

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE  
UNITED STATES

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JERRY FITCH, SR.  
*Applicant,*

v.

JOHNNY VALENTINE  
*Respondent.*

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MOTION FOR STAY OF MANDATE

PENDING THE FILING AND DISPOSITION OF A PETITION OF A WRIT OF  
CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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TO: THE HONORABLE ANTONIN SCALIA

Associate Justice of the United States Supreme Court and  
Circuit Justice for the Fifth Circuit

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TO THE HONORABLE ANTONIN SCALIA: Associate Justice of the United  
States Supreme Court and Circuit Justice for the Fifth Circuit:

Pursuant to Rules 22 and 23 of the Rules of this Court and 28 U.S.C. §  
2101(f), Applicant Jerry Fitch, Sr., respectfully requests a stay of the Mandate  
issued below pending the filing and final action by this Court on a Petition for a  
Writ of Certiorari seeking review of the decision of the Mississippi Supreme Court  
in this case.

The state of Mississippi is one of only seven states that retains the common  
law tort of alienation of affection. Long recognized as an antiquated means for  
judicial enforcement of traditionally endorsed marital arrangements and medieval  
notions of property, in practice its continued existence forms the predicate for

judicially sanctioned exploitation, blackmail, fraud and extortion. In this case, the lower court entered judgment against Mr. Fitch for \$642,000 compensatory damages and \$112,500 in punitive damages for conduct protected by the First Amendment and in contravention of the Due Process Clause of the Fourteenth Amendment. Petitioner now requests a stay of the mandate issued below pending the filing and disposition of a petition for a writ of certiorari to the Mississippi Supreme Court to consider the question whether the state may punish an individual for lawful conduct protected by the First and Fourteenth Amendments.

### **OPINIONS BELOW**

The opinion of the Mississippi Supreme Court (App. A ) from which this petition seeks review is reported at 959 So.2d 1012, (Miss. 2007). The opinion of the Mississippi Supreme Court denying petitioner’s petition for rehearing is not reported (App. B).

### **CONSTITUTIONAL PROVISIONS INVOLVED**

The First Amendment to the United States Constitution, in pertinent part, provides that “[c]ongress shall make no law . . . abridging the freedom of speech. . . [.]” U.S. Const. amend. I. The Fourteenth Amendment, in pertinent part, provides: “nor shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV.

### **STATEMENT OF THE CASE**

## A. Facts

This case involves the question of whether and under what circumstances a state may punish exercise of the right of intimate association.

Respondent Johnny Valentine met his future wife, Sandra, in approximately 1989-90. Although Respondent had recently divorced, Sandra was still married and living with her then husband when they began dating. Respondent and Sandra were married in 1993. From the start, the marriage was not ideal. Sandra complained about Respondent's frequent gambling and drinking and her frequent abandonment. Despite repeated requests that he stop this behavior, it continued throughout their marriage. The couple had one child together. They were separated several times during the marriage.

Sandra started working at Applicant Jerry Fitch's business in the Spring of 1997. Sandra's marriage to Respondent had all but formally ended long before she went to work for Mr. Fitch. Sandra initiated a relationship with Mr. Fitch and by the Spring of 1998, she was on intimate terms with him. Eventually, Respondent suspected something was going on between Sandra and Mr. Fitch beyond an employee-employer relationship and asked Sandra to quit her job. She refused.

Sandra had a child on February 5, 1999. Respondent suspected that the child was not his shortly after Sandra became pregnant and confronted her with his suspicions of her infidelity. Shortly thereafter; Sandra confirmed his suspicions.

Respondent and Sandra separated in August 1999. In September 1999,

Respondent had a DNA test done on the child born that year to determine if he was the father. After the results of the test proved the child was not fathered by him, Respondent nevertheless tried to reconcile with Sandra offering to raise the child as his own. Still, his wife would not quit her job with Mr. Fitch nor give up her relationship with him.

In October 1999, Respondent filed for divorce and the divorce was granted on grounds of adultery. The divorce was negotiated between Respondent's attorney, Petitioner's attorney and Petitioner. In the divorce, Sandra was given custody of the children, child support and the marital house. Respondent gave up the house and child in return for the admission of adultery which he and his attorney needed to prosecute an alienation of affection claim.

Sandra married Mr. Fitch in April 2002.<sup>1</sup>

## **B. The Proceedings Below**

This action was commenced by Respondent Johnny Valentine seeking damages for the tort of alienation of affection against Applicant Jerry Fitch, Sr. in the Circuit Court of Marshall County Mississippi on December 21, 1999. The matter was tried to a jury on March 29-30, 2005. Judgment was entered on April 12, 2005, against Mr. Fitch in the amount of \$642,000 actual damages and \$112,500 in punitive damages for a total award of \$754,500.00. Mr. Fitch's Motion for Judgment Notwithstanding the Verdict, for New Trial and for Remittitur was

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<sup>1</sup>Ironically, this was one reason Mississippi's high court found her testimony unbelievable.

denied by the trial court on August 24, 2005. Notice of Appeal was filed on September 16, 2005. The Mississippi Supreme Court affirmed the verdict on April 19, 2007.

In rejecting the due process claim,<sup>2</sup> Mississippi's highest court agreed with Respondent's argument that the due process argument was procedurally barred. *Valentine*, 959 So.2d at ¶ 44 Reaching the merits nonetheless, the court construed the challenge to be general in scope or the position that Mr. Fitch challenged the assessment of "punitive damages as a legitimate form of relief in alienation of affections cases."<sup>3</sup> The court completely overlooked, or chose not to address Mr. Fitch's argument that "the penal component of the award below ... offends substantive due process insofar as it sanctions punishment for constitutionally permissive conduct." *Id.* Instead, the court acknowledged Respondent's argument that punitive damages were appropriately awarded here when malice was presumed as a result of the adulterous relations between Mr. Fitch and Respondent's then wife.<sup>4</sup>

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<sup>2</sup>Mr. Fitch argued below that Mississippi's interest in preserving the sanctity of marriage (Mississippi's traditional and long held rationale for preserving the tort, *eg. Bland v Hill*, 735 So.2d 414, 418 (Miss. 1999)) ended "when one is punished for engaging in action protected by the Constitution that incidentally may also cause the transfer of affections to one outside the marriage." *Valentine*, 959 So.2d at ¶ 43.

<sup>3</sup>Despite the fact that Petitioner did not challenge the punitive damage award on proportionality grounds, the court looked at it this way. *See Valentine*, 959 So.2d at ¶ 44.

<sup>4</sup>*See Valentine*, 959 So. 2d at ¶ 43:

*Valentine* notes that this Court "has recognized punitive damages as proper relief in alienation of affection cases since *Brister v. Dunaway*, 149 Miss. 5, 115 So. 36 (1928)..." Moreover, he asserts that because adultery constitutes malice, see *Walter [v. Wilson]*, 228 So.2d [597] at 598 [(Miss.1969)] ("on the issue of adultery with the

A petition for rehearing was denied on July 26, 2007. The mandate was issued on August 2, 2007.

On August 2, 2007, counsel for Mr. Fitch learned that counsel for Mr. Valentine had undertaken efforts to enforce the judgment. Therefore, on August 2, 2007, Mr. Fitch filed on the Circuit Court of Marshall County, Mississippi a Petition to Stay All Proceedings. On September 7, 2007, Mr. Fitch filed with the Mississippi Supreme Court a motion to stay the mandate issued in this case pursuant to Miss. R. App. P. 41. On September 11, 2007, the lower court entered its order denying Appellant's request under Miss. R. Civ. P. 62. Mr. Fitch appealed that order to the Mississippi Supreme Court. The Mississippi Supreme Court denied Mr. Fitch's motion to stay the mandate on October 4, 2007.

### **JURISDICTION**

The decision of the Mississippi Supreme Court was entered on April 19, 2007. A petition for rehearing was denied on July 26, 2007 (App., *infra*, B). The mandate was issued on August 2, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

### **REASONS FOR GRANTING THE STAY**

The authority of this Court or of any Circuit Justice to grant a stay of the enforcement of a judgment below is set forth in 28 U.S.C. § 2101(f), which states:

In any case in which the final judgment or decree of any court is

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wife of another ... malice is presumed.”), then Miss. Code Ann. Section 11-1-65(1)(a) is satisfied and “[t]he necessary elements were present for the jury to determine whether or not to grant punitive damages in this case.”)



subject to review by the Supreme Court on writ of Certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judgment of the court rendering the judgment or decree or by a justice of the Supreme Court . . . .

This Court’s Rule 23 states that “[a] party to a judgment sought to be reviewed may present to a Justice an application to stay the enforcement of that judgment and “[a] stay may be granted by a Justice as permitted by law.” The Justices of this Court have identified three general criteria that must be met by a stay applicant to rebut the presumption that the decisions below on the merits and on the refusal to grant a stay pending certiorari are correct: (1) “a reasonable probability that certiorari will be granted (or probable jurisdiction noted), (2) “a significant possibility that the judgment below will be reversed, and (3) “a likelihood of irreparable harm (assuming the correctness of the applicant’s position) if the judgment is not stayed.” *Barnes v. E-Systems, Inc. Group Hosp. Med.& Surgical Ins. Plan*, 501 U.S. 1301, 1302 (1991) (Justice Scalia as Circuit Justice).

**I. THERE IS A REASONABLE PROBABILITY THAT CERTIORARI WILL BE GRANTED**

This case presents an important question of Constitutional law. This Court’s decision in *Lawrence v. Texas*, 539 U.S. 558 (2003) leaves open the question of whether the right not to be punished by the state for engaging in intimate conduct unapproved by the sovereign, also precludes state sanctioned punishment of extramarital conduct part and parcel to a loving relationship, that meets all the criteria of protected intimate association within the meaning of *Roberts v. United*

*States Jaycees, infra.* though also unapproved by the state.

This Court’s holding in *Campbell v. State Farm, infra*, prohibits arbitrary deprivations of property through the mechanism of punitive damages. A punitive damage award based on a presumption of malice arising out of otherwise lawful conduct is an arbitrary deprivation of property.

**A. THE COURT SHOULD CLARIFY WHETHER THE CONDUCT UPON WHICH THIS PUNITIVE DAMAGE AWARD IS PREDICATED IS CONSTITUTIONALLY PROTECTED**

This court has long recognized the personal liberty interests in jeopardy when a state actively interferes in the consensual adult sexual activity of its citizens. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), this Court signaled a new approach to evaluating such questions, determining that the Fourteenth Amendment provided a check to unwarranted state interference in the private lives of its citizenry.<sup>5</sup> Since that time, in varying degrees, this Court has identified a liberty interest worthy of Constitutional protection in a variety of settings that implicate exercise of the right of intimate association between consenting adults.<sup>6</sup>

In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984) this Court “concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the

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<sup>5</sup>*Griswold*, 381 U.S. at 484 (recognizing “zones of privacy” created by the guarantees found in the Bill of Rights).

<sup>6</sup>*Loving v. Virginia*, 388 U.S. 1 (1967) (marriage rights); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (marriage rights); *Moore vs. East Cleveland*, 431 U.S. 494 (1977) (cohabitation with ones relatives); *Cary v. Population Services International*, 431 U.S. 678 (1977) (contraception use)

role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.”

The long relationship between Jerry and Sandra Fitch, upon which the punitive damage award entered in this case was predicated, satisfies all of the *Roberts* criteria.<sup>7</sup> Though adulterous at its start, there was never any proof adduced that Mr. Fitch had no real affection and love for Sandra during the relationship. Indeed, the evidence was to the contrary.<sup>8</sup>

Mr. Fitch developed a relationship with Sandra, fathered a child with her and provided for the child before the relationship between Sandra and Respondent formally came to an end. Though assuredly nontraditional—and perhaps abhorrent to many—Petitioner and Sandra’s relationship clearly created and fostered a *de facto* family unit:

Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.

*See Roberts*, 468 U.S. at 620. The law of Mississippi looks upon the intimate

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<sup>7</sup>*See Roberts*, 468 U.S. at 620 “[F]actors that may be relevant include size, purpose, policies, selectivity, congeniality. . .”)

<sup>8</sup>Ultimately, Sandra and Petitioner had a child together and married. They were married at the time of trial below and remain so now.

association upon which the punitive damage award was predicated as “malicious.” Moral abhorrence by the sovereign, however, is not a relevant consideration in determining whether the intimate association at issue is entitled to Constitutional protection. Petitioner submits, he has made the requisite showing in the courts below that his relationship with Sandra at all relevant times was sufficiently imbued with the characteristics necessary to entitle him to state recognition of his liberty /privacy interests arising out of that relationship.

In *Lawrence v. Texas*, 539 U.S. 558 (2003), this Court extended Constitutional protection to same sex intimate relationships, recognizing the proposition that “individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment.” *Lawrence*, 539 U.S. at 574. This Court reasoned there can be conduct that it may not want to encourage or may not be “entitled to formal recognition in the law” but nevertheless “is within the liberty of person to choose without being punished.” *Id.* at 567.

The State of Mississippi cannot sanction the awarding of punitive damages on a presumption of malice arising from the exercise of intimate associational rights by consenting adults, absent compelling justification. In this case, such justification cannot be shown.<sup>9</sup>

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<sup>9</sup>Petitioner here is not urging a prohibition on all attempts by the state to foster traditional forms of marital relationships nor suggesting that there exists a Constitutional right to adultery. Short term sexual liaisons, lacking the hallmarks of a deep intimate interpersonal component may be

The protection and fostering of traditional forms of marriage and family are still preserved (to the extent they can ever be)<sup>10</sup> in the heart balm tort upon which compensatory damages were awarded in this case. With an adequate remedy to aggrieved spouses in Mississippi, there is simply no rational basis for state sanctioned punishment of intimate association between consenting adults. The Mississippi Supreme Court should be reversed.

**B. THE ASSESSMENT OF PUNITIVE DAMAGES FOR CONSTITUTIONALLY PROTECTED CONDUCT IS AN ARBITRARY DEPRIVATION OF PROPERTY**

In Mississippi, interference in the marital relations of another exposes the interloper to compensatory damages measured by the loss of consortium proved the result of the interference.<sup>11</sup> Punitive damages are allowable and presumed where an act of adultery is proven. *Walter v. Wilson, supra.*, 228 So.2d at 598.<sup>12</sup>

In *State Farm vs. Campbell*, 538 U.S. 408 (2003) this Court again reaffirmed the dangers inherent in punitive damage awards by civil juries, concluding that such awards “pose an acute danger of arbitrary deprivation of property.” *Campbell*, 538 U.S. at 418. Relevant to the question here presented, this court stated:

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subject to state interference justified by less compelling reasons than should be manifest here.

<sup>10</sup>*See Bland, supra.* 735 So.2d at 418 (We believe that the marital relationship is an important element in the foundation of our society. To abolish the tort of alienation of affections would, in essence, send a message that we are devaluing the marriage relationship.)

<sup>11</sup>*American Nat. Ins. Co. v. Hogue*, 749 So.2d 1254 (Miss. 1999) (Spouse's right of recovery on loss of consortium claim is limited to loss of society and companionship, interference with conjugal rights, and providing previously unnecessary physical assistance).

<sup>12</sup>*Overruled in part on other grounds, Saunders v. Alford*, 607 So.2d 1214, 1219 (Miss.1992).

We recognized in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), that in our judicial system compensatory and punitive damages, although usually awarded at the same time by the same decision maker, serve different purposes. *Id.*, at 432, 121 S.Ct. 1678. Compensatory damages “are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct.” *Ibid.* (citing Restatement (Second) of Torts § 903, pp. 453-454 (1979)). By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution. *Cooper Industries, supra*, at 432, 121 S.Ct. 1678; *see also* [*BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L. Ed.2d 809 (1996)] at 568, 116 S.Ct. 1589 (“Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition”); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) (“[P]unitive damages are imposed for purposes of retribution and deterrence”).

*Id.* at 416.

In the trial court below, the jury more than adequately compensated Respondent through the award of compensatory damages for the loss of consortium occasioned by Mr. Fitch's interference with the marriage at issue in this case. Mr. Fitch was then held liable to Respondent for punitive damages predicated on his adulterous relationship<sup>13</sup> with Sandra Fitch, former wife of Respondent; current wife of Mr. Fitch.

Although it is unclear whether the conduct upon which the punitive damage award is predicated (simple adultery) is or is not unlawful in Mississippi,<sup>14</sup> as

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<sup>13</sup>As pointed out by Mississippi's highest court, Respondent's punitive damage was predicated on something denominated “malicious adultery.” *Valentine*, 959 So.2d at ¶ 44.

<sup>14</sup>Although a statute remains on the books to that effect. *See* Miss. Code Ann.97-29-1 (Rev.1994) (adulterous cohabiting). As recognized by *Saunders supra*, 607 So. 2d at 1220, there is no general crime of adultery in Mississippi nor has anyone apparently been prosecuted for many years. Prosecution seems less likely now subsequent to this Court's decision in *Lawrence, supra*.

argued previously, it is protected by the Constitution, nonetheless. State sanctioned penalties essentially directed at “no[thing] more than prohibit[ing] a particular sexual act,” *Lawrence*, 539 U.S. at 568, constitutes an arbitrary deprivation of property redressable here. Because Mississippi has no legitimate interest in punishing Mr. Fitch’s conduct, the punitive damage award should be reversed.

**II. THERE IS A SIGNIFICANT POSSIBILITY THAT THE MISSISSIPPI SUPREME COURT’S DECISION WILL BE REVERSED UPON REVIEW**

There is a significant possibility that a majority of this Court might well reverse the Mississippi Supreme Court’s decision in this case because in upholding the antiquated tort of alienation of affection the Mississippi Supreme Court’s decision affirmed state sanctioned punishment of Mr. Fitch for conduct that is protected under the First Amendment in violation of his due process rights guaranteed by the Fourteenth Amendment.

**III. APPLICANT WILL BE IRREPARABLY HARMED IF A STAY IS NOT ISSUED PENDING THE DISPOSITION OF THIS CASE BY THIS COURT**

In the event a stay is not granted, the judgment of the Mississippi court will be executed and Mr. Fitch will be required to pay Respondent the full amount of the judgment against him: \$642,000 compensatory damages and \$112,500 in punitive damages.<sup>15</sup>

Here Respondent has already taken steps to execute the judgment against

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<sup>15</sup>This Court’s Rule 23 permits the court to protect the Respondent in the event a stay is granted but ultimately certiorari is denied or the lower court’s decision is upheld on the merits. Sup. Ct. R. 23(1). Without a stay no such protection will be afforded to Mr. Fitch.

Mr. Fitch and without a stay it is likely that he will complete that process. Accordingly, unless this Court issues a stay pending the outcome of certiorari proceedings, Mr. Fitch will be irreparably harmed. No prejudice can result from the granting of this request, as Respondant's judgment is adequately protected by a Letter of Credit covering all of the judgment and interest. *See* Appendix E.

### CONCLUSION

For the reasons set forth herein, Applicant Jerry Fitch respectfully requests that an order be entered staying the Mandate pending the completion of certiorari proceedings before this Court.

Respectfully submitted,

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