

No. 08-31958

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**IN THE SUPREME COURT OF THE UNITED STATES**

October Term, 2008

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

*Petitioner,*

v.

**WILLIAM R. TRACEY**

*Respondent.*

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**RESPONDENT BRIEF**

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## **QUESTIONS PRESENTED**

1. Whether the State of Craven violated the Fourth Amendment when Officer Calloway searched Mr. Tracey in a manner that exceeded the parameters of a protective search and discovered a firearm that was never in plain view.
2. Whether the State of Craven violated Mr. Tracey's rights under the Fourteenth Amendment Due Process Clause when it terminated his employment for participating in a private, consensual sexual relationship.

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## **OPINIONS BELOW**

The opinion of the United States District Court for the District of Craven, granting summary judgment in favor of Petitioner, Mr. William R. Tracey, is reprinted in the record. (R. at 2.) The opinion of the United States Court of Appeals for the Thirteenth Circuit, reversing the district court's grant of Mr. Tracey's motion for summary judgment, is reprinted in the record. (R. at 8.)

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Fourth Amendment to the United States Constitution provides:

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.

Section One of the Fourteenth Amendment to the United States Constitution provides:

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

Section 19-166.81, Craven Statutes, which is not reprinted in the record, provides that it is unlawful to be in possession of a concealed firearm. (R. at 3.)

Section 11-198.01, Craven Statutes, which is not reprinted in the record, provides that it is unlawful to engage in adultery. (R. at 4.)

## STATEMENT OF THE CASE

On June 7, 2005, Respondent William R. Tracey was arrested for possession of a concealed firearm in violation of Section 19-166.81, Craven Statutes. (R. at 2-3.) On the night in question, Mr. Tracey, a Rushmore County Police Officer, was investigating an illegal firearms distribution network pursuant to an undercover operation in a public park. (R. at 2.) A fellow Rushmore County policeman, Officer Calloway, was in the park pursuing a lead that a member of the network was meeting with prospective buyers. (R. at 2.) Officer Calloway was unaware that Mr. Tracey was an undercover policeman because he was affiliated with a different precinct and had been operating in that capacity for the majority of Officer Calloway's career. (R. at 2.) Officer Calloway became suspicious even though Mr. Tracey did not match the description of the suspect, because Mr. Tracey had short hair and was wearing a jacket despite mild temperatures. (R. at 2.) After observing Mr. Tracey for twenty minutes, during which he appeared to be surveying the layout of the park and its surrounding buildings, Officer Calloway approached Mr. Tracey. (R. at 2.)

After identifying himself, Officer Calloway demanded Mr. Tracey's name. (R. at 3.) Mr. Tracey volunteered his name then stood up from the park bench and attempted to walk away. (R. at 3.) Officer Calloway grabbed Mr. Tracey by the wrist, spun him around, and began to pat down the exterior of Mr. Tracey's clothing. (R. at 3.) Although Mr. Tracey voiced his objections to Officer Calloway's search, he never physically resisted. (R. at 3.) Officer Calloway concluded that Mr. Tracey was not armed as his search did not indicate any object that was consistent with a weapon. (R. at 3.) After concluding the search, Mr. Tracey again attempted to walk away. (R. at 3.) When Mr.

Tracey turned away, Officer Calloway thought he noticed a vertical leather strap underneath Mr. Tracey's jacket. (R. at 3.) Officer Calloway has conceded that he was unsure of the strap's purpose and did not get a close look at it. (R. at 3.) Nevertheless, Officer Calloway thought that the strap might be used to carry a concealed weapon, so he ordered Mr. Tracey to stop and turn around. (R. at 3.) When Mr. Tracey complied, Officer Calloway reached towards Mr. Tracey in hopes of moving aside the left portion of his jacket. (R. at 3.) Although Mr. Tracey protested by brushing Officer Calloway's hand aside, Officer Calloway more forcefully moved aside the jacket and discovered a pistol. (R. at 3.) Officer Calloway seized the firearm and placed Mr. Tracey under arrest. (R. at 3.)

Upon his arrest, Mr. Tracey's cellular telephone was seized by Officer Calloway. (R. at 3.) Officer Calloway reviewed the contact information stored in the phone and identified the telephone number of Jacqueline Malone, the daughter of Rushmore County Police Chief Patrick Malone. (R. at 3.) Ms. Malone was publicly estranged from her father after she alleged corruption inside the Police Department, and Officer Calloway immediately contacted her on the premise that Mr. Tracey might be "targeting" her in some way. (R. at 3-4.) Ms. Malone's response to a call from a police officer in her father's department was to become alarmed. (R. at 4.) At some point in the conversation, but before Officer Calloway disclosed the reason for his call, Ms. Malone volunteered that she was in a relationship with Mr. Tracey. (R. at 4.) She also confirmed that Mr. Tracey was an undercover police officer. (R. at 4.)

Prior to speaking with Mr. Tracey, Officer Calloway contacted Mr. Tracey's precinct. (R. at 4.) Officer Calloway reported that he had arrested Mr. Tracey for

unlawful possession of a firearm and disclosed that Mr. Tracey was involved in an extramarital affair with Ms. Malone. (R. at 4.) He then released Mr. Tracey. (R. at 4.) The following day, Mr. Tracey was terminated from his employment with the Rushmore County Police Department for the official reason of "behavior unbecoming of an officer." (R. at 4.) In fact, Chief Malone admitted that Mr. Tracey was actually terminated for engaging in an extramarital affair with Mr. Malone's daughter. (R. at 4.) Mr. Tracey was never performing any of his duties as an officer of the Rushmore County Police Department when he was with Ms. Malone. (R. at 4.) Craven Statute 11-198.01, which court records indicate has not been used in prosecution for over twenty years, prohibits adultery. (R. at 4.) Mr. Tracey was married at the time of his arrest, but he had been separated from his wife for over eighteen months and has been served with divorce papers. (R. at 4.) Ms. Malone is not married. (R. at 4.)

As a result of the search, and the subsequent termination of his employment, Mr. Tracey brought this action against Rushmore County Police Department pursuant to 42 U.S.C. §1983 for violations of his Fourth and Fourteenth Amendment rights. (R. at 2.) The United States District Court for the District of Craven granted the State's motion for summary judgment. (R. at 2.) The United States Court of Appeals for the Thirteenth Circuit reversed, holding that Officer Calloway conducted an illegal search and that Mr. Tracey's termination for his participation in an extramarital relationship was unconstitutional.

### **SUMMARY OF THE ARGUMENT**

This Court should affirm the ruling of the Thirteenth Circuit Court of Appeals and hold that Mr. Tracey's Fourth Amendment rights were violated when Officer Calloway

conducted a search that failed to adhere to the parameters of a protective search and discovered a firearm that was never in plain view. This Court has created a narrow exception to the Fourth Amendment warrant requirement for a police officer to conduct a protective search for weapons for the safety of herself and others. A protective search, under Terry, is confined to a limited pat-down of the exterior of the suspect's clothing. In order to justify a protective search, the officer must have specific and reasonable grounds to believe that criminal activity is underway and that the suspect is armed and dangerous.

In this case, Officer Calloway lacked reasonable suspicion that criminal activity was underway and that Mr. Tracey was armed. Even if Officer Calloway reasonably suspected that Mr. Tracey was armed, Officer Calloway far exceeded the limitations of a protective search when he moved aside the left exterior of Mr. Tracey's jacket. This extended search took place moments after Officer Calloway had conducted a protective search and concluded that Mr. Tracey was not armed. Additionally, Mr. Tracey's attempt to walk away illustrates that he did not present a threat to Officer Calloway's safety. Moreover, Officer Calloway's admitted uncertainty regarding the leather strap indicates that its incriminating character was not apparent. Accordingly, any reliance on the plain-view doctrine is misplaced. Ultimately, the totality of the circumstances in this case demonstrates that Officer Calloway acted unreasonably as his suspicions were based on a mere hunch that this Court has consistently recognized as legally insufficient to justify a warrantless search.

This Court should affirm the ruling of the Thirteenth Circuit Court of Appeals and hold that Mr. Tracey's Fourteenth Amendment rights were violated when the Rushmore County, Craven, Police Department terminated his employment for his participation in an

extramarital relationship. The evolution of substantive due process law in the area of liberty interests has led to this Court's recognition of the rights of individuals to make personal decisions relating to private, consensual sexual behavior without unjustified interference by the state. This Court's holding in Lawrence recognized a protected liberty interest in sexual privacy that applies in this instance to Mr. Tracey's choices and actions.

In order for a state to justify an infringement upon an individual's right to sexual privacy in the face of substantive due process, the state must demonstrate that its interests are important, that those interests are furthered by the infringement on the individual's rights, and that the infringement is necessary to achieve the state's goals. Here, the only state interests that could be asserted are prohibition of immoral behavior, protection of functioning marriages, or regulation of a state's police force. This Court has held that morality is not independently sufficient to warrant intrusion. Moreover, there is no functioning marriage here to protect. Finally, unlike internal relationships, private, consensual sexual relationships between police officers and members of the public do not have the potential to disrupt the police force. The state does not have legitimate interests in these matters, much less interests that withstand the heightened scrutiny standard.

## **ARGUMENT**

### **I. THE STATE VIOLATED THE FOURTH AMENDMENT BECAUSE OFFICER CALLOWAY LACKED REASONABLE SUSPICION, YET CONDUCTED A PROTECTIVE SEARCH THAT WAS EXCESSIVE AND DISCOVERED A FIREARM THAT WAS NEVER IN PLAIN VIEW.**

This Court should affirm the ruling of the Thirteenth Circuit and hold that the State violated Mr. Tracey's Fourth Amendment rights when Officer Calloway conducted a search beneath his outer garments and discovered a firearm that was not in plain view.

The Fourth Amendment of the Constitution provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, 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. It is axiomatic that the Fourth Amendment prohibits all warrantless searches that are unreasonable. Florida v. Jimeno, 500 U.S. 248, 250 (1991). Indeed, this Court has consistently observed that the “touchstone of the Fourth Amendment is reasonableness.” Katz v. United States, 389 U.S. 347, 360 (1967).

The reasonableness of a search, as contemplated by the Fourth Amendment, “depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.” United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985). The test for determining the reasonableness in a particular case “balances the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion.” United States v. Hensley, 469 U.S. 221, 228 (1985). In the context of the type of protective search at issue in this case, this Court has held that when a law enforcement officer reasonably suspects that criminal activity is underway and that the individual whom the officer is dealing with may be armed, the officer is entitled to conduct a limited exterior pat-down of the individual to ensure the safety of the officer and others in the immediate vicinity. Terry v. Ohio, 392 U.S. 1, 30 (1968). Additionally, items exposed to the plain view of the public, or obtained by consent are not protected under the Fourth Amendment. Katz, 389 U.S. at 351.

In this case, Officer Calloway acted unreasonably because he lacked reasonable suspicion that Mr. Tracey was behaving unlawfully to justify an intrusion upon his personal security. Even if Officer Calloway had reasonable suspicion that criminal activity was underway, he exceeded the constitutional parameters of a protective search that this Court identified in Terry. In any event, the state's legitimate interest in ensuring the safety of its officers was satisfied when Officer Calloway's initial search did not indicate the presence of a weapon and Mr. Tracey attempted to walk away. Furthermore, Officer Calloway's admitted uncertainty regarding the purpose of the vertical strap indicates that its incriminating character was not immediately apparent. Accordingly, any reliance on the plain-view exception to the Fourth Amendment warrant requirement is misplaced.

A. Officer Calloway lacked any reasonable suspicion yet conducted a protective search that exceeded the limitations announced by this Court.

With respect to the individual freedoms guaranteed by the Fourth Amendment, this Court has long recognized 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.” Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891). Nevertheless, this “inestimable right of personal security,” Terry, 392 U.S. at 8-9, is not limitless. This Court has held that when a law enforcement officer has a reasonable suspicion that criminal activity is underway, and that the individual whom the officer is investigating may be armed, the officer is entitled to conduct a limited search of the individual's exterior clothing to ensure the safety of the officer and others. Id. at 30.

In this case, the State lacked reasonable suspicion that criminal activity was underway to justify its search of Mr. Tracey. Furthermore, even if the State possessed the requisite reasonable suspicion, Officer Calloway failed to confine his search to a limited pat-down of exterior garments, and thus violated Mr. Tracey's Fourth Amendment rights.

1. The State lacked reasonable suspicion that criminal activity was underway.

In order to conduct the type of protective search for weapons authorized by this Court in Terry, the investigating officer must first have a reasonable suspicion that criminal activity is underway. Terry, 392 U.S. at 30. Expounding upon the concept of reasonable suspicion, this Court held that the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Id. at 21. The Terry court was particularly concerned with intrusions "based on nothing more substantial than inarticulable hunches." Id. at 22. In this case, the State is unable to point to specific and articulable facts that provide a reasonable basis for the intrusion upon Mr. Tracey. Indeed, Officer Calloway's intrusion was based precisely on the type of inarticulable hunch that this Court has "consistently refused to sanction." Id.; see Beck v. Ohio, 379 U.S. 89, 96-97 (1964).

In Terry, a police officer patrolling in downtown Cleveland noticed two men behaving peculiarly on a street corner. Terry, 392 U.S. at 6. The officer witnessed one of the men walking down the street past a store front, pausing briefly to peer inside, strolling on a short distance, and returning to the corner to confer with the other man. Id. The second man repeated this same routine, stopping at the exact same storefront to glance in, walking past the store a short distance and returning to meet the first man at the corner.

Id. After witnessing the two men repeat this ritual several times, a third man appeared to confer briefly with the first two men. Id. Suspecting that the men were armed and planning to hold up the store, the officer engaged the three men and asked for their names. Id. at 6-7. When they did not respond, the officer patted down the outside of their clothing to ascertain whether they were armed. Id. When the officer discovered that two of the men were carrying pistols, he placed them under arrest for carrying concealed weapons. Id. At trial, the two men moved to suppress the guns on the grounds that their admission violated the Fourth Amendment. Id. at 8.

The Terry Court held that, under the Fourth Amendment, an officer who has reasonable suspicion that criminal activity is underway and that the individual being investigated is armed, may “conduct a carefully limited search of the outer clothing” of the individual in an attempt to discover weapons to ensure the protection of the officer and others in the immediate vicinity. Terry, 392 U.S. at 30-31. This Court observed that the reasonableness of the officer’s actions depends on whether a reasonable person in the circumstances would be warranted in the belief that the safety of the officer or others was in danger. Id. at 27. This Court noted that the police officer “must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion.” Id. at 21.

In this case, the State lacked specific and articulable facts upon which to base its unreasonable intrusion into Mr. Tracey’s personal security. First, Mr. Tracey did not resemble the Red Tide official described in the lead. (R. at 2.) Although Mr. Tracey was wearing a jacket and had closely cropped hair (R. at 2), these aspects of his personal appearance simply do not furnish a reasonable basis to suspect that he was engaging in

criminal activity. Moreover, even though Mr. Tracey appeared to be “surveying the layout of the square,” he was merely sitting on a park bench. (R. at 2.) As far as Officer Calloway knew, Mr. Tracey was just enjoying the solace of the park and the “inordinate amount of time” (R. at 2) that he spent glancing around simply reflected his introspective demeanor. Additionally, the fact that Mr. Tracey objected to the pat-down is indicative of little more than an individual exercising his First Amendment right to free speech. See Lewis v. City of New Orleans, 415 U.S. 130, 131-34 (1974) (vacating conviction of appellant who cursed and threatened police officer under unconstitutionally overbroad municipal ordinance making it unlawful to use obscene language toward police officer); City of Houston v. Hill, 482 U.S. 451, 461 (1987) (observing that “the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers”).

After the initial search, Officer Calloway could not have reasonably suspected a continued threat of harm. At this point, Officer Calloway had failed to locate a weapon and Mr. Tracey was attempting to walk away. (R. at 3.) Under these circumstances, a reasonable person would not suspect that Mr. Tracey, in the midst of extricating himself from the altercation, presented an imminent threat to the safety of Officer Calloway or others. Moreover, the leather strap that Officer Calloway noticed could not have reasonably bolstered his suspicion that Mr. Tracey was armed because Officer Calloway conceded that he was “unsure of the strap’s purpose and did not have the opportunity to get a close look at it.” (R. at 3.) This admitted uncertainty, coupled with the fact that Officer Calloway had already conducted an unproductive search, greatly undermines the reasonableness of any suspicion that Mr. Tracey was armed. Additionally, there is no

indication in the record that Mr. Tracey impeded Officer Calloway's ability to conduct a thorough search such that a subsequent search might have been more availing. Indeed, to the extent that Mr. Tracey "did not physically resist" during the search (R. at 3), it is disingenuous to suggest that Officer Calloway still reasonably suspected that Mr. Tracey was armed immediately after concluding that he was not. Ultimately, the totality of Mr. Tracey's actions did not exude the imminence of criminal conduct that this Court has required to constitute a reasonable suspicion. Officer Calloway's suspicions were based on little more than a hunch that is legally insufficient to justify a protective search.

2. Even if the State had a reasonable suspicion that Mr. Tracey was armed, Officer Calloway exceeded the parameters of a protective search announced by this Court.

In Sibron v. New York, 392 U.S. 40, 65 (1968), this Court reiterated a critical limitation to the general proposition announced in Terry regarding a protective search for weapons. Specifically, this Court held that the protective search authorized in Terry may consist solely of a limited patting of the outer clothing of the suspect in an attempt to ascertain whether the suspect is armed. Id. In this case, the State violated the Fourth Amendment by extending its search beyond a mere exterior pat-down when Officer Calloway moved Mr. Tracey's jacket aside and revealed a firearm. Officer Calloway had already conducted an exterior pat-down that did not indicate the presence of a weapon. (R. at 3.) Given the absence of probable cause to arrest after the conclusion of the initial search, Officer Calloway was not entitled to conduct a more intrusive search.

A protective search that extends beyond the limited pat-down of exterior clothing "violates the guarantees of the Fourth Amendment, which protects the sanctity of the person against unreasonable intrusions on the part of all government agents." Sibron,

392 U.S. at 65-66. In Sibron, over the course of an eight-hour period, a police officer observed appellant converse with roughly six individuals whom the officer knew to be narcotics addicts. Id. at 45. The officer never overheard any of these conversations or witnessed anything pass between the addicts and appellant. Id. After observing appellant speak to three more addicts in a restaurant, the officer stopped appellant. Id. The State of New York had a ‘stop-and-frisk’ statute that authorized a police officer, with reasonable suspicion that criminal activity was underway, to search any person stopped for questioning who the officer believed was armed and dangerous. Id. at 43-44. Appellant failed to satisfy the officer’s request for his name and began to reach into his pocket when the officer thrust his hand into appellant’s pocket and discovered several envelopes containing heroin. Id. at 45. At trial, appellant unsuccessfully moved to suppress the heroin on the grounds that its admission and the underlying statute violated the Fourth Amendment. Id. at 44.

On appeal, this Court held that the evidence was inadmissible against appellant because the manner in which it was discovered was unreasonably related in scope to the purpose of a protective search for weapons. Id. at 65. This Court first examined whether probable cause existed for the arrest and concluded that merely observing appellant converse with several addicts, without knowing the substance of those conversations, did not furnish “the sort of reasonable inference required to justify an intrusion upon [appellant’s] personal security.” Id. at 62. This Court concluded that probable cause for the arrest did not exist until after the discovery of the heroin and noted that “[i]t is axiomatic that an incident search may not precede an arrest and serve as part of its justification.” Id. at 63 (citing Henry v. United States, 361 U.S. 98, 103 (1959)). This

Court further held that, even if there was a reasonable basis to search appellant for weapons, the intensity of the search rendered the evidence inadmissible because it exceeded the parameters of the protective search authorized in Terry. Sibron, 392 U.S. at 65. Specifically, this Court noted with approval that the search in Terry consisted “solely of a limited patting of the outer clothing of the suspect.” Id. This Court emphasized that the officer in Terry only placed his hands in the suspect’s pockets after his exterior pat-down indicated the presence of a weapon. Id.

In this case, Officer Calloway exceeded the clearly-articulated parameters of a protective search that were reiterated by this Court in Sibron. Although Officer Calloway appropriately limited the first search to an exterior pat-down of Mr. Tracey’s clothing, the State impermissibly extended its search when Officer Calloway moved Mr. Tracey’s jacket aside. Like the search in Sibron, this search was impermissible because it failed to adhere to the parameters of a protective search announced by this Court in Terry that consists “solely of a limited patting of the outer clothing of the suspect.” Terry, 392 U.S. at 30; see United States v. Casado, 303 F.3d 440, 447-49 (2d Cir. 2002) (vacating conviction due to improper protective search conducted by officer who reached into suspect’s pocket without first patting down exterior). As the Thirteenth Circuit observed, this search exceeded the boundaries of a Terry search and, thus, violated Mr. Tracey’s Fourth Amendment rights. (R. at 9-10.) Therefore, although the Officer Calloway initially complied with the protective search parameters set forth in Terry, the subsequent search doubtless exceeded those limitations. It is well settled that a search that is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable

intensity and scope. Terry, 392 U.S. at 18 (citing Kremen v. United States, 353 U.S. 346 (1957)); Go-Bart Importing Co. v. United States, 282 U.S. 344, 356-58 (1931).

Although several of the circuit courts have had occasion to extend the protective search beyond the conventional pat-down of exterior clothing, the facts underlying these decisions are distinguishable from this case. In United States v. Barboza, 412 F.3d 15 (1st Cir. 2005), the First Circuit upheld an officer's extension of the protective search where the suspect being searched was a renowned gang member who, according to police intelligence, routinely carried a firearm. Id. at 15-17. In United States v. Reyes, 349 F.3d 219 (5th Cir. 2003), the Fifth Circuit upheld an extension of the protective search that was prompted by a canine dog that alerted the officer that two suspects were in possession of narcotics which, the officer knew, were frequently accompanied by firearms. Id. at 225. Moreover, in Reyes, the officer was outnumbered and the search took place in a public bus station, such that a heightened concern for the officer's safety and the safety of others was warranted. Id. In this case, Officer Calloway had no intelligence that Mr. Tracey routinely carried a firearm, and given that Mr. Tracey was alone, there was no heightened concern for the safety of Officer Calloway or others. Accordingly, Officer Calloway's extended search was not reasonably related in scope to the protective search for weapons as he had already conducted an unproductive search and had merely a hunch that Mr. Tracey was armed.

The State violated Mr. Tracey's Fourth Amendment rights by conducting a protective search even though Officer Calloway lacked reasonable suspicion to believe that he was armed and dangerous. When Officer Calloway's initial search failed to indicate the presence of a weapon, Mr. Tracey walked away and did not present a threat

of harm. Moreover, Officer Calloway's uncertainty regarding the leather strap greatly undermines the reasonableness of his suspicion that Mr. Tracey was armed. Even if Officer Calloway had a reasonable suspicion, he failed to limit his protective search to an exterior pat-down of Mr. Tracey's clothing. Under these circumstances, Officer Calloway acted unreasonably and the state violated Mr. Tracey's Fourth Amendment freedoms.

- B. The plain-view doctrine does not apply because Officer Calloway lacked probable cause where his uncertainty regarding the strap shows that its incriminating character was not apparent.

Under the Fourth Amendment, "a search conducted without a warrant issued upon probable cause is *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions." Katz, 389 U.S. at 357. This Court has long recognized that "under certain circumstances the police may seize evidence in plain view without a warrant." Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971). Pursuant to the plain-view doctrine, a member of law enforcement may seize evidence of a crime without a warrant provided that "the officer did not violate the Fourth Amendment in reaching the place from which the object could be plainly viewed, the object's incriminating character is immediately apparent, and the officer had a lawful right of access to the object." United States v. Chipps, 410 F.3d 438, 442 (8th Cir. 2005); United States v. Thomas, 372 F.3d 1173, 1178 (10th Cir. 2004). In this case, Mr. Tracey's firearm was never in plain view and Officer Calloway's uncertainty regarding Mr. Tracey's strap greatly diminishes the credibility of any claim that its incriminating character was immediately apparent.

In order for a law enforcement officer to seize an item in plain view, the officer must possess probable cause with respect to the object's incriminating character. Arizona

v. Hicks, 480 U.S. 321, 328 (1987). In Hicks, police officers entered the apartment of an individual suspected to be involved in a shooting to search for the suspect, other victims, and weapons. Id. at 323. During the course of the search, police noticed expensive stereo equipment that appeared out of place in the otherwise seedy apartment. Id. Suspecting that it was stolen, one of the officers moved the equipment to obtain the serial numbers. Id. After confirming that the equipment was stolen, the officer seized the equipment and the individual was subsequently indicted for the robbery. Id. After the lower court upheld the individual's motion to suppress, this Court granted certiorari to determine whether the plain-view doctrine applies when the police lack probable cause to believe that the item in question is contraband. Id.

This Court held that, in order to apply the plain-view exception to the Fourth Amendment warrant requirement, the officer must have probable cause that the item in question is contraband. Id. at 326-27. This Court specifically rejected the notion that the lesser standard of reasonable suspicion is sufficient to justify seizure of items in plain view. Id. at 327. Indeed, this Court observed that “[d]ispensing with the need for a warrant is worlds apart from permitting a lesser standard of cause for the seizure than a warrant would require, i.e., the standard of probable cause.” Id. This Court also noted that a search is subject to the same probable cause standard, observing that the Supreme Court has never “drawn a categorical distinction between [searches and seizures with respect to] the degree of justification needed to establish the reasonableness of police action.” Id. at 328. Ultimately, this Court held that, given the lack of probable cause to believe that the equipment was stolen, the officer's search and subsequent seizure were unreasonable even though the equipment was in plain view. Id.

In this case, the State lacked probable cause to believe that Mr. Tracey was armed because his firearm was never in plain view and the incriminating character of the vertical leather strap that Officer Calloway noticed was not immediately apparent. Like the officer in Hicks, who lacked probable cause to believe that the equipment was stolen, Officer Calloway lacked probable cause to believe that Mr. Tracey was armed. First, there is no dispute that Mr. Tracey's firearm was never exposed to the plain view of the public. The only arguable justification for Officer Calloway's suspicion is the leather strap that he noticed when Mr. Tracey attempted to walk away. Officer Calloway fatally concedes, however, that he "was unsure of the strap's purpose and did not have the opportunity to get a close look at it." (R. at 3.) Moreover, moments before noticing the leather strap, Officer Calloway conducted a protective search for weapons and had already concluded that Mr. Tracey was unarmed. (R. at 3.) As the Thirteenth Circuit correctly held, Officer Calloway had, at most, a reasonable suspicion with respect to the strap. (R. at 9.) As far as Officer Calloway knew, the strap could have been suspenders or a back brace. Such an attenuated suspicion does not come close to the level of probable cause that this Court requires to seize objects in plain view. Accordingly, the plain-view doctrine does not apply and the State violated Mr. Tracey's Fourth Amendment rights when Officer Calloway moved the exterior of Mr. Tracey's jacket aside without probable cause to believe that he was armed.

This Court has held that the state must possess probable cause with respect to an object's incriminating character in order to seize an object that is in plain view. In this case, not only was Mr. Tracey's firearm never in plain view, but Officer Calloway's admitted uncertainty regarding the vertical strap demonstrates that its incriminating

character was not immediately apparent. Thus, the State lacked probable cause to believe that Mr. Tracey was armed and, accordingly, any reliance on the plain-view doctrine as justification for Officer Calloway's search is misplaced.

## II. THE STATE VIOLATED MR. TRACEY'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS BY TERMINATING HIS EMPLOYMENT FOR HIS PARTICIPATION IN AN EXTRAMARITAL RELATIONSHIP.

The State of Craven violated Mr. Tracey's right under the Due Process Clause of the Fourteenth Amendment when it terminated him from his employment with the Rushmore County Police Department for his participation in an extramarital relationship. The Due Process Clause of the Fourteenth Amendment provides that no state shall "[d]eprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. For over forty years, this Court has recognized a liberty interest in the "right to privacy," which includes at least some private sexual conduct. See Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (finding that sexual privacy inside a marriage was improperly infringed upon by a state law prohibiting the use of contraceptives). This right has increased in scope and authority since that time, most recently clarified and strengthened by this Court's decision in Lawrence v. Texas, 539 U.S. 558, 558 (2003).

As Justice Kennedy stated for this Court in Lawrence, individuals in a private, consensual sexual relationship have a "right to engage in their conduct without the intervention of the government." Id. at 578. The justification provided by the State of Craven as to why it terminated Mr. Tracey from his otherwise unquestioned service was that he violated the Craven law against adultery. Without a substantial and important

governmental interest, the State cannot constitutionally control the most private human contact – sexual behavior – of any person, police officer or private citizen.

Here, the State did not have a legitimate state interest to justify its infringement on Mr. Tracey’s protected liberty interest. The law that the State used to proscribe Mr. Tracey’s conduct was both obsolete and based solely on moral considerations that do not provide sufficient cause for the State to interfere with his personal liberty. Thus, the State of Craven unconstitutionally deprived Mr. Tracey of his protected liberty interest when it terminated him from his employment for his private, consensual sexual conduct.

- A. Decisions about private, consensual sexual behavior constitute protected liberty interests, and Mr. Tracey’s actions are therefore entitled to the corresponding substantive due process protections.

The evolution of liberty interests under substantive due process have taken a parallel path to the development of equal protection laws. Like the application of intermediate scrutiny to governmental actions against a traditionally underrepresented class, intermediate scrutiny in cases involving liberty interests can be utilized to avoid violations of rights in a historically-recognized but legally-developing area of liberty. This Court’s holding in Lawrence is the most recent step that recognizes individuals’ protected liberty interests in their private, consensual sexual behavior. These liberty interests now deserve intermediate scrutiny when state actions attempt to infringe on that right of sexual privacy.

Beginning with Griswold, heightened liberty interests have expanded from the simple recognition of sexual privacy inside the marital bedroom to sexual privacy in any private, consenting environment. After Griswold, this Court decided that decisions about sexual behavior in the context of contraception should be afforded to all persons, married

or not. Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972). Often quoted throughout later cases, this Court said in Eisenstadt that the Constitution protects “the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” Id. at 453. Continuing this trend toward sexual privacy, this Court announced that individuals have autonomy regarding sexual and procreative control. Roe v. Wade, 410 U.S. 113, 154 (1973) Moreover, a person has the right to make important decisions about herself, but “this right is not unqualified and must be considered against *important* state interests in regulation.” Id. (emphasis added).

Extending these protections even further, this Court held that sexual autonomy, specifically the making of decisions “in a field that by definition concerns the most intimate of human activities and relationships,” is at the heart of constitutionally protected privacy. Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977). Revisiting and somewhat revising the nature of the state’s role in a woman’s procreative decisions, this Court established that abortion is an act “fraught with consequences for others.” Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992) (joint opinion of O’Connor, Kennedy, and Souter, J.J.). Partly for that reason, this Court designed a test to determine whether the state has overreached into the inherently personal and private decisions of the individual; in abortion matters, that test asks whether the state has placed an undue burden on a woman’s ability to make the decision herself. Id. at 874.

Essentially overruling the standard coming from Roe, that a state action must serve a compelling state interest in abortion cases, the Casey Court established a new standard. More restrictive on the state than a rational basis test, but less deferential to the

individual than strict scrutiny, this intermediate ground served to weigh the interests of the state against the rights of the individual. Id. As an example of the fact that this standard retains a heightened analysis, the Court held in Casey that spousal notification provisions in abortion cases were invalid because they could legally take the important decision of whether or not to procure an abortion and put it into the hands of an estranged, or even abusive, spouse. Id. at 893-95. This demonstrated that this Court recognized that an individual, even when that individual is married, retains the right to make sexual decisions about him or herself. The state must have an important interest that can only be furthered by interfering with those decisions for such interference to be constitutional. In all of the discussion of standards and rights, what must not be forgotten is this Court’s clear statement that matters relating to private sexual and reproductive acts “involv[e] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [and that] are central to the liberty protected by the Fourteenth Amendment.” Id. at 851.

Most recently, this Court’s opinion in Lawrence devoted fifteen pages to addressing the nature of the liberty interests and individual rights at stake in cases dealing with private, consensual sexual activity, but only a single sentence addressing the standard of review. Lawrence, 539 U.S. at 562-77. This unequivocally demonstrates that the focus of this Court in that case was the deeply complex nature of individual rights as fundamentally personal as those connected to sexual behavior. In the very beginning of his opinion for the Court, Justice Kennedy stated: “Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.” Id. at 562.

Lawrence, which dealt with two adult men convicted under a Texas statute that criminalized homosexual sodomy, presents a similar situation to the case here in that the law involved is a statute “that purport[s] to do no more than prohibit a particular sexual act.” Id. at 567. In Lawrence, that act was homosexual sodomy, whereas here, the law used to justify the State’s action prohibits extramarital sex. (R. at 4.) Like the law in Lawrence, the law here has “more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home.” Lawrence, 539 U.S. at 567. The Court in Lawrence held that “the fact that a State’s governing majority has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.” Id. at 577. Thus, whether the practice is sodomy or adultery, the perception of a private, consensual sexual practice as immoral is not sufficient to justify its prohibition.

One of the key features of this Court’s opinion in Lawrence was that it expressly overruled the previous decision in Bowers v. Hardwick, 478 U.S. 186 (1986). Lawrence, 539 U.S. at 578. Bowers, like Lawrence, dealt with adult males in a private, consensual homosexual relationship who challenged a state law against sodomy. Id. at 187. The old rule from this Court in Bowers specifically rejected the proposition that “any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription.” Id. at 191. Relying on this exact statement, as well as additional language and legal holdings from Bowers, the Sixth Circuit held that an extramarital affair between a male police officer and civilian woman was not protected under the Due Process Clause of the Fourteenth Amendment. Marcum v. McWhorter, 308 F. 3d 635, 641-42 (6th Cir. 2002).

Marcum is no longer good law after this Court's decision in Lawrence. The court stated in Marcum that it was "relying on Bowers for guidance when determining whether an adulterous relationship between two consenting adults is constitutionally protected as a fundamental element of personal liberty." Id. at 641. The Marcum court further stated that "Bowers is factually analogous to [the facts in Marcum] in that it evaluates a consensual sexual relationship between two adults" and provides Supreme Court guidance on how to analyze "cases dealing with private, sexual relationships." Id. When this Court overruled the holding of Bowers, and held that Justice Stevens's dissent in Bowers, 478 U.S. at 216 (Stevens, J., dissenting), should and does control, the Court essentially overruled Marcum as well. Marcum could not be more factually analogous to the current case. "Individual decisions by ... persons, concerning the intimacies of their physical relationship ... are a form of 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." Id. at 578. This statement by Justice Stevens, later adopted by the majority in Lawrence, applies with equal force to Mr. Tracey because he was engaged in a private, intimate physical relationship.

Describing Lawrence, Justice Kennedy said:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices . . . .

Id. at 578. In this case, these same characteristics apply. Mr. Tracey is an adult who engaged in a private consensual sexual relationship with Ms. Malone. (R. at 4.) The difference is in the nature of the sexual behavior; in Lawrence, the private conduct was

homosexual in nature, and here the private conduct was extramarital in nature. Just as the conduct that defendants in Lawrence engaged in was in violation of law due to its nature, the same is true here. Thus, the recognized right against unjustified interference with sexual privacy afforded the defendants in Lawrence should be extended to Mr. Tracey as well.

Nothing about this Court's holding in Lawrence indicates that it only applies to instances of homosexual sodomy. Mr. Tracey was punished for his participation in a private, consensual, sexual relationship, and that act had traditionally been perceived as immoral. Instead of a law proscribing homosexual unmarried sex, the State of Craven proscribes extramarital sex. (R. at 4.) However, for the reasons described above, the recognition of a protected liberty interest in Lawrence extends to instances of heterosexual extramarital sex. Furthermore, the state action here was not a criminal case against a private individual, but rather the termination of a police officer on the grounds that he violated a law against adultery. (R. at 2, 4.) However, the fact that the State here has not brought criminal charges, but instead attempted to regulate an individual's behavior through employment conditions, does not change the constitutional protection provided. The right to sexual autonomy, that was outlined by this Court in Lawrence, extends to all citizens, whether private individuals or police officers. Therefore, Mr. Tracey's protected liberty interest in sexual privacy should be afforded greater constitutional protection than the minimum safeguards of the rational basis test.

- B. The State's termination of Mr. Tracey for an extramarital affair violates the Fourteenth Amendment because it fails to survive the intermediate scrutiny that Mr. Tracey's protected liberty interest warrants.

This Court should apply a level of scrutiny in this case that balances Mr. Tracey's right to sexual privacy with the State's interests in protecting the institution of marriage and prohibiting immoral conduct. This kind of balancing would reflect the importance of the individual's rights as well as the protection granted them, while offering an opportunity for the State to demonstrate that its interests are substantial, furthered by the State action, and only achievable by the means used. In Lawrence, this Court expanded traditional notions of the right to privacy to adopt what has since been recognized by some circuits as an intermediate level of scrutiny in instances of private sexual conduct. See Lawrence, 539 U.S. at 578; Cook v. Gates, 528 F.3d 42, 52 (1st Cir. 2008) (stating that Lawrence "applied a balancing of constitutional interests that defies either the strict scrutiny or rational basis label"); Witt v. Dep't of the Air Force, 527 F.3d 806, 818 (9th Cir. 2008) (holding that Lawrence identified a protected liberty interest and requires a heightened scrutiny analysis). In this case, the Thirteenth Circuit similarly held that in cases of private sexual conduct, intermediate scrutiny should be applied in order to balance the state's interests against those of the individual person. (R. at 11.)

Similar to the "undue burden" standard announced in Casey, the standards provided by the courts in Cook and Witt require a more demanding review of state action when dealing with matters of sexual privacy. These standards demonstrate that a reasonable reading of Lawrence recognizes a protected liberty interest in private, consensual sexual behavior. The nature of the sexual behavior being regulated is not the deciding characteristic. Whether the sexual behavior being regulated is homosexual or

extramarital in nature, the action still unconstitutionally infringes upon this protected right unless the state can demonstrate that its action can withstand the appropriate level of constitutional scrutiny.

The Thirteenth Circuit below cited to the decisions of the First and Ninth Circuits because they are sufficiently analogous to this case and provide meaningful interpretations of Lawrence's effect on cases dealing with sexual privacy. The Cook and Witt cases both dealt with individuals discharged or suspended from military service under the Act known as "Don't Ask, Don't Tell" ("DADT") for engaging in homosexual relationships. The First Circuit in Cook cited multiple reasons to interpret Lawrence as identifying a protected liberty interest. Cook, 528 F.3d at 52. The Cook court ultimately identified a protected liberty interest because of the compelling "precedent relied on by Lawrence," the Court's "special reliance on Justice Stevens' Bowers dissent," and the Court's rejection of morality as a basis for an intrusive law. Id. at 53. The court also found that Lawrence balanced "the state's asserted interest in prohibiting immoral conduct against the degree of [the state's] intrusion into the petitioners' private sexual life . . ." Id. at 56. Under this protected liberty interest, Mr. Tracey's right to sexual privacy becomes apparent and must be weighed against the State's interests that are purportedly served by his termination.

Similar to the reasoning used by the other courts, the Thirteenth Circuit held that Mr. Tracey's conduct deserved protection under Lawrence because his as-applied challenge prevailed over the State of Craven's asserted interests. The Cook court held that the Supreme Court's protection of sexual privacy did not render DADT facially unconstitutional. Id. DADT specifically prohibited public homosexual acts and coerced

sexual acts, which do not fall under the category of protected behavior in Lawrence. Id. The Cook court also identified that specific Congressional concerns were clearly stated in the language of DADT. Id. at 46. At the outset, the Act identifies a potentially detrimental effect on “unit cohesion” that unwanted sexual attraction or attention could engender among military personnel who are living in close quarters. Id. Unlike the specifically stated justifications for DADT, the State of Craven has not demonstrated any reason why prohibiting private, consensual sexual activity between a married male police officer and an unmarried female civilian would in any way cause harm to the police force. Mr. Tracey is presenting an as-applied challenge rather than a facial challenge because any interests the state may proffer were not furthered by his termination.

Mr. Tracey’s activity falls within a category of protected liberty interests recognized by this Court in Sell v. United States, 539 U.S. 166, 167 (2003). In Sell, this Court recognized that an individual can have a ‘significant,’ constitutionally-protected ‘liberty interest’ that requires greater justification for state intrusion than a mere rational basis, yet does not require the application of strict scrutiny. Id. at 178-80. This Court held that involuntary administration of medication to a mentally-ill defendant was constitutional. Id. This Court observed that substantive due process protection depends on whether the government’s interests are important in comparison to the rights of the individual in the context of the case. Id. at 180-81.

Following the reasoning of Sell, the Ninth Circuit in Witt similarly held that a heightened scrutiny analysis requires the government to “justify its intrusion into the personal and private life of the individual.” Witt, 527 U.S. at 818. Drawing on this heightened scrutiny analysis, the Witt court evaluated the competing interests of the state

and the individual as dependent on three factors. Witt, 527 F.3d at 819. The court held that when the government attempts to intrude on matters of sexual privacy, it “must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest.” Id. With these factors defining the level of scrutiny, the Witt court remanded the case to the trial court for other factual findings. Id. at 822.

Applying this level of scrutiny, the State action in this case is ultimately unconstitutional. Mr. Tracey is bringing an as-applied challenge because he was terminated for a private, consensual sexual relationship with a woman other than his estranged wife. (R. at 4.) In both Sell and Carey, where this Court has applied a standard equivalent in nature to intermediate scrutiny, the primary goal was to achieve a balance between the interests of the individual and of the government. Here, Mr. Tracey’s as-applied challenge should be considered in light of the unique circumstances it presents. Mr. Tracey had been legally separated for over eighteen months at the time of his termination. (R. at 4.) He had also been served with divorce papers, and Ms. Malone is unmarried. (R. at 4.)

Accordingly, the State’s strongest interests purportedly served by terminating Mr. Tracey would be prohibition of immoral behavior, protection of marriage as an institution, or regulation of officer conduct. As the Thirteenth Circuit recognized, the State failed to demonstrate that these are even legitimate governmental interests. (R. at 11-12.) Applying the intermediate standard that this case requires, the State’s action improperly infringed on Mr. Tracey’s protected liberty interest. Each of these potential reasons fails not only the general standards set forth by this Court, but also each of the

prongs of the intermediate scrutiny test. The State has not demonstrated that an important governmental interest exists in prohibiting “immoral” behavior in this context. After Lawrence, private, consensual sexual practices cannot be regulated by the state, simply because the majority believes them to be unsavory.

Mr. Tracey’s marital infidelity did not affect the institution of marriage. Indeed, the State has failed to demonstrate that a healthy marriage even existed to be damaged by his actions. As a practical matter, given that Mr. Tracey is legally separated, with his divorce impending, his marital status is essentially meaningless. There is no evidence that a successful marriage existed in this case, which would be required to demonstrate an important governmental interest in regulating adulterous behavior. There is nothing to demonstrate that a prohibition of adultery significantly furthers such an interest when it simply regulates the sexual behavior of a legally separated man on the verge of divorce. Moreover, given the record’s silence as to the difficulty of obtaining a divorce in the State of Craven, a ruling in the State’s favor could set a precedent that would allow vindictive spouses to maintain the legal fiction of a marriage just to turn their estranged husbands or wives into criminals.

Mr. Tracey was neither on duty nor performing any of his undercover functions when he met with Ms. Malone. (R. at 4.) There is nothing in the record to indicate that Mr. Tracey’s relationship with Ms. Malone affected his job performance in any way. In fact, Police Chief Patrick Malone admitted that the only reason for Mr. Tracey’s termination was the affair, and not the official reason of “behavior unbecoming an officer.” (R. at 4.) Terminating Mr. Tracey for his participation in an extramarital affair would not be necessary to regulate officer conduct. Given that the adultery statute had

not been used in prosecution for over twenty years, (R. at 4) it would be unreasonable for Mr. Tracey to assume that he must conform his conduct to this sort of obsolete regulation.

Even if Mr. Tracey's right to sexual privacy does not deserve additional constitutional protections, the State's action does not survive even the most deferential level of scrutiny. Even if the level of scrutiny requires only that the State's action be rationally related to a legitimate governmental interest, the State has not met this burden. This conclusion is supported by lower courts that have addressed cases factually similar to Mr. Tracey's situation. Courts have held that, absent additional factors making it relevant to his job performance, the State did not have a legitimate interest in regulating the officer's private, consensual sexual behavior. In Shuman v. Philadelphia, 470 F. Supp. 449, 459 (D.C. Pa. 1979), the court held that an officer's extramarital relationship that did not adversely affect his job performance was within a protected zone of privacy into which the state could not intrude. Id. at 459.

The officer in Shuman was subjected to an investigation and refused to answer questions regarding his private sexual conduct. Id. Here, the only evidence against Mr. Tracey as to his "behavior unbecoming of an officer" was the alarmed and spontaneous statement Ms. Malone made to Officer Calloway when he contacted her. (R. at 4.) A broader understanding of liberty reveals that Mr. Tracey's privacy was infringed upon in intense ways. His relationship with Ms. Malone was not discovered because of anything that he or Ms. Malone did to draw attention to it. Rather, another police officer called Ms. Malone after retrieving her contact information from Mr. Tracey's cellular phone.

(R. at 4.) This led to the discovery of a relationship that was in no way open or notorious, as common law adultery laws would prohibit.

This case is distinguishable from cases in which regulations concerning private, personal decisions have been held to justify termination of police officers. Those cases typically revolve around the detrimental effect that the officer's behavior has on his job performance or the established workplace hierarchy. In Shawgo v. Spradlin, 701 F.2d 470 (5th Cir. 1983), the court held that a police department's prohibition of cohabitation and off-duty dating amongst officers was not a violation of the officers' right to privacy. Id. at 479. This factual distinction is of paramount importance. Dating and cohabitation amongst officers contributes to the same sorts of concerns identified in the DADT cases about detrimental effects on unit cohesion. Mr. Tracey's relationship with a civilian woman would have no such effects. Accordingly, the State has failed to prove any legitimate governmental interest in regulating Mr. Tracey's private, consensual sexual relationship.

## CONCLUSION

This Court should affirm the ruling of the Thirteenth Circuit Court of Appeals because the State violated Mr. Tracey's Fourth Amendment rights. Officer Calloway conducted a search that failed to adhere to the parameters of a protective search and discovered a firearm that was never in plain view. Officer Calloway lacked a reasonable basis to suspect that Mr. Tracey was armed and dangerous, as required to justify a protective search. Even if Officer Calloway reasonably suspected that Mr. Tracey was armed, Officer Calloway exceeded the limitations of a protective search when he moved Mr. Tracey's jacket aside. Moreover, Officer Calloway's uncertainty regarding the

leather strap demonstrates that its incriminating character was not immediately apparent. Accordingly, any reliance on the plain-view doctrine is misplaced. Under the circumstances of this case, Officer Calloway's search was unreasonable and, consequently, the State violated Mr. Tracey's Fourth Amendment rights.

This Court should affirm the ruling of the Thirteenth Circuit Court of Appeals and hold that the State of Craven violated Mr. Tracey's Fourteenth Amendment rights. Under this Court's liberty interest jurisprudence, Mr. Tracey has a protected liberty interest in his sexual privacy. The State terminated Mr. Tracey because of his participation in an extramarital relationship in violation of an obsolete and unenforced State law. Any attempt by the State to infringe upon Mr. Tracey's liberty interest must be supported by justifications that withstand an intermediate level of scrutiny. Accordingly, the state must demonstrate that its interests are important, that those interests are furthered by the infringement on the individual's rights, and that the infringement is necessary to achieve the state's goals. However, the State failed to demonstrate even legitimate governmental interests in regulating Mr. Tracey's private, consensual sexual behavior, much less interests meeting these higher standards. For these reasons, the State's termination of Mr. Tracey for his participation in an extramarital relationship violated his Fourteenth Amendment Due Process rights.