

No. 08-31958

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In the  
**Supreme Court of the United States**

October Term, 2008

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Rushmore County, Craven, Police Department,

Petitioner

v.

William R. Tracey

Respondent

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On the Writ of Certiorari to the  
Thirteenth Circuit Court of Appeals

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BRIEF FOR PETITIONER

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<p>Team X *Counsel for Petitioner</p>
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## **QUESTIONS PRESENTED**

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

II. 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 opinion of the United States District Court for the District of Craven is reported at Tracey v. Rushmore County, Craven Police Department, 05-1947 (2005) and contains the issuance of summary judgment for Rushmore County Craven Police Department. The appellate opinion and judgment is reported at Tracey v. Rushmore County, Craven Police Department, 06-6436 (13<sup>th</sup> Cir. 2006).

## **CONSTITUTIONAL PROVISIONS INVOLVED**

Relevant Constitutional provisions applicable to this case are the Fourth and Fourteenth Amendments of the Constitution. U.S. Const., amend. IV, U.S. Const., amend. XIV § I.

## **STATUTORY PROVISIONS INVOLVED**

Craven County does not have a concealed carry provision, and any person who possesses a concealed firearm is in violation of Craven Statute 19-166.81. Also, Craven Statute 11-198.01 prohibits adultery.

In addition, respondent brings his claim pursuant to 42 U.S.C. § 1983 which provides the following:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory...causes to be subjected, any citizen within the jurisdiction thereof to the deprivation of any rights, privileges, immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

## STATEMENT OF THE FACTS

On June 7, 2005, in Rushmore County, Craven, an officer named Maxwell Calloway, one of the Petitioner's employees, observed Respondent sitting on a park bench of the north side of McDonough Square. Officer Calloway had been investigating an illegal firearms distribution network tied to the private military company, Red Tide "R-T" for the last eight months. R. p. 2.

At the time of his arrest, Respondent was also a police officer for Petitioner. Respondent had been working for the Rushmore County Police Department for seven years but had been working on an undercover operation that targeted the sale of illegal firearms in Rushmore County. Although both officers were employed by Petitioner, they worked for different precincts, and Respondent had been working undercover for the majority of Officer Calloway's tenure. Therefore, Officer Calloway had no reason to know that Respondent was a police officer acting undercover. R. p. 2.

On the day of the arrest, Officer Calloway was pursuing a lead that an R-T official was meeting with potential buyers in McDonough Square. While he was in McDonough Square looking for the R-T official, Officer Calloway saw Respondent. Respondent had closely cropped hair and was wearing a nylon bomber jacket in seventy degree weather. Although Respondent did not meet the description of the R-T official, Officer Calloway was suspicious of both his attire and behavior. Officer Calloway observed Respondent for the next twenty minutes, noting that the respondent seemed agitated and spent a large amount of time surveying the layout of the square and scanning the rooftops of the surrounding buildings. While he did not want to compromise the eight month investigation, Officer Calloway found it necessary to approach the respondent. R. p. 2.

When he approached the respondent, Officer Calloway identified himself and asked for the respondent's name. In response to the question, the respondent became angry and glanced to his right and left repeatedly. The respondent finally said that his name was "Bill." After observing respondent's response, Officer Calloway still believed that the respondent might have been involved in criminal activity. Then, the respondent stood and turned to leave, so Officer Calloway grabbed him by his left wrist to turn the respondent to face him. Officer Calloway patted down the outer surface of Respondent's clothing to determine whether Respondent was armed. While he was patting down the respondent, the respondent began to curse and berate Officer Calloway, but he did not resist the pat-down. During the pat down, Officer Calloway did not feel any object that felt like a weapon. R. p. 3.

After Officer Calloway began frisking, the respondent turned to leave without the officer's permission. As the respondent turned away, Officer Calloway noticed a suspicious vertical leather strap around the respondent's upper chest area that was under the unzipped bomber jacket. Although Officer Calloway was uncertain of the strap's exact purpose and did not have the opportunity to closely examine it, the strap appeared to be a strap to a concealed firearm. With heightened suspicions, Officer Calloway asked the respondent to turn around again. Reluctantly, the respondent complied. Officer Calloway then reached towards the respondent's jacket so that he could get a clearer view of the strap. In response, the respondent brushed Officer Calloway's hand aside. Officer Calloway reached out again, with slightly more force, to move the left exterior of the respondent's jacket aside. The movement of the jacket revealed a "Glock 21" .45 caliber pistol. R. p. 3.

Once the firearm was revealed, Officer Calloway seized the firearm and placed Respondent under arrest. The respondent began to tell Officer Calloway that he was a police officer and arresting him would put his investigation in jeopardy and expose him to physical danger by revealing his identity. Because he wanted to assure that his statement was credible, Officer Calloway requested the respondent's identification. The respondent stated that he never carried any identification to show that he was part of the law enforcement while he was working undercover. The respondent's story seemed suspicious, so Officer Calloway determined that the respondent should be held pending further investigation. Also, Officer Calloway told the respondent that Craven does not have a concealed carry provision, and carrying a concealed firearm is in violation of Craven Statute 19-166.81. R. p. 3.

Officer Calloway took Respondent to his precinct in Charlestown, and the police conducted a full search. One of the items seized was a cellular phone that contained the contact information for several R-T officials. Officer Calloway also found contact information for Jacqueline Malone, daughter of Rushmore County Police Chief, Patrick Malone. Officer Calloway knew that Jacqueline was Patrick Malone's daughter because Jacqueline had made allegations that appeared in local newspapers that there was corruption within the Rushmore County Police Department. R. p. 3. These allegations proved to be false. R. p. 4.

The contact information of the R-T officials that Officer Calloway found in Respondent's phone made Officer Calloway suspect that Respondent was targeting Ms. Malone because of her relationship to the police chief. Thus, he immediately called Ms. Malone. Alarmed from receiving a call from local law enforcement, Ms. Malone

spontaneously revealed that she was having an affair with the respondent, an undercover police officer. In response, Officer Calloway called the respondent's precinct to explain that he had mistakenly arrested one of their undercover officers and apologized. Also, he disclosed that he had learned that Respondent was having an affair with Ms. Malone. R. p. 4.

After he was informed of the situation, Officer Calloway returned to discuss matters with the respondent. The respondent explained that the firearm that he had been carrying was issued by the police department and that he had authorization to carry it. Officer Calloway apologized for the confusion and released the respondent. R. p. 4.

A day later, on June 8, 2005, the Rushmore County Police Department terminated the respondent for "behavior unbecoming of an officer." However, Police Chief Malone admitted that the reason for termination was because of Respondent's involvement in an extramarital affair in violation of the state's adultery statute. Although the respondent was not on duty during his encounters with Ms. Malone, the respondent is married. At the time of the termination, Respondent had been separated from his wife for eighteen months and was recently served with divorce papers. Ms. Malone is not married. Craven Statute 11-198.01 prohibits adultery, but no prosecutions have been brought under this statute in the last twenty years. R. p. 4.

## **STATEMENT OF THE CASE**

Respondent filed in the United States District Court for the District of Craven. District Judge MacGowan granted summary judgment for the Rushmore County Craven Police Department on the issues concerning the Fourth Amendment and Fourteenth

Amendment because of his finding that there was no genuine issue of material fact. The final summary judgment in favor of Craven Police was granted on February 19, 2006.

Respondent appealed to the Thirteenth Circuit United States Court of Appeals. The Court of Appeals heard arguments on March 15, 2007. After oral arguments, the Court of Appeals for the Thirteenth Circuit reversed and remanded on both issues concerning the Fourth and Fourteenth Amendment. Circuit Judge McGurk of the appellate court concluded that the district court erred in holding that neither constitutional rights were violated, so the Court of Appeals reversed the summary judgment and remanded. In a unanimous three judge panel decision, the judgment was decided in favor of Respondent on April 29, 2007.

The Rushmore County Craven Police Department appealed the Thirteenth Circuit's decision. The Supreme Court of the United States granted certiorari for the case in the October 2008 term.

## **SUMMARY OF ARGUMENTS**

The Fourth Amendment does not prohibit a police officer acting under a reasonable suspicion from moving aside an exterior garment of a suspect. An officer is able to conduct an investigatory stop in order to relieve his suspicions that a suspect might be armed with a weapon. When the suspect frustrates this stop by pushing the officer's hand down or not complying in any way with a pat-down, the officer is constitutionally protected in performing an intrusive search to relieve his suspicions if the suspect is armed. Officer Calloway only reached once he saw the possible concealed firearm holster under Respondent's jacket. He did not touch the inside of the jacket and

seize the Glock 21, .45 caliber pistol until Respondent pushed his hand down. Thus, Officer Calloway's actions were in compliance with the Fourth Amendment.

The Due Process Clause of the Fourteenth Amendment does not prohibit the termination of a police officer for his participation in an extramarital affair. The Supreme Court has not established a fundamental right to privacy generally. Therefore, an affair is not constitutionally protected by the Fourteenth Amendment. Because sexual intimacy is not a fundamental right, the Court should apply the rational basis test. Also, in terminating the police officer, the government was acting in its employment capacity rather than as a sovereign. Thus, the police department had leeway in its ability to terminate its employees within its discretion.

## **ARGUMENTS**

### **I. THE FOURTH AMENDMENT DOES NOT PROHIBIT A POLICE OFFICER, ACTING UNDER A REASONABLE SUSPICION, FROM MOVING ASIDE AN EXTERIOR GARMENT OF A SUSPECT.**

#### **Standard of Review**

“As a general matter determinations of reasonable suspicion and probable cause should be reviewed de novo on appeal.” Ornelas v. United States, 517 U.S. 690, 699 (1996).

#### **A. Fourth Amendment flexibility depends upon totality of the circumstances**

Police officers have a constitutional duty under the Fourth Amendment to obtain a warrant based upon probable cause if the circumstances are not exigent. The police must, whenever practicable, obtain a search warrant from a judicial official. Katz v. United

States, 389 U.S. 347 (1967). The Fourth Amendment protects citizens and ensures them “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. The objective reasonableness of the Fourth Amendment is assessed by “examining the totality of the circumstances.” Ohio v. Robinette, 519 U.S. 33 (1996). However, there have been a few notable exceptions to the warrant requirement including consent searches, plain view, and reasonable suspicion.

**B. A man scanning rooftops and wearing a jacket in seventy degree weather gives a police officer reasonable suspicion to conduct a pat-down**

If the officer has a reasonable suspicion that the person is armed, the police officer may perform a Terry stop and frisk. That reasonable suspicion is based upon the totality of the circumstances. “Where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous” Terry v. Ohio, 392 US 1, 30 (1968) the officer, who identifies himself, is entitled to perform a pat-down search of the exterior garments in order to “dispel his reasonable fear for his own or others’ safety.” Id.

Unusual conduct by Respondent had been identified. Respondent was located in the exact location, McDonough Square, where Calloway’s undercover operation between an illegal firearms dealer and a prospective buyer was to take place. Calloway saw Respondent’s unique clothing choice of a bomber jacket even though it was seventy degrees. Calloway’s suspicion level peaked when he saw Respondent surveying and scanning buildings in a professional manner. Moreover, Respondent appeared to be very agitated. R. p. 2. “Nervous, evasive behavior is a pertinent factor in determining

reasonable suspicion.” Illinois v. Wardlow, 528 U.S. 119, 120 (2000). Respondent’s clothing coupled with his behavior in scanning the rooftops gave Officer Calloway reasonable suspicion.

Officer Calloway’s experience as an undercover investigator into the illegal firearms business, in addition to Respondent’s attire and surveying actions, led him to believe that Respondent was involved in criminal activity. R. p. 2-3. Calloway’s subjective belief satisfies the Terry test which involves the belief must “lead him reasonably to conclude in light of his experience that criminal activity may be afoot.” Terry, 392 US at 30.

Moreover, the objective standard presented by Carroll v. United States is also satisfied. This objective standard asks the following pertinent question: Would the facts available to the officer at the moment of seizure or the search cause a man of reasonable caution in the belief that the action taken was appropriate? Carroll v. United States, 267 US 132 (1925). We live in a post September 11<sup>th</sup> world in which we are more cognizant of people looking up and surveying buildings. In light of this, the objective standard would be satisfied to establish reasonable suspicion.

When Calloway’s suspicions were not dispelled, Calloway seized Respondent who was trying to walk away from Calloway. Officer Calloway grabbed Respondent by the left wrist. R. p. 3. This incident indicated a seizure. A seizure occurs when an officer, by means of physical force or show of authority, has in some way restrained a citizen’s liberty. “When a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.” Terry, 392 U.S. at 16. By the fact that Calloway grabbed Respondent’s left wrist, a seizure occurred. R. p. 3.

Respondent was in the exact location where Calloway was watching for a weapons' dealer and a weapons' buyer. Calloway believed that Respondent was somehow involved in that criminal activity. With all of this intelligence information, weapons were the main topic. Because of this, Calloway had every right to fear that Respondent, who had identified himself as "Bill," had a weapon on him. R. p. 3. "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances should be warranted in the belief that his safety or that of others was in danger." Beck v. Ohio, 379 U.S. 89, 91 (1964). Thus, the pat-down search was appropriate.

**C. Scope of pat-down: Who needs probable cause to reach?**

The scope of the pat-down occurred in a systematic way. While Terry laid down the foundational purpose for a pat-down to see if the suspect was armed, Sibron v. New York defined the scope of the pat-down: "the 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 v. New York, 392 U.S. 40, 65 (1968). Calloway's actions conform to the proposition in Sibron. Calloway patted the exterior surface of the respondent's clothing to see if the respondent was armed. When Officer Calloway did not feel any object consistent with a weapon, Respondent turned around to leave and exposed a vertical strap, typical of a concealed weapon holder, under his jacket; concealed weapons are illegal under Craven Statute 19-166.81. R. p. 3.

Officer Calloway never told Respondent that he had concluded the pat-down procedures. Moreover, Respondent's cursing and berating of Officer Calloway were

enough to distract him even though Respondent did not physically resist the pat-down. Calloway did not tell Respondent that he was free to leave from the investigatory stop. Rather, the investigatory stop was still in effect when Respondent turned to leave. R. p. 3. The facts indicate that Officer Calloway asked Respondent to stop and turn around again. Respondent begrudgingly complied the second time. R. p. 3.

The Rushmore County Craven Police Department's position is that Officer Calloway had established reasonable suspicion, and the investigatory stop for the stop and frisk pat-down was still in progress when Respondent turned to leave. Therefore, the vertical leather strap underneath the respondent's unzipped jacket, located around the respondent's upper chest area is just another fact which supported the already articulated reasonable suspicion. The strap was consistent with those used to carry a concealed firearm. So, this would be a fact that would heighten Officer Calloway's sense of fear due to a possible attack by a weapon. R. p. 3.

As long as he was not plundering in Respondent's pockets, Calloway was in complete compliance with Minnesota v. Dickerson. "If an officer continues to explore a detainee's pocket after having concluded that it contains no weapon, the valid scope of a Terry search has been exceeded and any contraband in the pocket must be suppressed." Minnesota v. Dickerson, 508 U.S. 366, 378-379 (1993). A noted exception to this rule has been discussed in Adams v. Williams where the detainee attempted to prevent an officer from conducting an effective pat-down. "Courts have recognized that a more intrusive Terry search may be constitutionally permissible when the detainee attempts to prevent an officer from performing an effective pat-down." Adams v. Williams, 407 U.S.

143, 148 (1972). By brushing Calloway's hand aside, Respondent was preventing Officer Calloway from performing an effective pat-down.

The facts indicate that "Calloway reached towards the respondent to move aside the left exterior portion of the respondent's jacket," but he never touched the inside of the jacket until Respondent forcefully swatted his hand down. He did not have the opportunity to touch inside the jacket because Respondent responded to his reach "by brushing Officer Calloway's hand aside." By brushing Officer Calloway's hand aside, he was preventing the performance of an effective investigatory stop because there had been no official end to the investigatory stop in the first place. R. p. 3.

Calloway never told Respondent that the pat-down had ended. However, Respondent walked away without the officer's acknowledgement that the investigatory stop had concluded. R. p. 3. By Respondent walking away, this can be considered flight. "Officers confronted with flight may stop a fugitive and investigate further." Wardlow, 528 U.S. at 120. There is no case law defining a limit on how many pat-downs an officer can perform in order to conduct a thorough and effective pat-down. "An officer is authorized to detain a person for as long as is reasonably necessary to effectuate the purpose of the detention. State v. DuPaul, 509 N.W.2d 266, 270 (N.D. 1993).

In fact, the Supreme Court held in Adams v. Williams that an officer, even relying on information from an informant, is justified in disarming a resisting suspect even if the officer has not done a pat-down search. In Adams, the officer did not even perform a pat-down search before seizing the suspect's weapon. The defendant refused to get out of the car so the officer could perform a pat-down search. As a result, the officer reached into the suspect's waistband and pulled out a gun. The Supreme Court held that this was

constitutional. Adams, 407 U.S. 143. In the case at issue, a pat-down did occur, and then the suspect, Respondent, walked away without any acknowledgement that the officer was done. Respondent's turn revealed a vertical strap on his body. This strap, based upon Calloway's experience, was consistent with concealed weapon holsters. When Respondent turned around again, as instructed by Officer Calloway, Respondent did not know what Officer Calloway was going to do. He just pushed his hand away. Calloway reached but never touched the inside of the jacket until Respondent pushed his hand down. The circumstances in Adams warranted the officer's intrusive search to disarm the suspect. Adams, 407 U.S. 143. If the officer in Adams was constitutionally able to reach for the weapon because of the non-compliance of the suspect, Calloway should also be able to perform a more intrusive search when the suspect knocked his hand down in order to prevent the reveal of the Glock 21, .45 caliber handgun under his jacket.

Similarly, state courts have held that where potential suspects refuse to cooperate during the pat-down the officer is constitutionally protected to reach in the suspect's pocket to take things of possible harm. In Hayes v. State, an appellate court in Georgia held an officer's actions to be constitutional when he reached into a suspect's pants' pocket to determine whether it contained a weapon where the suspect grabbed and pushed the officer's hands away from his pocket in addition to turning his body to prevent the officer from touching the outside of the pocket. Hayes v. State, 202 Ga.App. 204, 414 S.E.2d 321 (1991).

Moreover, a New Jersey court in State v. Kearney upheld an immediate search where the suspect prevented an officer from conducting the pat-down search by grabbing the officer's hands and backing away from him when the officer attempted to touch the

bulge in the suspect's clothing. State v. Kearney, 183 N.J.Super. 13, 443 A.2d 214, 216 (1981). Also, a Minnesota court held that the suspect's brushing of the officer's hand coupled with the suspect's reach to his pocket gave the officer grounds in which to reach into the pocket to obtain the remnants. State v. Heitzmann, 632 N.W.2d 1 (N.D. 2001). Heitzmann also acknowledged that "courts have recognized a more intrusive Terry search may be constitutionally permissible when the detainee attempts to prevent an officer from performing an effective pat-down." Id. at 9.

With these supporting cases, Officer Calloway was constitutionally justified to reach into Respondent's pocket when he swatted Calloway's hand down in an attempt to touch the clothing. There had not been an official end to the investigatory stop or the frisk pat-down. Officer Calloway acted reasonably when Respondent pushed his hand down and in the midst of the fact that Respondent did not identify himself as a police officer until the Glock 21, .45 caliber pistol was seized. As a result of Respondent trying to prevent Calloway's efforts and brushing Officer Calloway's hand down, Officer Calloway was not prohibited in moving aside the exterior portion of Respondent's garment and then seizing the pistol. R. p. 3.

**D. Stereos and concealed handguns—that is like comparing apples to oranges**

The United States Court of Appeals for the Thirteenth Circuit contends the argument that this case is analogous to Arizona v. Hicks. The totality of the circumstances is the driving force of determining the constitutionality of one's actions under the Fourth Amendment. Ohio v. Robinette, 519 U.S. 33 (1996).

A stereo manipulation case like Hicks does not even come close in comparison with a concealed weapon case. In Hicks, the police officers were privileged in the suspect's apartment to seize weapons in connection with their shooting investigation. Arizona v. Hicks, 480 U.S. 321 (1987). However, the court concluded the officers were not privileged to move around the seemingly out of place stereo equipment in order to check to see if the stereo equipment was stolen. The court distinguished the fact that if the serial number had been in plain view, then the equipment would have been permissibly seized. Id.

Stereo equipment that is presumably stolen is something that a warrant can be easily obtained for in order to check the serial numbers. However, to require a police officer to get a search warrant in order to disarm a suspect when there is reasonable suspicion that the suspect is armed puts the police officer's life in danger. The most recent statistics compiled by the FBI show that "27 officers were slain with firearms when they were 0-5 feet from the offenders and 4 officers died while investigating suspicious persons/circumstances." U.S. Department of Justice, Officers Feloniously Killed, <http://www.fbi.gov/ucr/killed/2007/feloniouslykilled.html> (last visited Jan. 22, 2009). Since 1998, 60 officers have lost their lives while investigating suspicious persons/circumstances. Table 19 Law Enforcement Officers Feloniously Killed, Circumstances at Scene of Incident, 1998-2007, [http://www.fbi.gov/ucr/killed/2007/data/table\\_19.html](http://www.fbi.gov/ucr/killed/2007/data/table_19.html) (last visited Jan. 22, 2009).

For the Court of Appeals to claim Calloway's acts as unconstitutional on the facts at hand means that the court system has been blinded by the fact that we are dealing with a human life which can never be replaced as opposed to trivial stereo systems. Calloway

could have been one of those statistics of law enforcement officials shot within 0-5 feet of the suspect. For him to disarm the suspect was the appropriate constitutional action.

The totality of the circumstances encompassed a myriad of facts that led to Officer Calloway's justifiable reach. First, Respondent was in the exact location where Calloway was in surveillance of an illegal weapons deal that was supposed to go down. Second, Respondent was scanning the rooftops of surrounding buildings, and in a post-September 11<sup>th</sup> world, this can be suspicious behavior. Third, Respondent's behavior was erratic with agitation. Fourth, his clothing was increasingly layered for the warm day of seventy degrees. Fifth, a vertical shoulder strap consistent with a concealed weapon holder was seen in plain view under Respondent's jacket. R. p. 2-3. These facts presented a danger to Officer Calloway's well-being. There were no facts like these in Hicks; thus, these circumstances warranted the actions taken by Calloway.

Officer Calloway's reasonable suspicion allowed him to do the pat-down search as proscribed by Terry. When Respondent walked away, the investigatory stop and frisk was not complete; therefore, Calloway was privileged to apprehend Respondent in order to relieve his suspicions that Respondent was not armed. When Respondent pushed Officer Calloway's hand down, this action allowed Calloway to treat Respondent as a hostile suspect, requiring a more intrusive search. The court protected a police officer's safety in Adams; this court should do the same in this case by protecting police officers like Calloway.

## II. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT PROHIBIT THE TERMINATION OF A POLICE OFFICER FOR HIS PARTICIPATION IN AN EXTRAMARITAL AFFAIR.

### **Standard of Review**

The Supreme Court should apply the de novo standard of review to this case. Courts of appeals should apply the de novo standard of review when evaluating a district court's determination of state law. Salve Regina Coll. v. Russell, 499 U.S. 225, 231 (1991). Appellate judges are able to devote their time to resolving legal issues. Id. at 232. Thus, the Court must review the question of law under the de novo standard. Id. at 232-33.

### **A. The Supreme Court has never recognized a fundamental right to private sexual activity generally**

The Fourteenth Amendment does not permit a state to “deprive any person of life, liberty, or property, without due process of law” U.S. Const., amend. 14, § 1. Also, “the Fourteenth Amendment forbids the government to infringe fundamental liberty interests at all, no matter what process is provided, unless infringement is narrowly tailored to serve a compelling state interest.” Washington v. Glucksberg, 521 U.S. 702, 721 (1997). However, the only fundamental rights and liberties which qualify for protection are those that are “deeply rooted in this Nation’s history and tradition and ‘implicit in the concept of ordered liberty.’” Chavez v. Martinez, 538 U.S. 760, 775 (2003). The Supreme Court has expressed its reluctance to expand the fundamental rights protected by due process. Id. When presented with the opportunity, the Court has not recognized general private sexual activity as a fundamental right. Williams v. Attorney Gen. of Ala., 378 F.3d 1232,

1235 (11<sup>th</sup> Cir. 2004). Private sexual intimacy is not a fundamental right. Therefore, the termination of a police officer for his participation in an extramarital affair does not violate his Fourteenth Amendment right.

In Lofton v. Secretary of Department of Children and Family Services, the Court found that the Supreme Court's decision in Lawrence v. Texas did not recognize an unstated fundamental right to private sexual intimacy. Lofton v. Sec'y of Dep't of Children and Family Servs., 358 F.3d 804, 815-816 (11th Cir. 2004), Lawrence v. Texas, 539 U.S. 558 (2003). Lofton provides persuasive authority for the Court to decline to recognize sexual intimacy between two adults as an additional fundamental right. Id. Like the respondents in Lofton, Ms. Malone and Respondent were two adults that engaged in sexual intimacy. R. p. 4. Petitioner did not violate Respondent's right to the Due Process Clause of the Fourteenth Amendment by terminating him for having an extramarital affair.

In Lofton, homosexual foster parents and guardians litigated to challenge the constitutionality of a Florida law that prohibited them from adopting children. Id. at 807-808. The litigants argued that the Supreme Court's decision in Lawrence, which struck down Texas's sodomy statute, identified a new fundamental right of sexual intimacy. Id. at 815. The Eleventh Circuit Court found that the Supreme Court never characterized homosexual sodomy as a fundamental right. Furthermore, the Court did not locate the right to homosexual sodomy in the Constitution; rather, the right was the by-product of many different constitutional principles and interests. The Lawrence opinion failed to perform a fundamental-rights analysis which evaluates whether the petitioners' right is a fundamental right and liberty "deeply rooted in this Nation's history and tradition." Id. at

816. Also, the Lawrence opinion did not provide the “careful description” of the fundamental liberty interest that is characteristic of a fundamental-rights analysis. Instead, the Court used a general analysis. Id.

The Lofton opinion notes that the primary indicator that the Supreme Court did not create a new fundamental right in the Lawrence analysis is that the Court did not apply the strict scrutiny standard. The strict scrutiny standard is the applicable standard when fundamental rights are implicated. Instead of using strict scrutiny, the Court utilized the rational-basis test. Thus, Lofton held that Lawrence did not create a new fundamental right of general sexual privacy. Id. at 817.

Because the Lawrence decision did not create a new fundamental right for private sexual activity generally, the Court should not find that Respondent had a fundamental right to sexual intimacy. Respondent was terminated for having an extramarital affair. R. p. 4. Like the homosexual litigants in Lofton, the Respondent wants the Court to find that he had a fundamental right to sexual intimacy so that the Court will, in turn, apply the strict scrutiny standard. However, the Court has yet to recognize that sexual intimacy is a fundamental right. Because the Court declined to identify sexual intimacy as a new fundamental right when previously given the opportunity, the Court should not now choose to recognize it in the instant case.

Like the Lofton decision, the court in Williams also found that there was no fundamental, substantive right of consenting adults to engage in private sexual intimacy that would trigger a strict scrutiny analysis. Williams, 378 F.3d at 1237-38. In Williams, the respondents were a civil liberties group that challenged the constitutionality of an Alabama statute that prohibited the commercial distribution of any device predominantly

used for stimulating the human genitals. Id. at 1233. The respondents claimed that the statute denied them substantive due process to the fundamental right of sexual privacy. Id. In the opinion, the court applied the Glucksberg analysis of a fundamental right in which the court examines the asserted right and then determines whether the asserted right is one of “those fundamental rights and liberties which are, objectively, deeply rooted in the Nation’s history and tradition...” Id. at 1239. Using this analysis, the Court found that there was no fundamental right to sexual privacy. Id. Therefore, the Court upheld Alabama’s statute and found in favor of the defendant. Id. at 1250. Furthermore, the Court notes that the Glucksberg Court listed the existing fundamental rights and did not include a right to sexual intimacy within the list. Id. at 1238., Glucksberg, 521 U.S. at 720.

This court should look to Williams for guidance. Like the litigants in Williams, the Respondent would like for this court to recognize a new fundamental right of sexual intimacy. The Court has not recognized this fundamental right in the past when presented with the opportunity. *See, e.g., Carey v. Population Servs. Int’l*, 431 U.S. 678, 688 n. 5 (1977). Therefore, the Court should not find that Respondent’s extramarital affair constituted a fundamental right.

In addition to the Eleventh Circuit’s decisions in Lofton and Williams, the Seventh Circuit’s decision in Muth v. Frank also stated that the decision in Lawrence did not create a fundamental right to sexual privacy. Muth v. Frank, 412 F.3d 808, 817 (7th Cir. 2005). The Seventh Circuit’s opinion says, “Lawrence does not announce, as Muth claims it did, a fundamental right, protected by the Constitution, for adults to engage in all manner of consensual sexual conduct, specifically in this case incest.” Id. This court

reiterates that in the Lawrence decision the Supreme Court did not apply “the specific method it had previously created for determining whether a substantive due process claim implicated a fundamental right” in Glucksberg. Id., Glucksberg, 521 U.S. at 720-21. Furthermore, the Muth decision highlights the Lawrence opinion’s failure to apply the strict scrutiny standard, confirming that sexual privacy is not a fundamental right. Muth, 412 F.3d at 818. The Court in Muth writes, “Strict scrutiny is the standard applicable to challenges where a fundamental liberty interest is at issue. The Court’s refusal to apply that standard confirms that the Court was not creating a new fundamental right.” Id. The Muth Court concludes the following:

Given, therefore, the specific focus in Lawrence on homosexual sodomy, the absence from the Court’s opinion of its own “established method” for resolving a claim that a particular practice implicates a fundamental liberty interest, and the absence of strict scrutiny review, we conclude that Lawrence did not announce a fundamental right of adults to engage in all forms of private consensual sexual conduct.

Id.

As the Lofton, Williams, and Muth holdings illustrate, the Supreme Court has not recognized a fundamental right to sexual privacy generally. Lofton, 358 F.3d 804, Williams, 378 F.3d 1232, Muth, 412 F.3d 808. Therefore, the respondent did not have a fundamental right to conduct an extramarital affair, and the Rushmore Police Department’s termination of him for his conduct was constitutional. R. p. 4.

**B. It is inappropriate for the Court to recognize a new right as broad as “sexual privacy”**

In addition to the fact that no fundamental right of sexual privacy exists, it is inappropriate for this Court to recognize a new right as broad as “sexual privacy.” The

Court has been constantly “...reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.” Glucksberg, 521 U.S. at 720. This Court has stated that by creating a new constitutional protection to a liberty interest, the Court is, in a way, placing “...the matter outside the arena of public debate and legislative action.” Id. Thus, the Court applies the “utmost care” when asked to extend constitutional protection to a liberty interest. If the Court did not apply the “utmost care,” the Due Process Clause would become the “policy preferences of Congress.” Id. By recognizing that the sexual intimacy of an extramarital affair is a fundamental right, the Court would be expanding the definition of sexual privacy and would be by-passing Congress. Id.

**C. When determining if there is a fundamental right to sexual privacy generally, the Court should apply the *Glucksberg* analysis to the facts**

In Gluckberg, the Supreme Court established a substantive-due-process analysis which should be used to determine if a challenged right is fundamental. Glucksberg, 521 U.S. at 720-21. Justice Rehnquist writes that “we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition.’” Id. (quoting Moore v. E. Cleveland, 431 U.S. 494, 503 (1977)). After determining that the right is part of this Nation’s history, there must be a careful description of the “asserted fundamental liberty interest.” Id. at 721. According to this established analysis, these two steps must be taken to determine which standard of review should apply – rational-basis or strict scrutiny. Id.

In the present case, the asserted right at issue is adultery. In evaluating the ancient roots of adultery, Marcum v. McWhorter noted, “Adultery, though not a crime at English common law, was punishable under the canon law, which was administered by the ecclesiastical court of England. Marcum v. McWhorter, 308 F.3d 635, 642 (6th Cir. 2002). In early American history, the Puritans punished adultery with a married woman as a capital offense, and from this law, state laws developed, criminalizing adultery. The criminalization of adultery by a state or the lack of a law that criminalizes adultery does not substantiate adultery as a fundamental right. Thus, “Based on the historical treatment of adultery, a right to engage in an intimate sexual relationship with the spouse of another cannot be said to be either deeply rooted in this Nation’s history and tradition or implicit in the concept of ordered liberty.” Id. Because the asserted right of adultery is not deeply rooted in the Nation’s tradition as a protected liberty interest, the Court should not apply the heightened standard of review. Instead the Court should apply the rational-basis standard. *See generally* Glucksberg, 521 U.S. 702.

**D. There is no fundamental right at issue, and the Court should apply the rational basis standard of review**

A fundamental-rights analysis requires the strict scrutiny test which is sustained only if the legislation is “narrowly tailored to further a compelling government interest.” Lofton, 358 F.3d at 815. However, when there is no fundamental right at issue, the rational-basis test is applied. In this case, the asserted right, sexual intimacy, is not a fundamental right. Therefore, the rational-basis test should be applied to this case. The Court must evaluate whether the challenged statute is rationally related to a legitimate state interest. Heller v. Doe, 509 U.S. 312, 320 (1993).

When applying the rational-basis standard, the legislation “is accorded a strong presumption of validity.” Id. at 319. The Court does not have the luxury to “judge the wisdom, fairness, or logic of legislative choices. F.C.C v. Beach Commc’ns, Inc., 508 U.S. 307, 313 (1993). This standard requires that the statute be upheld “against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational-basis for the classification.” Id. at 320. If there is a rational-basis, the legislation will not be invalidated even if the law appears unwise or disadvantages a specific group, or the rational seems questionable. Romer v. Evans, 517 U.S 620, 632 (1996). Plausible reasons for the statute terminate the inquiry. F.C.C., 508 U.S. at 314. Furthermore, the state does not have the burden of producing evidence to sustain the rationale of the statute. Heller, 509 U.S. at 320. Rather, the party that is attacking the legislation in question will have the burden to show that every possible use for the legislation is negative. Id. at 320-21.

In the present case, the respondent was a police officer that was terminated from the Rushmore County Police Department for having an extramarital affair in violation of a Craven statute that prohibits adultery. The petitioner terminated Respondent for his conduct in order to regulate officer conduct. Thus, the rational-basis of the challenged legislation was to regulate officer conduct – a legitimate state interest. A policy in which the police department terminates those officers that fail to conform to the department regulations is a rational state interest.

Shawgo v. Spradlin is similar to the present case because, like the present case, Shawgo recognized that regulation officer conduct is a legitimate state interest. Shawgo v. Spradlin, 701 F.2d 470 (5<sup>th</sup> Cir. 1983). In Shawgo, two police officers sued the police

department, the city, and the chief of police for violating their constitutional due process rights of privacy. The defendants had disciplined the respondents, in compliance with departmental and city regulations, for off-duty dating and cohabitation. The court held that the disciplinary actions did not violate the officers' privacy interests. Id. at 472.

Furthermore, Shawgo held that the state has a rational-basis for regulating officer conduct, which includes terminating officers who fail to conform to department regulations. Id. at 483. The Court found that "police officers enjoy no constitutionally protected right to privacy against undercover and other investigations of department regulations..." Id.

Like Shawgo, the present case involves a police officer that was terminated because he failed to conform to the regulations. R. p. 4. Respondent was terminated for having an extramarital affair. R. p. 4. Although he was off duty, adultery is against the Craven state law. R. p. 4. As an officer, the police department expects officers to obey all laws. Thus, Respondent, like the respondents in Shawgo, did not follow police regulations. The Rushmore Police Department had a legitimate state interest to regulate its police department, and the enforced policy in the present case is rationally related to this interest.

**E. Although the Court has found a right to privacy in specific instances, there is no general right to privacy in all situations**

The Supreme Court has never recognized a general right to privacy. In Griswold v. Connecticut, the Court held that a state law prohibiting the use of contraceptives was unconstitutional because it was an intrusion into the marital bedroom. Griswold v. Connecticut, 381 U.S. 479 (1965). While the Court mentioned the Due Process Clause of

the Fourteenth Amendment, the Court concentrated its analysis on the Fourth Amendment. Also, the Court highlighted the “notions of privacy surrounding the marriage relationship.” Id. at 486.

Unlike Griswold, the present case does not involve the privacy within the marital bedroom. Respondent and Ms. Malone were involved in an extramarital affair. R. p. 4. Rather than value the privacy and sanctity of marriage, Respondent had sexual relations with a woman that was not his wife. In Griswold, the Court highlights the sanctity of marriage by stating, “Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.” Id. In the present case, no zone of privacy exists for an extramarital affair.

Although Eisenstadt v. Baird, found that allowing married persons to obtain contraceptives while forbidding the distribution of contraceptives to unmarried persons was unconstitutional, the Court did not expand the right to privacy. Eisenstadt v. Baird, 405 U.S. 438 (1972). The Court did not evaluate the Due Process Clause of the Fourteenth Amendment; rather, it evaluated the Equal Protection Clause of the Fourteenth Amendment. Id. at 446-47. The Court found that different classes of people may not be treated in different ways. Id. In this case, unmarried persons were being treated differently from married persons because the state was denying unmarried persons access to contraceptives. In order to classify, the Court evaluated whether there was some “ground of difference that rationally explain[ed] the different treatment accorded married and unmarried persons under the Massachusetts General Laws Ann., c. 272. ss

21 and 21A.” Id. at 447. The Court held that there was no rational reason to treat the two classes differently. Id. By finding this law unconstitutional, the Court did not expand the concept of privacy.

Unlike Eisenstadt, the present case involves the Due Process Clause of the Fourteenth Amendment rather than the Equal Protection Clause. The Craven Law involved in this case treats all classes of citizens the same, making it illegal for any person to commit adultery. R. p. 4. Therefore, Respondent is not a part of a class of persons that is being classified differently from others. All police are expected to follow the regulations of the Rushmore Police Department.

Carey held that regulations that imposed a burden on the fundamental decision of whether to bear or beget a child could be justified only by a compelling state interest and must be narrowly tailored to only express those interests. Carey, 431 U.S. 678. In this case, respondent, distributors of contraceptives, challenged the constitutionality of a New York statute that specifically prohibited the distribution of contraceptives to anyone under the age of sixteen by anyone other than a licensed pharmacist. The statute also banned the advertising and display of contraceptives. Id. The Court in Carey did not expand the right to privacy; rather they reiterated that women have the fundamental right of whether to bear or beget a child, as decided in both Griswold and Eisenstadt. Id. at 685. The Court stated that the right to privacy has been recognized in certain circumstances. Individuals have the right in making decisions involving marriage, procreations, contraception, family relationships, and child rearing and education. Id.

The Court in Carey does not state that there is a right to the privacy of sexual intimacy. *See generally* id. To the contrary, the Court mentions the fundamental rights

that have been recognized, stating that “the outer limits of this aspect of privacy have not been marked by the Court...” Id. at 684-85. The present case questions the constitutionality of terminating a police officer for violating a statute which prohibits adultery. R. p. 4. This case involves sexual intimacy which the Carey Court does not recognize as a fundamental right. An extramarital affair does not involve marriage, procreation, contraception, family relationships, child rearing, or education. Id. at 685. To the contrary, an extramarital affair contradicts these specific fundamental rights.

Although each of the aforementioned cases involves a specific right to privacy, the Supreme Court does not grant the right to privacy generally. Each case stated the specific fundamental right that the Court was recognizing in that case. None of the rights protected by the Due Process Clause of the Fourteenth Amendment involve the protection of sexual intimacy between two adults involved in an extramarital affair. *See, Griswold* 381 U.S. 479, Eisenstadt, 405 U.S. 438, Carey, 431 U.S. 678.

**F. There is no liberty interest at issue when applied to an extramarital affair between unmarried adults**

Although the Lawrence decision held that the Texas statute made it a crime for two persons of the same sex to engage in certain intimate sexual conduct violated the Due Process Clause, the decision was specific to the case and the Supreme Court failed to use a fundamental rights analysis. Lawrence, 539 U.S. 558. The Lawrence case involved two defendants that were convicted in criminal court for engaging in sexual conduct. Id. The defendants were two adult males that were engaging in the consensual act of sodomy in their home. Id.

The present case can be distinguished from Lawrence because the Lawrence case involved two consenting homosexuals while the present case involves two individuals involved in an extramarital affair. R. p. 4. In Lawrence, the Supreme Court states that the homosexual relationship “whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.” Id. at 558. Thus, this specific decision was made because of the individuals’ homosexual relationship. The Court’s opinion highlights the reasoning behind their holding in Lawrence when Justice Kennedy writes the following:

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 common to a homosexual lifestyle.

Id. at 578.

Unlike Lawrence, the Respondent, in the present case, was married at the time of his extramarital affair with Ms. Malone. R. p. 4. His actions could harm the sanctity of his own marriage, especially his wife. Furthermore, he was a police official, a public servant. While the defendants’ actions in Lawrence did not involve the public, the actions of the Respondent did. As a public figure, he was subject to the regulations required by the Police Department. By having an extramarital affair, he violated the Police Department’s regulations. R. p. 4.

Lawrence is also not similar to Respondent’s case because Lawrence involved a criminal arrest, and the present case involved a termination. R. p. 4. In Lawrence, the defendants were “arrested and convicted of deviate sexual intercourse in violation of a

Texas statute forbidding two persons of the same sex to engage in certain intimate sexual conduct.” Id. at 558. The Court discusses the stigma of a criminal statute and the record that the defendants would have to bear for the offense. Furthermore, the Court highlights the lack of equality in convicting homosexuals and not convicting others for a similar offense. Id. at 575.

In the present case, the Respondent was not convicted for the crime; rather he was terminated from his position as a police officer. R. p. 4. He will not have to suffer the stigma of a conviction and will not have a criminal record attached to his name. Furthermore, the Craven statute treats all individuals equally. Therefore, the facts of the present case are quite distinct from the specific facts of Lawrence.

The Lawrence opinion never states that general sexual privacy is a fundamental right, and it fails to use the fundamental rights analysis that the Supreme Court generally employs when evaluating fundamental rights. *See generally* Lawrence, 539 U.S. 558. In a fundamental-rights analysis, the Court must find that the fundamental liberty interests are “so rooted in the traditions and conscience of our people as to be ranked as fundamental.” United States v. Salerno, 481 U.S. 739, 751 (1987). Furthermore, the liberty interest must be an interest that is traditionally protected by our society. Moore, 431 U.S. at 503. Once the Court determines that a fundamental right is at issue, the Court must apply the strict scrutiny standard, assuring that the legislation is narrowly tailored to serve a compelling state interest. Glucksberg, 521 U.S. at 721.

The Lawrence Court does not find that the consensual act of sodomy in the privacy of one’s home is deeply rooted in the nation’s history. Lawrence, 539 U.S. at 568-71. Moreover, the Court discusses the historical punishments for sodomy. Instead

of making a decision based on history, the Court examined modern-day treatment of homosexuals, stating that “we think our laws and traditions in the past half century are of most relevance here.” Id. at 571-72. By failing to make its decision based on the nation’s historical perception of sodomy, it can be concluded that the Lawrence decision was not a fundamental-rights analysis – meaning sexual privacy generally is not a fundamental right. *See generally* Lawrence, 539 U.S. 558.

Another indicator that the Lawrence decision did not create a right to privacy is the fact that the Court did not apply the strict scrutiny standard characteristic of a fundamental rights analysis. The Court concludes, “The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of an individual.” Id. at 578. The Court applied a lower standard of review. Hence, the Court’s application of a lower standard of review implies that the Court was not recognizing sexual privacy as a fundamental right. *See generally* id.

Witt v. Department of Air Force is a Ninth Circuit decision that evaluated the scrutiny used in Lawrence in applying the substantive due process analysis. Witt v. Dep’t of Air Force, 527 F.3d 806, 814-18 (9th Cir. 2008). In this case, the appellant received an honorable discharge from the Air Force for violating the Don’t Ask Don’t Tell rule. Id. at 809-10. The appellant argued that Lawrence applied strict scrutiny while the government argued that the case applied the rational-basis test. Id. at 814-15. While the Court decides not to apply the rational-basis standard, the Court admits, “Substantive due process cases typically apply strict scrutiny in the case of a fundamental right and rational review in all other cases.” Id. at 817. Even though they admit that strict scrutiny should be applied for fundamental rights, the Witt Court writes, “However, we hesitate to apply

strict scrutiny when the Supreme Court did not discuss narrow tailoring or a compelling state interest in Lawrence, and we do not address the issue here.” Id. at 817-18. Thus, instead of determining the scrutiny applied in Lawrence, the Court chose to avoid discussing it in their analysis. *See generally id.* The Court goes on to discuss the analysis used in another case that applied a heightened level of scrutiny to a due process claim. Id. at 818, Sell v. United States, 539 U.S. 166, 179 (2003). Although the Court finally applied intermediate scrutiny to the analysis, the Court did not base their analysis on Lawrence and did not use the strict scrutiny analysis that is characteristic of constitutional challenges to fundamental rights. Witt, 527 F.3d 806.

In Cook v. Gates, the First Circuit interpreted Lawrence as applying a balancing test that balanced “the strength of the state’s asserted interest in prohibiting immoral conduct against the degree of intrusion into the petitioners’ private sexual life caused by the statute in order to determine whether the law was constitutionally applied.” Cook v. Gates, 528 F.3d 42, 56 (1st Cir. 2008). Like the respondents’ claim in Cook, the Respondent’s claim would not succeed, even if the Court applies this liberal interpretation of Lawrence. In applying the balancing test, the present case will withstand a Constitutional challenge. The state’s interest in prohibiting adultery is to prevent harm to the institution of marriage. This protection of the sanctity of marriage throughout the state, in addition to regulating the police department, outweighs the intrusion of this law into the lives of those that have chosen to enter into marriage, such as the Respondent and his wife. See, Commonwealth v. Stowell, 449 N.E.2d 357, 360 (Mass. 1983) (quoting Southern Sur. Co. v. Oklahoma, 241 U.S. 582, 596 (1916) (describing the harm that adultery causes to the marital relationship)).

**G. There is a distinct difference between the government as employer and the government as sovereign**

Engquist v. Oregon Department of Agriculture and Bishop v. Wood highlight the difference between the government as an employer and government as sovereign. Engquist v. Or. Dept. of Agric., 128 S. Ct. 2146 (2008), Bishop v. Wood, 426 U.S. 349 (1976). Engquist states that the Supreme Court has historically held that there is a crucial distinction in a constitutional analysis between the government as a lawmaker and the government as a proprietor. Engquist, 128 S. Ct. at 2151. The Court writes, “We have often recognized that government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large.” Id. Although it has been recognized that public employees do have privacy interests, these interests must be balanced against the realities of the workplace. Id. The Supreme Court has found that “the Due Process Clause does not protect a public employee from discharge, even when such discharge was mistaken or unreasonable.” Id., *See Bishop*, 426 U.S. at 350.

This Court should look to Bishop for guidance. Bishop held that “the Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.” Id. In Bishop, a former police officer brought an action against a city for violating his due process rights when he was discharged from his job. Id. at 343. The Court discussed that the federal court is not the appropriate forum to review public agency’s daily personnel decisions. Id. at 349. Even if the personnel decision was erroneous, the Court writes that it believes that there are other ways to correct the problem. Id. at 350.

Like the police officer in Bishop, Respondent brought this action for violating his due process rights when he was terminated from his job. R. p. 2. The Court should apply the holding in Bishop to this case and find that the federal court is not the appropriate forum for a police officer's job that was terminated at the discretion of his police chief. The termination was a personnel decision, and whether right or wrong, did not constitutionally infringe upon the liberty of Respondent. The government was acting as an employer, not sovereign, when the police chief terminated the respondent. Thus, the police chief had more leeway in making a discretionary personnel decision.

### **CONCLUSION**

The Respondent's constitutional rights were not violated. Therefore, the decision of the Thirteenth Circuit Court of Appeals should be reversed in favor of the Petitioner, Rushmore County Craven Police Department.

**Respectfully submitted.**

Team X

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