. 10); see *United States v. Askew*, 529 F.3d 1119, 1133 (D.C. Cir. 2008) (holding partial opening of suspect’s jacket was an unconstitutional search outside the bounds of *Terry* where incriminating characteristics of evidence in question were not immediately apparent).

D. Because Mr. Tracey Complied with the Arresting Officer’s Requests, A More Intrusive *Terry* Search was not Reasonably Necessary

The district court cites to a North Dakota Supreme Court opinion as authority for the proposition that a suspect’s attempts to impede an effective pat-down render a more intrusive *Terry* search constitutionally permissible. (R. 5), *State v. Heitzmann*, 632 N.W.2d 1, 9 (N.D. 2001). The *Heitzmann* court relied upon this Court’s decision in *Adams v. Williams*, 407 U.S. 143 (1972), along with to several other state court opinions. See e.g. *State v. Warren*, 603 P.2d 550, 552 (Ariz. 1979) (upholding search into suspect’s pocket when suspect pushed officer’s hands and refused to keep hands placed on wall). The district court concluded, applying *Heitzmann*, that Mr. Tracey’s slow identification, cursing and berating of the arresting officer, and brushing aside of the arresting officer’s hand rendered it “difficult to imagine” that the arresting officer “was able to perform an effective pat-down. (R. 5-6). However, the stipulated facts distinguish the frisk-search of Mr. Tracey from the district court’s cited authority because

Mr. Tracey's conduct fell short of conduct that threatened the arresting officers safety or rendered a pat-down impossible.

1. *Adams v. Williams*

First, *Adams* authorized the more intrusive search of reaching through the windshield of a car and grabbing a fully loaded revolver from the defendant's waistband because the defendant failed to respond to the arresting officer's orders to exit the vehicle, thus making it impossible for the officer to carry out an effective pat-down without placing himself in greater risk. *Adams*, 407 U.S. at 148; *see also* Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment*, § 9.6, (2008); *State v. Smith*, 693 A.2d 749, 752 (Md. 1997). Unlike the situation confronted by the officer in *Adams*, Mr. Tracey's actions did not render an effective *Terry* search impossible. Indeed, Mr. Tracey "did not physically resist" the initial frisk, and Mr. Tracey "complied," albeit grudgingly, when the arresting officer asked him to "stop and turn around." (R. 3). Moreover, when the arresting officer reached toward him, Mr. Tracey simply "brush[ed]" the arresting officer's "hand aside." *Id.* Because Mr. Tracey never took actions that made a frisk impossible to perform, but rather complied with the arresting officer's requests and did not resist the frisk, the *Adams* decision cannot justify the arresting officer's more intrusive search of forcefully moving the exterior of Mr. Tracey's jacket.

Second, the *Adams* decision is distinguishable because the arresting officer in *Adams* had precise information about the location of a handgun and narcotics on a particular suspect. 407 U.S. at 144. The informant was "personally known" to the arresting officer, had provided information to the officer in the past, and provided information that "was immediately verifiable at the scene." *Id.* at 146. Moreover, the scene itself was dangerous, with the informant pointing to a suspect "who was sitting alone in a car in a high-crime area at 2:15 in the morning." *Id.* at 147. Unlike the precisely, identified suspect in *Adams*, the stipulated facts here reveal that Mr.

Tracey “did not match the description of the R-T official,” nor did the arresting officer possess reliable information revealing the precise location of a handgun, and nor do the stipulated facts describe McDonough Square as a “high crime area.” The *Adams* court relied upon these circumstances to conclude that “the policeman’s action in reaching to the spot where the gun was thought to be hidden constituted a limited intrusion designed to insure his safety, and . . . that it was reasonable.” *Id.* 148. Because the arresting officer here lacked precise and reliable information singling out Mr. Tracey as a dangerous suspect possessing a particular weapon in a particular place, and because the facts do not suggest that McDonough Square was a high crime area, this Court should not conclude that forcefully moving the left exterior of Mr. Tracey’s jacket was reasonable to insure the arresting officer’s safety.

2. *Heitzmann*

The *Heitzmann* decision, cited in the District Court’s order, is distinguishable for similar reasons. The arresting officer in *Heitzmann* encountered the defendant during a traffic stop, initiated at the request of a deputy on the county’s drug task force. 632 N.W.2d at 4. The officer arrested the driver of the vehicle who warned the officer that there was a pistol in the back of the vehicle. *Id.* In addition, the drug task force deputy alerted the arresting officer that the passenger-defendant was on probation, had recently received a shipment of methamphetamine, and was probably “agitated” from an earlier search of his home conducted by the deputy. Last, the deputy warned the arresting officer to “be cautious” when approaching the defendant. *Id.* at 5. Like *Adams*, but unlike the instant case, the initial police stop in *Heitzmann* was based upon reliable information suggesting the particular defendant recently received a shipment of methamphetamine, could have possessed a firearm, and was told by another deputy who had recently interacted with the suspect to “use caution”. 632 N.W.2d. at 8-11.

Moreover, the circumstances of the pat-down further distinguish *Heitzmann* from the instant case. 632 N.W.2d at 8-9. During the initial pat-down of the *Heitzmann* defendant's pockets, the police officer "noticed a 'bunch of stuff'" and was "unable to tell if there was a weapon in the pockets." 632 N.W.2d at 8. At this point the confrontation "escalated," the defendant made "quick evasive movements as though he was going to run around the front of the truck," requiring the officer to "grab his sleeve." *Id.* at 8-9. The suspect continued to resist, and "pull[ed] his arm out of his jacket," *id.* at 9, and "eventually escaped from the officer's grasp and attempted to flee." *Id.* at 10. The *Heitzmann* court concluded, where the "officer was required to hold onto Heitzmann to attempt to frisk him and because of Heitzmann's nervousness . . . the officer's removal of the wallet . . . from Heitzmann's pocket was reasonable under these extenuating circumstances." 632 N.W.2d at 10.

3. Conclusion

Two crucial distinctions emerge between the instant case, and the *Heitzmann* and *Adams* decisions. First, the arresting officers in *Heitzman* and *Adams* both possessed reliable information suggesting the particular defendant posed a precise threat. Armed with such precise and particular knowledge, their more intrusive *Terry* searches received heightened justifications, whereas, the forceful and intrusive conduct of the instant arresting officer could only be justified by ambiguous inferences based on Mr. Tracey's haircut, apparel, behavior, and a vertical leather strap.

Second, the actions taken by the *Heitzmann* and *Adams* defendants posed a greater impediment to the arresting officers' ability to effectuate a frisk than those taken by Mr. Tracey. The *Adams* defendant refused to exit his vehicle upon the demands of the arresting officer and thus rendered a *Terry* frisk impossible, while the *Heitzmann* defendant repeatedly moved away from the arresting officer, pulled his arm out of his jacket, and even attempted to flee. Moreover,

the arresting officer in *Heitzmann*, felt objects in the suspect's pocket that could have been weapons, no such objects were felt during Mr. Tracey's pat-down. Further, the conduct by the *Heitzmann* defendant stands in sharp contrast to Mr. Tracey's lack of physical resistance to the initial frisk and grudging compliance with the arresting officer's request that he stop and turn around. The simple act of brushing aside the arresting officer's hand falls well short of the actions taken by the *Adams* and *Heitzmann* defendants. Thus, where both reliable and particular information about the threat posed by the suspect is absent and where the conduct of the suspect does not render a *Terry* search impossible or dangerous, the arresting officer here lacked sufficient justification to conduct the forceful and intrusive search behind Mr. Tracey's jacket.

II. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PROHIBITS THE TERMINATION OF A POLICE OFFICER FOR HIS PARTICIPATION IN AN EXTRAMARITAL AFFAIR

A. FUNDAMENTAL RIGHTS ANALYSIS: The Due Process Clause Prohibits Mr. Tracey's Firing Because Personal Dignity and Control over Intimate Affairs is a Fundamental Right Deeply Rooted in this Nation's History and Tradition and Implicit in the Concept of Ordered Liberty

The state may not fire someone for engaging in Constitutionally-protected activity. Mr. Tracey was fired because he chose to date Ms. Malone. *Lawrence* holds individual decisions, by both married and unmarried persons, "concerning the intimacies of their physical relationship" are "a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (citing and adopting *Bowers v. Hardwick*, 478 U.S. 186 (1986) (Stevens, J., dissenting)). Therefore, Mr. Tracey's firing was unconstitutional.

1. Personal Dignity and Control of Intimate Affairs is a Fundamental Right Because it is Deeply Rooted in this Nations History and Tradition and is Implicit in the Concept of Ordered Liberty

Personal Dignity and Control over intimate affairs satisfies this Court's most recent and restrictive standard for what constitutes a fundamental right: a fundamental right is one that is deeply rooted in this Nation's history and traditions and is implicit in the concept or ordered

liberty. *Chavez v. Martinez*, 538 U.S. 760 (2003). However, as Justice Harlan II pointed out in his *Ullman* dissent, “[t]radition is a living thing.” *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (dissent vindicated by *Griswold* striking down law challenged in *Ullman*). Therefore, “[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.” *Lawrence*, 539 U.S. at 572 (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)). Further, *Lawrence* and *Atkins* point to the idea that objective factors such as state legislative decisions, and non-enforcement of laws, can be strong evidence bearing on the exact nature of a tradition. *Lawrence*, 539 U.S. at 559, 569-70; *Atkins v. Virginia*, 536 U.S. 304 (2002).

Lawrence's choice of *Griswold* as the “the most pertinent starting point,” with its broad protections on intimate affairs, casts additional doubt on the viability of *Glucksberg's* conservative, narrow vision of fundamental rights (deeply rooted in this Nation's history and traditions), which only originally ever got the support of four to five justices (Justice O'Connor joined the five Justice majority, but also wrote one of five concurring opinions). 539 U.S. at 563; *Washington v. Glucksberg*, 521 U.S. 702 (1997). This court should recognize the right to decisional non-interference in intimate affairs for public employees. Intimate decisions are those which primarily affect oneself (or those involved in the intimate association) and which do not tangibly harm others.

Control over intimate affairs is expressed in criminal law theory, over five hundred years of Western philosophy, the U.S. Constitutional order, legal precedents, and the history of this Nation. Non-interference in Mr. Tracey's private dating choices is protected in two lines of cases-- one establishing dynamic due process privacy rights, and one line protecting freedom of intimate association, as well as the recent *Lawrence* case, despite its ambiguities.

Constitutional protections on sexual autonomy and privacy are not limited to marriage. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). Most commentators believe *Eisenstadt* was logically incoherent when it used the Equal Protection Clause to extend to non-married couples the right to access contraception, yet refused to formally recognize any protection on a non-married person's right to choose to have sex. See Ira Mark Ellman, et al., *Family Law: Cases, Text, Problems* 1003 (1998). *Lawrence* is properly read as reconciling this inconsistency and clarifying that the Fourteenth Amendment substantive due process right to autonomy and privacy in intimate affairs applies equally to all adults-- married or single, gay or straight.

a. Respect for an Individual's Right to Develop Personhood and to Make Decisions Over Intimate Affairs Absent Harm to Society is Deeply Rooted in this Nation's History and Traditions

Understanding the *Lawrence* opinion is impossible without understanding the dignity jurisprudence that Justice Kennedy has been developing in his recent opinions. The concept of dignity is central to International and European human rights law, which Justice Kennedy teaches in Austria. In 2003 Justice Kennedy gave a talk to the ABA which covered incorporating aspects of dignity into U.S. jurisprudence. Dignity has been a consistent theme in Kennedy's recent opinions. See *Lawrence*, 539 U.S. 558 (mentioning dignity five times); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851-52 (1992) (dignity was mentioned seven times by the Justices, and Kennedy wrote in terms of a woman's "dignity and autonomy," her "personhood," her "destiny," and her "conception of ... her place in society."); *Gonzales v. Carhart*, 550 U.S. 124 (2007) (framing debate around "respect for the dignity of human life").

Dignity has deep roots the last five hundred years of Western thought and helps frame the concepts of decisional privacy, autonomy, liberty and "the pursuit of happiness." In 1486, the Italian Christian humanist Giovanni Pica Della Mirandola wrote, "We [the Supreme Maker] have given you, O Adam, no visage proper for yourself, nor endowment properly your own, in order

that whatever place, whatever form, whatever gifts you may, without premeditation, select, these same you may have and possess through your own judgment and decision. . . . you may, as the free and proud shaper of your own being, fashion yourself in that form you may prefer.” *On the Dignity of Man*. With no proper universal visage, the individual must define happiness and the meaning of their life, rather than society providing a singular purpose for all its members.

Dignity repudiates medieval concepts of the state as having inherent, divine authority to regulate any and all aspects of its subjects lives and re-conceives society's proper role as empowering individuals in development of their personality. Therefore government is necessary to prevent self-interested, rational people from harming each other, but is not necessary to dictate individual morality, which must be sorted out using experience and reason. This framework was central to the thinking of Madison and his contemporaries who saw the role of government not only to preserve life and property, but also to help empower people to control their destiny, pursue happiness, and even reach self-actualization. Jason S. Marks, *Beyond Penumbra and Emanations: Fundamental Rights, the Spirit of the Revolution, and the Ninth Amendment*, Seton Hall Cost. L.J. 435, 456-67 (1995). Thus, “[t]hese 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. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” *Casey*, 505 U.S. at 851.

The writings of Immanuel Kant, James Madison and John Stuart Mill developed this notion of inherent dignity. For Kant inherent human dignity meant that humans had inherent value and were not to be treated as mere means to an end, by either the state or another individual. For Mill, it meant “[t]hat the only purpose for which power can be rightfully

exercised over any member of a civilized community, against his will, is to prevent harm to others.” John Stuart Mill *On Liberty*, reprinted in, Anita L. Allen, ed. *Privacy Law and Society* 187 (West 2007). Therefore, government must protect human beings in their property, from bodily injury and death, but also in a third intangible way-- in their “spiritual nature” and their “right to enjoy life,” their “right to be let alone-- the most comprehensive of rights and the right most valued by civilized men.” Samuel Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 193 (1890); *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

After World War II, dignity became the central concept in human rights jurisprudence. For example, the Universal Declaration of Human Rights starts with, “[w]hereas recognition of the inherent dignity. . .” and Article One states, “[a]ll human beings are born free and equal in dignity and rights.” Further, Article 22 protects the right to “dignity and the free development of. . . personality.” This idea that humans have inherent worth deserving of respect by governments, and that it is up to the individual to define happiness and decide the meaning of their life, has been given prominence in international and U.S. rights jurisprudence because it is the antithesis to fascist ideology, which held that meaning, power, and progress come from the state, and that individuals are mere means for the state to use to pursue its goals. The prominence of dignity and autonomy increased dramatically after World War II in U.S. jurisprudence as well. *See generally* Paul M. Secunda, *The (Neglected) Importance and Being Lawrence: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. Davis L. Rev. 85, 108-12, n.188 (2005) (noting increase in phrase “the right to be let alone” from three times prior to 1946 to 42 times between 1946 and 2006).

During the Twentieth century, the United States increasingly defined itself in opposition to authoritarian forms of government. This necessitated repudiation of this Court's and Nation's

praise for eugenics as well as other efforts to define the proper meaning of life purely in terms of majoritarian ethos. *Id.* Thus, the central aim of sovereign power in the United States for at least the last fifty years has been to empower individuals to develop their personality, their relationships and their own vision of happiness. *See Bd. of Dirs. of Rotary Int'l. v. Rotary Club of Duarte*, 481 U.S. 537 (1987), 545; J.B. Schnoewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* (1998) (autonomy is essential to human personality); Jed Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737, 740-47 (1989) (privacy rights are a necessary limit on government to prevent totalitarianism); Joseph Kupfer, *Privacy, Autonomy and Self-Concept*, 24 Phil. Q. 81, 81-82 (1987) (arguing that only by being consistently treated by society as an autonomous being, can one develop a subjective sense of moral autonomy necessary for participation in a democratic society); Joel Feinberg, *Autonomy, Sovereignty and Privacy: Moral Ideals in the Constitution?*, 58 Notre Dame L. Rev. 445 (1983).

Within this context of humans having inherent dignity and 'no proper visage,' it is easier to understand what Justice Kennedy meant when he wrote, “[t]he instant case involves liberty of the person both in its spatial and more transcendent dimensions.” 539 U.S. at 558. In *Lawrence*, the heterosexual majority had essentially said that they have the right to engage in oral and anal sex, as the title of the “Homosexual Sodomy,” law, the lack of any criminal prohibition on fornication and Constitutional protections on sex within marriage indicated, yet homosexuals had no legal outlet for their sexual expressions and development. What Texas tried to do in *Lawrence* was a not only an invasion of homosexual plaintiff's home life, and infringement of their right to control their bodies, but also an affront to their inherent dignity, expressed in terms of their right to be treated by their government with respect as rational, autonomous, God-made human beings.

Thus, the precedents of this Court have used “privacy” and due process as a means to protect three types of individual rights: property (privacy in the home, control over one's image),

bodily integrity (protections from harm and freedom over one's body), as well the “more transcendent dimensions” involving autonomy and free development of personhood (dignity). *Lawrence* represents the first time a clear majority of this Court endorsed protections for the individual's dignity and free development of personality by recognizing a Constitutional right to decisional non-interference in matters of intimate affairs. *Secunda*, 40 U.C. Davis L. Rev. at 111.

b. The Right to Decisional Non-Interference in Intimate Affairs is Supported by Normative Principles and is Implicit in the Concept of Ordered Liberty

Protections on privacy and autonomy absent objective government justifications, such as harm to another person or damage to an institution are deeply rooted in Western thought and history, as the previous section shows. Contrary to what many many social conservatives intuitively think, this Court's privacy and autonomy decisions are not based on contemporary post-modernist challenges to any attempts at establishing order and recognizing objectivity. Rather, court protection of privacy is a means to establish a zone for the development of personhood, and is based on the normative good “of the protection of the integrity of the personality.” *See* Daniel J. Solove, *Conceptualizing Privacy*, 90 Cal. L. Rev. 1087, 1116-19 (2002). Therefore, these privacy protections, rather than tearing down social order, are implicit and necessary in any concept of ordered liberty.

Courts have used privacy to protect two types of fundamental employee rights: First, by restricting an employer from gaining access to certain information about an employee, but also by preventing the use of that information, once gathered, in order to protect the employee's ability to make autonomous, private decisions without fear of repercussion. *Thorne v. City of Segundo*, 726 F.2d 459, 468 (9th Cir. 1983) (reversing dismissal of § 1983 claim), *cert. denied*, 469 U.S. 979 (1984). In *Thorne*, a female city employee applicant took a polygraph to become a police officer and was asked about her sexual relationship with a married police officer and the

miscarriage of the child from that relationship. 726 F.2d at 462. The court held that once information was gathered in violation of an individual's privacy rights, use of that information in an adverse employment decisions would also be a unconstitutional violation of that person's due process privacy rights. *Id.* Thus, privacy rights are not only used to protect an individual's ability to control information about herself, but often also as a means to protect autonomous decision-making including dating choices, even adulterous ones.

Protections on privacy in sexual matters also exists in non-Western legal systems. For example, Islamic law “places privacy interests at the heart of every prosecution for consensual sex crimes.” Seema Saifee, Note, *Penumbras, Privacy, and the Death of Morals-Based Legislation: Comparing U.S. Constitutional Law with the Inherent Right of Privacy in Islamic Jurisprudence*, 27 *Fordham Int'l L.J.* 370, 453 (2003). One of Islamic jurisprudence's many protections on privacy is a procedural protection of sexual privacy by requiring four witnesses of good moral character to testify before anyone can be convicted of adultery. *Id.* at 370-78, 412-37. The result is that only sexual crimes which are quite open and notorious result in criminal penalties. *Id.*

Autonomy and privacy in intimate affairs is necessary to fulfill needs in human community. Carlos A. Ball, *Communitarianism and Gay Rights*, 85 *Cornell L. Rev.* 443 (2000). One who has a more puritan or republican (rather than a libertarian) reading of the Constitutional structure, might not believe the normative values behind privacy. They also may think that too many protections on sexual autonomy unwisely isolates individuals from society. However, privacy protections on sexual autonomy are not excessively individualistic, but rather protect diverse communities, which “assist individuals in forming identities and play a vital role in the development of individual character and sense of self-worth.” *Id.* at 473.

Sexual acts as well as expressions of sexual identity are normal ways in which humans express themselves and develop identity within any community. *See* Brief for American Psychological Association et al. as Amici Curiae Supporting Petitioner at 15-16, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152338. Just as restrictions on homosexual sex threatened the fabric and stability of gay community, criminalization of adultery prior to legal divorce but after a couple has separated, robs people of a powerful way (their sexuality) of forming new bonds in the community. Recently separated individuals, many of whom have been deserted by their spouse, seek relationships in communities because they are lonely, desire sexual fulfillment and for the emotional and economic stability that a new relationship or marriage will bring. To criminalize or punish such behavior, absent harm to a third party, isolates people and undermines ordered liberty. This is especially true given the difficulty that older couples have in forming meaningful relationships in community, which is exacerbated by adultery laws and their abusive application by overbearing employers. *See* Sharon Jayson, *Singles Find Love, Marriage After Age 45*, USA Today, July 1, 2008.

Further, privacy is necessary to enjoy sex. Intimacy is diminished absent safety and privacy. Fear of prosecution or loss of one's job based on dating choices diminishes an individual's ability to enjoy sex.

Thus, the idea of non-interference with intimate decisions that primarily affect oneself and that do not harm others is expressed in criminal law theory, over five hundred years of Western philosophy, the U.S. Constitutional order, legal precedents, scientific understanding, statutes, and the history of this Nation. It applies even to adulterous conduct, for the legality of an action, while it may make a government interest slightly stronger, does not lower the level of scrutiny nor remove a right from Constitutional protection. *Swope v. Bratton*, 541 F.Supp 99 (W.D. Ark. 1982) (boss's inquiry into affair by plaintiff who was married, but separated, violated

his privacy rights because there was no damage to job performance or public image of police department).

For this court to condone the police department's firing of Mr. Tracey would be to assert that Mr. Tracey's supervisor was a better arbiter of Mr. Tracey's personal intimate decisions than Mr. Tracey himself. It would also require holding that the majority in each state has inherent authority to dictate private morality and stifle personal development. Indeed, absent a desire to protect citizens, such state interference with Mr. Tracey's intimate affairs necessitates treating him as incapable of making decisions which primarily affect his own life and personal development and harm no others. It is to treat him as less than a fully rational human being. It denies his dignity.

Further, it goes against our Constitutional order which provides a sphere of privacy for the development of human personality by protecting individual rights and inherent dignity over exercise of state power, and which provides “substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” *Lawrence*, 539 U.S. at 572

2. Freedom of Intimate Association is a Fundamental Right Protected by the Due Process Clause of the Fourteenth Amendment

The First Amendment reads, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. amend. I. It includes a general protection on freedom of association, and applies to the states via the Due Process Clause of the Fourteenth Amendment. *NAACP v. Alabama, ex rel. Patterson*,. 357 U. S. 449 (1958). Since *NAACP*, the fundamental right to freedom of association has also been applied to far more situations than political advocacy groups. Addressing whether a private civic organization that wished to exclude women

was subject to a Minnesota anti-discrimination statute, the *Roberts* court held that, in addition to expressive political groups, the Freedom of Association also applies to social relationships:

In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty.

Roberts v. U.S. Jaycees, 468 U.S. 609, 617-18 (1984).

This line of cases protects what this Court describes as the fundamental right to “intimate associations.” *Bd. of Dirs. of Rotary Int’l. v. Rotary Club of Duarte*, 481 U.S. 537, 545 (noting “[t]he Court has recognized that the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights”). Indeed, the *Griswold* decision's penumbra of privacy rights is rooted in the “freedom to associate and privacy in one's associations.” *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (quoting *NAACP v. Alabama*, 357 U.S. 449, 462 (1958)).

In its most thorough explanation of the right to intimate associations to date, the Court in *Roberts v. U.S. Jaycees* noted that if

the Bill of Rights is designed to secure individual liberty, [then] it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. . . . Protecting these relationships from unwarranted state interference therefore safeguards the ability to independently define one's identity that is central to any concept of liberty. . . . [these personal bonds] act as critical buffers between the individual and the power of the State.

468 U.S. at 618-19.

Roberts laid out a sliding-scale balancing test in which associations get more protection in proportion to their “size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent.” *Id.* at 620. Thus, a club that offers its services to the

public at large will get little or not protection; whereas, the smaller, more selective and more intimate an association is, the stronger its protection under the intimate associations doctrine.

Under the *Roberts* test, social disapproval of a relationship does not remove it from First Amendment protection. *Id.* at 316-17. Key to whether the right of free association applies is simply whether the individuals wish to associate. “[W]hen the State interferes with individuals’ selection of those with whom they wish to join in a common endeavor, freedom of association in both of its forms may be implicated.” *Id.* at 618. Significant restrictions on freedom of association generally trigger strict scrutiny; however, the Supreme Court has not provided guidance as to the level(s) of scrutiny in the intimate associations context. *Davis v. Federal Election Com’n*, 128 S.Ct. 2759 (2008) (strict scrutiny on freedom of association in political context).

Naturally, the analysis under freedom of intimate association and under substantive sexual privacy rights often intertwine. *See Corrigan v. City of Newaygo*, 55 F.3d 1211, 1215 (6th Cir. 1995) (personal friendships which are related to privacy and are protected by the due process clause are protected under freedom as association analysis); *Bowers v. Hardwick*, 478 U.S. 186, 206 (1986) (Blackmun, J., dissenting) (using both approaches and noting “the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution’s protection of privacy.”) In the area of freedom of intimate associations, the Circuits are split as to what protection is given to adulterous relationships in the public employment context, and they have repeatedly cried out for guidance. Marcus, *Freedom of Intimate Association* at 280-90. Additionally, there is a strong need to integrate a freedom of intimate association analysis with due process sexual privacy/autonomy cases. Although the intimate association cases are not easily categorized, and there are splits within circuits, they generally fall into three categories: 1. Strict scrutiny (5th, 6th, 9th), 2. *Roberts* sliding scale

balancing test/nexus test/undue burdens test/other balancing test (1st, 2nd, 5th, 6th, 8th, 10th) 3. no protection or minimal protection under brightline test or rational basis review (11th, 3rd, 6th). *Id.* at 280-99; *Wilson v. Taylor*, 658 F.2d 1021 (5th Cir. Oct. 1981). (requiring compelling interest and restriction closely drawn in order to avoid unnecessary abridgement of the constitutional right of free association).

The cases giving minimal or no protection to sexual privacy and intimate adulterous associations are invalid after *Lawrence*, because they relied heavily on *Bowers v. Hardwick*. See generally, *City of Sherman v. Henry*, 928 S.W.2d 464 (Tex. 1996) (citing *Bowers* sixteen times and departing from prior state precedent); *Shahar v. Bowers*, 114 F.3d 1097, *en banc*, (11th Cir. 1997) (upholding Georgia's termination of a lawyer based on her participating in a lesbian religious commitment ceremony and citing *Hardwick* at least six times). In conclusion, some sort of strict scrutiny or a *Roberts*-based balancing test should apply to the current case under a freedom of intimate associations analysis.

3. Mr. Tracey's Firing was Unconstitutional Because petitioner cannot advance a compelling government interest with Means Narrowly Tailored to Advance that Government Interest
a. Facial Invalidity

There is a strong consensus among jurists that the criminal law is not the proper sphere to enforce sexual morality. Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 Calif. L. Rev. 335 (2000); Richard Posner, *Sex and Reason* 261, 261 n.44 (1992) (noting that fornication and sodomy laws undermine marriage by forcing unqualified people into marriages, and that an attempt to enforce New Jersey's adultery statute led to its swift repeal); Joel Feinberg, *The Moral Limits of the Criminal Law, Volume One: Harm to Others* (Oxford 1984); John Stuart Mill, *On Liberty* (1859).

In 1955 the American Law Institute made clear that it opposed "criminal penalties for consensual sexual relations conducted in private." ALI, Model Penal Code § 213.2, Comment 2,

372 (1980). It justified its decision on three grounds: (1) The 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. ALI, Model Penal Code, Commentary 277-280 (Tent. Draft No. 4, 1955).

Mr. Tracey's situation is an example of such blackmail, because Chief Malone, who is hardly an impartial actor, fired Mr. Tracey absent any complaint from the public or from the separated spouse. The facts indicate Chief Malone fired Mr. Tracey the day after Malone discovered about the dating relationship between Ms. Malone and Mr. Tracey, while giving the reason "conduct unbecoming of an officer." (R. 4). Later, after having time to read statute books if he so pleased, Chief Malone attempted to ground his rash judgment in Craven's adultery statute. Criminalizing adultery does little to stop adultery, which is usually the symptom, not the cause of a failed marriage, and rather increases the power of public employers to guise their arbitrary decisions in the criminal law.

b. As Applied

The foundation of a free society is the power of the individual, as a rational being, to live his life as he pleases absent clear government sanctions made pursuant to properly constituted authority. The default position in a free society is liberty and autonomy. *See* Joel Feinberg, *Harm to Others* (1984). Thus, all coercive action must be justified by some persuasive reason. *Id.* Although there is no clear public-private line beyond which the government may not go, certain matters primarily affect only the individual, and not society at large. *Lawrence* made clear that the state has a diminished interest in regulating adult private consensual sex, and that moral disapproval, alone, was not a legitimate justification for preventing people from making choices which primarily affect their own lives, and do not harm others.

After Lawrence Regulating Private Sexual Conduct that Harms no Other Person is Not Within the Proper Power of Government, and therefore, Government Coercion that Relies on Craven's Adultery Statute is Invalid as Applied to Mr. Tracey. Therefore, this court should recognize in its analysis that Mr. Tracey actually broke no laws because he engaged in constitutionally protected activity.

c. Unconstitutional Condition on his Employment

Firing Mr. Tracey based on his dating decisions is an unconstitutional condition of his employment by a public employer, and thus, violates his Due Process Rights to sexual privacy and freedom of intimate associations. Since freedom of intimate association and the corresponding privacy rights are fundamental rights we urge this court to adopt strict scrutiny, or in the alternative, a balancing test with a presumption in favor of liberty during off-duty conduct. Thus, to overcome Mr. Tracey's rights of association and decisional non-interference in intimate affairs, the state the state must present a compelling interest and any restriction must be closely drawn in order to avoid unnecessary abridgement of associational freedoms. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976).

The state may often exert more control an employer, than it would be able to over the general public, due to its interest in office discipline and efficiency. *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 80 (2004) (upholding termination of police officer who made and sold videos of himself stripping in his police uniform, based on state's "legitimate and substantial interests"). However, the state may not condition public employment upon the relinquishment of protected right, without a clear nexus between the conduct and interests. *Id.* State interests must also be sufficient to *justify* the intrusion on the particular right. *Id.*; *Lawrence*, 539 U.S. at 560 (noting that the "Texas statute furthers no legitimate state interest which can justify its intrusion into the individual's personal and private life"). Finally, "policemen, like teachers and lawyers, are not

relegated to a watered-down version of constitutional rights.” *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).

Under a *Roberts* sliding-scale balancing test, marriage gets the highest protection while all intimate dating relationships get nearly as much protection, even adulterous ones. *Kraus v. Vill. of Barrington Hills*, 571 F. Supp. 538, 541, 543 (N.D. Ill. 1982) (holding that absent illegal activity, freedom of association is inviolate, but failing to rule based on standing and abstention grounds); *Wilson v. Swing*, 463 F.Supp. 555 (M.D. N.C. 1978) (adulterous conduct protected by freedom of association and privacy). In *Kraus*, a married couple who regularly hosted legal sex swinger parties in their house sued their city in order to prevent police officers from continuing to harass visitors to their house by issuing vehicle citations. 571 F. Supp. at 540. The *Kraus* court noted that since the First Amendment is designed to shield diverse communities, beliefs and lifestyles from majoritarian regulation, “[t]he litmus test of Constitutionality is not whether the conduct is distasteful.” *Id.* Applying this reasoning to the present case, Mr. Tracey's conduct was not illegal because it was protected under *Lawrence* as adult consensual sexual activity. Further, the mere fact that Mr. Tracey's conduct was distasteful, does not make his actions outside of due process protection.

To regulate off-duty conduct, the police department should be required to focus on objective evidence to demonstrate that the alleged harm caused by his expression was “real, not merely conjectural.” See *United States v. Nat'l Treasury Empl. Union*, 513 U.S. 454, 475 (1995). Examples of objective evidence are a complaint either by the offended spouse or from a member of public which could be used to demonstrate actual damage to the reputation of the department.

The heightened scrutiny approach is consistent with the privacy and intimate association case law as it stood before *Bowers* (1986). See *Briggs v. N. Muskagee Police Dept.*, 563 F.Supp. 585 (D. Mich. 1983), *aff'd*, 746 F.2d 1475 (5th 1984) (table decision), *cert. denied*, 473 U.S. 909

(1985). In *Briggs*, a small town part-time police officer separated from his wife and then moved in with a new lover (his wife and he subsequently divorced that year). *Id.* at 586. The part-time officer was suspended and subsequently fired because he violated Michigan's anti-cohabitation law (the discipline was pursuant to a procedurally-proper hearing). *Id.* at 587. The court reasoned that privacy rights protect “the *individual*, married or single, to be free from unwarranted governmental intrusion into” their intimate affairs. *Id.* at 588 (citing *Eisenstadt*, 405 U.S. at 453 (emphasis in original)). The court noted the “similarity between the interests of an unmarried couple in choosing to live together, and the interests in personal privacy and freedom of association previously recognized by the Court as fundamental.” *Id.* Further, the court reasoned that “[m]arriage exists to facilitate the expression of emotional and sexual intimacy. That intimacy is so fundamental to individual liberty that it demands constitutional protection. Nothing is different about the psychological and emotional needs of unmarried couples which would justify denying them the same protection.” *Id.*

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 such majoritarian coercion.” *Id.* at 590. This reasoning, as applied to the present case, reveals that neither the fact that adultery is criminalized in Craven, nor that fact that it may be disapproved of by the general community, if true removed it from Constitutional protection.

The *Briggs* case borrowed the balancing test from *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), and required the government to show a “substantial justification” for the officer's discipline while conducting a “careful consideration of both the interests of the individual and the interests of the government,” (an approach which has been used frequently since). *Id.* at 587

The *Briggs* case is ideal because it based its equally in “constitutionally-guaranteed rights of privacy and association.” *Id.* Indeed, had Justices Stevens and Blackmun triumphed three years later in *Bowers*, *Briggs*' integration of autonomy and privacy rights and application of heightened scrutiny would have been standard. Instead, the *Bowers* decision skewed this Court's privacy jurisprudence far off the path it was on in the early 1980s, and has made the privacy cases inconsistent with this Court's intimate associations jurisprudence. Thus, to fulfill *Lawrence*'s adoption of Justice Stevens' *Bowers* dissent, and to integrate this court's privacy and intimate associations cases, this Court should adopt the approach taken in *Briggs*.

Mr. Tracey has been separated from his wife for one and one half years, and neither she nor anyone else has complained about Mr. Tracey's relationship with Ms. Malone to the police department. Since petitioner cannot rely on preventing harm to any person or institution, and relies on moral disapproval alone, they have no legitimate interest.

d. Neither the Criminalization of Adultery nor the Firing of Mr. Tracey Furthered the Interest of Promoting Marriage

Criminalizing adultery can undermine marriage and reconciliation. *State v. Lynch*, 562 P.2d 1386, 1391 (Ariz. Ct. App. 1977); Model Penal Code § 213.6 note on adultery and fornication at 433 (Proposed Official Draft 1962). Further, criminalization of adultery undermines family court proceedings by creating a Constitutional right to remain silent in such proceedings. Further, there is no evidence that criminalizing adultery and other sexual acts has any deterrent effect. MPC at 437. Adultery remains the symptom, not the cause of a failed marriage in most cases. *Id.*

e. Firing Mr. Tracey did Nothing to Promote Public Safety, or Ensure Productive Employee Performance

There is no evidence that Mr. Tracey was anything but an upstanding officer. Lacking any objective evidence to show harm to the institution of the police force, there is no clear nexus

between the adverse employment action and job performance. This alone should make the firing unconstitutional.

f. Mr. Tracey's Private, Off-Duty Relationship with Ms. Malone did Nothing to Hurt the Public Image of the Police Department

The public image of a police department has justified many restrictions on employees' off-duty conduct. *See City of San Diego, Cal. v. Roe*, 543 U.S. 77, 80 (2004). In *Roe*, a police officer recorded and sold videos of him stripping in his police uniform. *Id.* Key to the Court's outcome was that the selling of the videos was commercial activity, and also that the use of the uniform and wider availability of the videos created a reasonable risks of harm in the mind of the employer. Here, no such actual harm or risk of harm existed. Mr. Tracey's relationship was private and only occurred when he was off-duty. (R. 4). No citizen complained about Mr. Tracey's conduct. Thus, this case is easily distinguishable from cases where there was a public uproar or a reasonable risk of harm to the department's public image.

g. The Police Department Cannot Claim a Legitimate Interest in Cohesiveness of the Police Department

Further, the cases involving departmental cohesiveness are distinguishable, because they involve officers who had sexual relations with their co-worker's spouses. *See Mercure v. Van Buren Twp.*, 81 F. Supp. 2d 814 (E.D. MI 2000) (affair with supervisor's wife); *Fabio v. Civ. Serv. Comm. Of City of Philadelphia*, 48 Pa. 309 (1980) (affair with fellow police officer's wife). Clearly, an officer taking steps to interfere with and help destroy a co-worker's marriage does far more damage to departmental cohesiveness than Mr. Tracey's off-duty dating of Ms. Malone. This is especially true because the facts show that Ms. Malone was estranged from her father, Chief Malone. (R. at 3). Thus, the relationship between Ms. Malone and Chief Malone is not deserving of protection to the detriment of Mr. Tracey and Ms. Malone's privacy rights either in the general or specific sense.

Also, there is a large difference between the spousal relationship and the father-adult daughter relationship. A spouse has the legal right to chose whether their marriage will be monogamous. Chief Malone does not have a legally-cognizable right to decide whether and who his adult daughter will date. To hold otherwise would be to take our system of law back thousands of years to a time when fornication was a crime against the father's property interest in his daughter's virginity.

h. The Police Department Cannot Claim a Government Interest in “Promoting Morality” Because Public Opinion Does Not Support Punishing a Man for Dating a New Woman After he had been Separated from his Wife for a Year and a Half and Served with Divorce Papers

This Court has recently emphasizing the dignity of man and evolving standards of decency that mark the progress of a maturing society as helpful for determining public morality. *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002). To measure public morality, Atkins looked to objective factors to the maximum possible extent, and the “clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.” *Id.* at 312. It noted that “consistency of the direction of change” is key. *Id.* at 315. Noting “[t]he evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of [one side].” *Id.* at 316. Lawrence added that evidence of non-enforcement was also important for an analysis aimed at determining values.

The move over the last sixty years has been toward the de-criminalization of adultery. MPC at 430-31. Additionally, there is strong evidence of non-enforcement of adultery statutes, especially without a complaint by the offended spouse (required in about five states) or some sort of open and notorious adultery, neither of which exists here. *Id.* In New York alone, thousands of divorce cases are heard each year, many of which involve adultery, yet no prosecutions occur,

evidencing a conscious pattern of non-enforcement at least as strong as the one observed in *Lawrence. Id.* at 434.

Further, even those who support regulation of private morality for the sake of majoritarian moral order would not support coercion in this case. The critics of Mill's harm principle require “strenuous and unequivocal” public support for punishing the sexual behavior from an “overwhelming” majority, and also that the behavior be “grossly and openly” conducted in order to qualify as an offense against public morality. James Fitz & James Stephen, *Liberty, Equality, Fraternity* (1873). Neither of these two conditions exist in the present case.

This court should conclude that Petitioner has no legitimate interest behind their termination of Mr. Tracey. Further, even if one of the above government interests is deemed legitimate by this court, none are compelling or even substantial enough, in the crucial language of *Lawrence*, to *justify* derogation of Mr. Tracey's important interests in his right to work, his dignity, and his sexual autonomy.

B. PROCEDURAL DUE PROCESS ANALYSIS: The Due Process Clause Prohibits Mr. Tracey's Firing without Notice or an Opportunity to be Heard because he was Deprived Liberty and Property Interests

The Due Process Clause of the Fourteenth Amendment provides that government may not deprive an individual of life, liberty, or property without due process of law. U.S. Const., amend. 14, § 1. Procedural due process requires that a public employee, deprived of a liberty or property interest in their employment, be given adequate notice and a meaningful opportunity to be heard. *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 570 (1972). To determine whether procedure is due, this Court first examines whether there is a sufficient interest grounded in state or local law or practice. *See Roth*, 408 U.S. at 577; *Paul v. Davis*, 424 U.S. 693, 709 (1976). If a constitutionally recognized property or liberty interest is implicated, this

Court employs a balancing test to determine how much process is due. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

The threshold question is whether any process is due. *See Roth*, 408 U.S. at 570. This Court looks at the “nature” of the interest to determine if the interest is within the Fourteenth Amendment’s protection of liberty and property. *Id.* at 571. Property interests “are created and . . . defined by existing rules or understandings that stem from an independent source such as state law, rules or understandings.” *Davis*, 424 U.S. at 709 (citing to *Roth*, 408 U.S. at 577.). While it is not clear whether Craven law, a local rule, or an implied expectation would sustain a legitimate claim of entitlement to Mr. Tracey’s continued employment, *see Roth*, 408 U.S. at 588, most federal and state employees have some procedural protection by statutory schemes. *See Generally* 77 Am. Jur. Trials 1 § 41. Accordingly, it is likely that Mr. Tracey, via his sustained employment with the Rushmore County Police Department, held a legitimate claim of entitlement to his continued employment.

The requirements of procedural due process apply to deprivation of a liberty interest as well. *See Roth*, 408 U.S. 569-70. “Without doubt,” the liberty interest justifying procedural due process protection, “denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.” *Id.* at 572. These liberty interests are not limited to fundamental rights. *See id.*; Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1426 (1989). To implicate procedural due process, dating is considered a liberty interest. *See Wilson v. Taylor*, 733 F.2d 1539 (11th Cir. 1984) (infringement of dating relationship actionable under § 1983). Accordingly, the Police Department’s decision to terminate Mr. Tracey for exercising a constitutionally recognized liberty interest entitles Mr. Tracey to procedural due process.

When this Court finds that a public employee was deprived of a property or liberty interest, "there can be no doubt that at a minimum [Due Process] require[s] that deprivation . . . be preceded by notice and opportunity for hearing." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (citing to *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). This Court describes "the root requirement of the Due Process Clause as being that an individual be given an opportunity for hearing *before* he is deprived of any significant property [or liberty] interest. . . . The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Loudermill*, 470 U.S. at 542-46 (quotations omitted) (emphasis in original).

First, Mr. Tracey was denied his due process right to notice because the Police Department fired him only one day after his personal relationship to the police chief's daughter was exposed. (R. 4). The department also denied Mr. Tracey adequate notice by basing their decision on a vague and shifting rationale supported, in part, by a criminal statute that had not been enforced in decades. *See Shawgo v. Spradlin*, 701 F.2d 470, 477 (5th Cir. 1983) (holding administrative regulation cases imposing sanctions must give the regulated party fair warning and reasonable standard of culpability); *Perea v. Fales*, 39 Cal.App.3d 939, 942 (1974) (holding the expression "conduct unbecoming an officer" fails, on its face, to provide a standard).

Second, Mr. Tracey was denied his due process opportunity to be heard when he was fired without pre- or post-termination hearing, without the opportunity to present or dispute facts, and without opportunity for meaningful representation. *See Arnett v. Kennedy*, 416 U.S. 134 (1974) (holding the right to a hearing encompasses the right to a meaningful hearing). Further, the opportunity to be heard entitles a person to an impartial and disinterested tribunal, with participation and dialogue by affected individuals within the decision-making process. *See United States v. Jerrico*, 446 U.S. 238, 242 (1980). Mr. Tracey was denied this right because the

Police Chief, the estranged father of Ms. Malone, made the decision alone. Permitting additional decision-makers is especially important post-*Lawrence* because it would reduce the risk of Constitutional error and promote judicial efficiency by preventing an employer from unilaterally depriving a terminated public employee of their liberty and property interests. *See Loudermill*, 470 U.S. at 543 (holding need for predetermination hearing must balance interests at stake). Thus, because Mr. Tracey’s firing deprived him of a property and liberty interest, and because Mr. Tracey was not given notice or opportunity for a hearing, the Due Process Clause prohibits his termination from public employment. *See Loudermill*, 470 U.S. at 546.

CONCLUSION

For reasons provided above, this Court should affirm the court of appeals decision reverse the district court and remand for further proceedings.

Respectfully submitted,
N

Team Designation Letter: N
Counsel for Respondent

CERTIFICATE OF SERVICE:

I hereby certify that on this 2nd day of February, 2009, no later than 5:00 P.M., I submitted a true and correct copy of the above Brief for Respondent to sarah.oetinger@gmail.com or lzjeffre@email.unc.edu in both a Microsoft Word document file and a PDF file. By Submitting this brief, each team member certifies that this brief has been prepared in accordance with the Craven Competition Rules and that this brief represents the work product, proofreading, and evaluation of ONLY the members of the team designated as letter N.

N

Team Designation Letter: N
Counsel for Respondent