Nos. 15-1315, 15-1326

In The Supreme Court of the United States

JULIAN KENNETH ARMEL, JR.,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petitions For Writs Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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RESTATED QUESTION PRESENTED

Armel challenges his 1985 convictions under Virginia Code § 18.2-361 for engaging in oral sex with minors and for paying for oral sex in a public place. In 2013, the Fourth Circuit concluded that § 18.2-361(A) was facially invalid in light of *Lawrence v. Texas*. But in 2015, the Supreme Court of Virginia adopted a narrowing construction of the statute, upholding its application to sodomy involving children, prostitution, and public places, and excluding from its reach private sexual conduct between consenting adults. The question presented is:

> Whether the Virginia Supreme Court, as the final arbiter of Virginia law, properly adopted an authoritative, narrowing construction of § 18.2-361(A) that cures any constitutional infirmity that the statute suffered in light of *Lawrence*.

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STATEMENT OF THE CASE

1. Julian Kenneth Armel, Jr. challenges his 1985 convictions under Virginia's sodomy statute, Virginia Code § 18.2-361. Armel engaged in oral sex with minors; he also paid for oral sex in a public place. Armel was over 30 years old at the time of his offenses.

On October 29, 1985, Armel pleaded guilty in the Circuit Court for Frederick County under § 18.2-361 to 15 counts of "carnally knowing a person by the mouth and engaging in fellatio."[1] Ten of his convictions involved minors: one victim was 15 years old, and the other victim was 13 years old.[2] The remaining five counts involved oral sex with a person of unspecified age in exchange for money in a public place—a local sawmill.[3] Armel received a five-year sentence for each count with 10 years suspended for the five counts involving prostitution at the sawmill and for two of the

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[1] U.S. Magistrate Judge's R. & R., *Armel v. Johnson*, No. 2:04cv600, at 1-2 (E.D. Va. July 19, 2005). He also was convicted of two counts under Virginia Code § 18.2-374.1 for "producing or making sexually explicit visual material of a subject less than eighteen years of age." *Id.* at 2.

[2] *Id.* at 11-12.

[3] *See id.* at 14-15 ("Armel admitted that the offenses involved prostitution: 'All three of these boys [the two minor victims and the individual of majority] approached me, specifically to *earn money* in the manner they were used to earning it with other men.'. . . . Armel substantiates that the sodomy incidents occurred 'at the sawmill in Frederick County.' " (citations omitted) (emphasis added)).

counts involving a minor.[4] He also was sentenced to 10 years of probation.[5]

On November 1, 1985, Armel pleaded guilty in the Circuit Court for the City of Winchester under § 18.2-361 to one count of "carnally knowing a person by mouth."[6] A Winchester grand jury had indicted Armel in July 1985 based on evidence "that a fifteen-year-old boy went to the defendant's home and performed sodomy on the defendant" for $25.[7] In accordance with the plea agreement, the trial court sentenced Armel to five years in the penitentiary but suspended the sentence.[8]

Armel did not appeal any of his convictions.[9]

2. On March 12, 2013, the Fourth Circuit held in *MacDonald v. Moose*[10] that Virginia Code § 18.2-361(A) was facially unconstitutional in light of *Lawrence v.*

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[4] *See id.* at 2.

[5] *Id.*

[6] Written Statement in Lieu of Tr. at 1, *Commonwealth v. Armel*, No. CR85000115-01 (Winchester Cir. Ct. Aug. 28, 2015).

[7] U.S. Magistrate Judge's R. & R., *Armel v. Johnson*, No. 2:04cv601, at 10 & n.8 (E.D. Va. July 19, 2005).

[8] Order, *Commonwealth v. Armel*, No. 85-CR-115, at 1 (Winchester Cir. Ct. Nov. 1, 1985). Armel was indicted on two other charges, which were nolle prossed. *See* Plea Agreement at 1-2, *Commonwealth v. Armel*, Nos. 85-CR-113, 85-CR-114, 85-CR-115 (Sept. 1985).

[9] U.S. Magistrate Judge's R. & R., *supra* note 1, at 2; Written Statement in Lieu of Tr., *supra* note 6, at 1.

[10] 710 F.3d 154 (4th Cir.), *cert. denied*, 134 S. Ct. 200 (2013).

Texas.[11] In *MacDonald*, the state trial court found after a bench trial that the defendant had solicited oral sex from a 17-year-old girl.[12] But the Fourth Circuit vacated MacDonald's conviction because, in its view, § 18.2-361(A) was "materially indistinguishable" from the Georgia statute at issue in *Bowers v. Hardwick*,[13] which was invalidated by *Lawrence*.[14] Despite recognizing "that a state could, consistently with the Constitution, criminalize sodomy between an adult and a minor," the court concluded that "deliberate action by the people's representatives" was required if § 18.2-361(A) was to be preserved.[15] According to the Fourth Circuit, "a judicial reformation of the anti-sodomy provision to criminalize MacDonald's conduct in this case . . . [would] require[ ] a drastic action that runs afoul of the Supreme Court's decision in *Ayotte v. Planned Parenthood of Northern New England*."[16]

3. In 2014, the Virginia General Assembly amended Virginia Code § 18.2-361(A) to remove the anti-sodomy provision at issue here.[17] As amended,

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[11] *Id.* at 165-66 (citing *Lawrence v. Texas*, 539 U.S. 558 (2003)).

[12] *Id.* at 156-57.

[13] 478 U.S. 186 (1986).

[14] *MacDonald*, 710 F.3d at 163.

[15] *Id.* at 165.

[16] *Id.* at 165-66 (citation omitted). *See also Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006).

[17] 2014 Va. Acts ch. 794 ("If any person carnally knows in any manner any brute animal~~, or carnally knows any male or female person by the anus or by or with the mouth,~~ or voluntarily submits to such carnal knowledge, he ~~or she shall be~~ *is* guilty of a Class 6 felony~~, except as provided in subsection B~~.").

§ 18.2-361(A) now states: "If any person carnally knows in any manner any brute animal or voluntarily submits to such carnal knowledge, he is guilty of a Class 6 felony."[18] The 2014 amendment added anal intercourse, cunnilingus, fellatio, and anilingus to criminal statutes punishing prostitution and crimes involving children.[19]

4. On February 26, 2015, the Virginia Supreme Court responded to *MacDonald* in *Toghill v. Commonwealth*.[20] The defendant in *Toghill* had solicited oral sex from an undercover agent he believed to be a young teenage girl.[21] Unlike the Fourth Circuit, however, the Virginia Supreme Court adopted a narrowing construction of § 18.2-361(A) to eliminate its theoretical application to conduct protected by *Lawrence*.[22] The court explained that "[t]he easy to articulate remedy is that Code § 18.2-361(A) is invalid to the extent its provisions apply to private, noncommercial and consensual sodomy involving only adults."[23] Because Toghill had "solicit[ed] sodomy with a person whom he thought was a minor," the court held that § 18.2-361(A) was

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[18] Va. Code Ann. § 18.2-361(A) (2014).

[19] *See id*. §§ 18.2-346 (2014), 18.2-348 (2014), 18.2-356 (2016 Supp.), 18.2-368 (2014), 18.2-370 (2014), 18.2-370.1 (2014), 18.2-371 (2016 Supp.), 18.2-374.3 (2014).

[20] 768 S.E.2d 674, 677-78 (Va. 2015).

[21] *Id.* at 676.

[22] *Id.* at 682 ("[W]e hold that it is proper to apply the 'normal rule' by prohibiting those applications of Code § 18.2-361(A) that are unconstitutional and leaving the constitutional applications of Code § 18.2-361(A) to be enforced.").

[23] *Id.* at 681.

"constitutional as applied to him" and that he did "not have standing to assert a facial challenge."[24]

5. Armel filed motions in the Frederick County and Winchester circuit courts to vacate his convictions, arguing that they were unconstitutional under *MacDonald*.[25] Relying on *Toghill*, each trial court denied Armel's motion.[26] The Virginia Supreme Court refused Armel's petitions for review.[27] He timely petitioned this Court for writs of certiorari.[28]

REASONS FOR DENYING THE WRITS

This Court should deny Armel's petitions for writs of certiorari. There is no split of authority warranting this Court's review. Although there may

[24] *Id.* at 680.

[25] Pet. for Writ of Cert. at App. A, *Armel v. Commonwealth*, No. 15-1315 (filed Apr. 22, 2016); Pet. for Writ of Cert. at App. A, *Armel v. Commonwealth*, No. 15-1326 (filed Apr. 26, 2016).

[26] Pet. for Writ of Cert. at App. A, No. 15-1315; Pet. for Writ of Cert. at App. A, No. 15-1326.

[27] Pet. for Writ of Cert. at App. B, No. 15-1315; Pet. for Writ of Cert. at App. B, No. 15-1326.

[28] Armel's petition challenging his Frederick County convictions was filed on April 22, 2016 and assigned Docket No. 15-1315. On May 20, 2016, this Court requested the Commonwealth's response.

Armel's petition challenging his Winchester conviction was filed on April 26, 2016 and assigned Docket No. 15-1326. On June 22, 2016, this Court requested the Commonwealth's response. The Commonwealth submits this brief in opposition to both petitions.

appear to be tension between how the Fourth Circuit in *MacDonald* and the Virginia Supreme Court in *Toghill* applied *Lawrence* to Virginia Code § 18.2-361(A), the Virginia Supreme Court has the final word when construing Virginia statutes. After *Toghill*, *MacDonald* is no longer controlling precedent with respect to the meaning of § 18.2-361(A). Thus, Armel is mistaken that individuals who challenge their convictions under § 18.2-361(A) will receive different outcomes depending on whether their case is brought in federal or State court.

This case also does not present an important question of federal law. Armel's argument that *Toghill* is inconsistent with *Lawrence* is incorrect. In light of *Toghill*'s authoritative construction of § 18.2-361(A), the criminal conduct at issue here is conduct that *Lawrence* did not address: sodomy between an adult and a minor; sodomy in public; and sodomy in exchange for money. Since *Lawrence*, there have been no reported prosecutions in Virginia for private sexual conduct between consenting adults protected by that case. And the 2014 amendments to § 18.2-361(A) foreclosed the possibility of any such prosecution in the future. Accordingly, there is no certworthy issue presented here.

I. There is no conflict between *Toghill* and *MacDonald* because the Virginia Supreme Court properly adopted a narrowing construction of Virginia Code § 18.2-361(A).

Armel is wrong that the Fourth Circuit and the Virginia Supreme Court decisions addressing the constitutionality of Virginia Code § 18.2-361(A) are in conflict. Armel fails to appreciate the effect of the Virginia Supreme Court's limiting construction in *Toghill*. When, as here, a State's highest court narrows the reach of a statute that might otherwise be unconstitutional, federal courts are obligated to follow that narrowing construction as an authoritative interpretation of State law.[29] Thus, even if the statute had been vulnerable to a facial challenge, *Toghill* cured any such defect, and certiorari should be denied.

A. The Virginia Supreme Court has the authority to adopt a narrowing construction of a Virginia statute to save it from being facially unconstitutional.

This Court has long held that "[a] State's highest court is unquestionably 'the ultimate exposito[r] of state law.' "[30] It is for "the [Virginia] Supreme Court to

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[29] *See, e.g.*, *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971).

[30] *Riley v. Kennedy*, 553 U.S. 406, 425 (2008) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)). *See also Winters v. New York*, 333 U.S. 507, 513-14 (1948); *Murdock v. Memphis*, 87 U.S. 590, 635-36 (1874) (stating that "the court would not be justified in reversing the judgment of the State court" where "there exist

say what [Virginia] law is" and that determination "merits respect in federal forums."[31] Thus, Armel's principal argument—that the Virginia Supreme Court lacked authority to adopt a saving construction of Virginia Code § 18.2-361(A) because a federal court had previously found the statute facially unconstitutional—is without merit.

In *MacDonald*, the Fourth Circuit held that—because the statute "prohibit[s] sodomy between two persons without any qualification"—§ 18.2-361(A) was "facially unconstitutional."[32] Asserting that the statute had broad scope, the Fourth Circuit believed that it could not save it through a narrowing construction.[33] The court therefore concluded that the statute was invalid under *Lawrence*.

But in *Toghill*, the Virginia Supreme Court properly applied a narrowing construction of the statute to avoid any conduct that is constitutionally protected under *Lawrence*.[34] Correctly recognizing that it was not bound by the Fourth Circuit's decision in *MacDonald*, the court considered Toghill's facial challenge

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other matters in the record actually decided by the State court which are sufficient to maintain the judgment of that court").

[31] *Riley*, 553 U.S. at 425; *see also Mullaney*, 421 U.S. at 691 ("[W]e accept as binding the Maine Supreme Judicial Court's construction of state homicide law.").

[32] *MacDonald*, 710 F.3d at 166.

[33] *See id.* at 167 ("The anti-sodomy provision itself . . . cannot be squared with *Lawrence* without the sort of judicial intervention that the Supreme Court condemned in *Ayotte*.").

[34] *Toghill*, 768 S.E.2d at 682.

to § 18.2-361(A) de novo.[35] In doing so, the court "'construe[d] the plain language of [t]he statute to have limited application,'" holding that "Code § 18.2-361(A) is invalid [only] to the extent its provisions apply to private, noncommercial and consensual sodomy involving only adults."[36] Under that narrowing construction, § 18.2-361(A) could continue to proscribe "sodomy involving children, forcible sodomy, prostitution involving sodomy, and sodomy in public."[37]

That narrowing construction was proper because State courts have greater leeway than federal courts to issue limiting interpretations of State statutes to save them from invalidity. Indeed, this Court has said that federal courts "are 'without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent.'"[38] So if

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[35] *Id.* at 677 (citing *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring)). *See also Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997) (criticizing the Ninth Circuit for suggesting that a state court would be bound by the federal circuit's construction of federal law; citing *Lockhart*, 506 U.S. at 375-76 (Thomas, J., concurring), for the proposition that the "Supremacy Clause does not require state courts to follow rulings by federal courts of appeals on questions of federal law").

[36] *Toghill*, 768 S.E.2d at 681 (citation omitted).

[37] *Id.* The Virginia Supreme Court has expressly applied *Toghill* to uphold an individual's conviction under § 18.2-361(A) for sodomy in a public place. *See McClary v. Commonwealth*, No. 140785, 2015 Va. Unpub. LEXIS 17 (Feb. 26, 2015); *McClary v. Commonwealth*, No. 0240-13-4, 2014 Va. App. LEXIS 152 (Apr. 29, 2014).

[38] *Stenberg v. Carhart*, 530 U.S. 914, 944 (2000) (quoting *Boos v. Barry*, 485 U.S. 312, 330 (1988)).

a state statute is unconstitutionally overbroad—i.e., it criminalizes conduct that is protected under the First Amendment—"[o]nly the [State] courts can supply the requisite [narrowing] construction, since of course '[federal courts] lack jurisdiction authoritatively to construe state legislation.'"[39] In other words, the Fourth Circuit could reasonably believe that it could not narrow Code § 18.2-361(A).[40] But the Virginia Supreme Court plainly had that power.[41]

Armel argues that "to uphold the Virginia antisodomy statute as applied would violate" *Ayotte*.[42] But that argument fundamentally misunderstands the relationship between federal and State courts with respect to the construction of State statutes. In *Ayotte*, this Court explained that "we restrain *ourselves* from 'rewrit[ing] state law to conform it to constitutional requirements' . . . ."[43] *Ayotte* thus was restating the principle that *federal courts* cannot narrow "a *state statute* unless such a construction is reasonable and readily apparent."[44] Nothing in *Ayotte* questioned this Court's

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[39] *Gooding v. Wilson*, 405 U.S. 518, 520 (1972) (quoting *Thirty-Seven Photographs*, 402 U.S. at 369).

[40] *See, e.g.*, *Grayned v. Rockford*, 408 U.S. 104, 110 (1972) ("[I]t is not within our power to construe and narrow state laws.").

[41] *See Riley*, 553 U.S. at 425; *Gooding*, 405 U.S. at 520.

[42] Pet. for Writ of Cert. at 9, No. 15-1315; Pet. for Writ of Cert. at 9, No. 15-1326.

[43] 546 U.S. at 329 (quoting *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988)).

[44] *Boos*, 485 U.S. at 330 (emphasis added).

numerous precedents describing how *State courts* may adopt a narrowing construction.[45]

Moreover, the Virginia Supreme Court explained in *Toghill* why its narrowing construction satisfied *Ayotte*. After considering the factors described in *Ayotte*, the court held "that it is proper to apply the 'normal rule' by prohibiting those applications of Code § 18.2-361(A) that are unconstitutional and leaving the constitutional applications of Code § 18.2-361(A) to be enforced."[46] The court explained that its holding was "an exercise in judicial restraint . . . allow[ing] the constitutional portions of [the] statute . . . to remain in effect and reflect[ing] the legislative preferences exhibited by the Code and the subsequent acts of the General Assembly."[47]

What the Virginia Supreme Court did in limiting the conduct criminalized by § 18.2-361(A) is directly analogous to what numerous other State courts have done in response to federal constitutional challenges.[48] For example, in *Posadas de Puerto Rico Associates v.*

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[45] *See, e.g.*, *Mullaney*, 421 U.S. at 691; *Winters*, 333 U.S. at 513-14; *Murdock*, 87 U.S. at 635-36.

[46] *Toghill*, 768 S.E.2d at 682.

[47] *Id.*

[48] *See, e.g.*, *R. A. V. v. St. Paul*, 505 U.S. 377, 381 (1992); *Hebert v. Louisiana*, 272 U.S. 312, 316-17 (1926) (explaining that "[a]ll that would be open in this Court under the due process clause is whether the State had power to impose the penalty fixed by the statutes" and that "[t]he Supreme Court of the State having held that the two statutes must be taken together in determining the penalty intended[,] we must accept that conclusion as if written into the statutes themselves").

Tourism Co., this Court upheld a Puerto Rico statute "restricting advertising of casino gambling aimed at the residents of Puerto Rico."[49] Although the statute broadly stated that no "'gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico,'" the Superior Court of Puerto Rico "issued a narrowing construction of the statute, declaring that 'the only advertisement prohibited . . . is that which is . . . to attract the resident to bet at the dice, card, roulette and bingo tables.'"[50] Relying on the same rule applicable to "one of the 50 States," this Court held that it "must abide by the narrowing construction[] announced by the Superior Court" in "reviewing the facial constitutionality of the challenged statute."[51] The Virginia Supreme Court in *Toghill* took the same action as the Puerto Rican court in *Posadas de Puerto Rico Associates*, and its interpretation is entitled to the same respect.

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[49] 478 U.S. 328, 330 (1986).

[50] *Id.* at 332, 334-35 (citation omitted).

[51] *Id.* at 339. *See also Lindsley v. Nat'l Carbonic Gas Co.*, 220 U.S. 61, 73 (1911) ("[I]t is necessary to inquire what construction has been put upon [the statute] by the highest court of the State, for that construction must be accepted by the courts of the United States and be regarded by them as a part of the provision when they are called upon to determine whether it violates *any right* secured by the Federal Constitution." (emphasis added)).

B. Because *MacDonald* is no longer controlling precedent, an individual convicted of sodomy under Virginia Code § 18.2-361(A) should not receive different outcomes in federal and state court.

Once "the State obtain[s] an 'acceptable limiting construction' from the state courts," this Court has "made clear that . . . convictions [may] stand so long as the defendants were not deprived of fair warning."[52] Armel does not claim that his conduct—sodomy with children, prostitution involving sodomy, and sodomy in public—is constitutionally protected, nor does he contend that Code § 18.2-361(A) did not give him fair warning that his conduct could be illegal. Thus, the statute, "as [narrowly] construed [by the Virginia Supreme Court,] 'may be applied to' " Armel's conduct, which "occur[ed] prior to the construction."[53] Armel's convictions therefore properly stand under this Court's precedent and *Toghill*.

Armel argues that certiorari is necessary because the conflict between *MacDonald* and *Toghill* will result in individuals challenging their convictions under Virginia Code § 18.2-361(A), leading to different outcomes depending on whether they are in federal or State court. But there is no risk of differing results; as shown

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[52] *Younger v. Harris*, 401 U.S. 37, 50 (1971) (citation omitted).

[53] *Osborne v. Ohio*, 495 U.S. 103, 115 (1990) (quoting *Dombrowski v. Pfister*, 380 U.S. 479, 491 n.7 (1965)). *See also Thirty-Seven Photographs*, 402 U.S. at 375 n.3 ("[O]nce the overbreadth of a statute has been sufficiently dealt with, it may be applied to prior conduct foreseeably within its valid sweep.").

above, this Court's precedent makes clear that the Virginia Supreme Court's construction of § 18.2-361(A) binds federal courts.[54] "[T]he duty rests upon federal courts to apply state law . . . in accordance with the *then controlling decision of the highest state court*."[55] That duty remains even if the State's highest court changes its interpretation of state law in the middle of an appeal.[56] Thus, the supposed "confusion and injustices arising from inconsistent federal and state interpretations of state law" that Armel hypothesizes do not exist.[57]

In sum, the Fourth Circuit's conclusion in *MacDonald* that § 18.2-361(A) criminalizes constitutionally protected, private sexual conduct in violation of *Lawrence* is no longer controlling in light of *Toghill*. In a future case, the Fourth Circuit will be able to easily reconcile any perceived tension between *MacDonald* and *Toghill* by limiting *MacDonald*'s holding in light of *Toghill*.[58] Certiorari therefore is not necessary or warranted.

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[54] *See supra* Part I.A.

[55] *Vandenbark v. Owens-Ill. Glass Co.*, 311 U.S. 538, 543 (1941).

[56] *See, e.g.*, *Huddleston v. Dwyer*, 322 U.S. 232, 236 (1944) ("[A] judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones.").

[57] *Vandenbark*, 311 U.S. at 543.

[58] *Helton v. AT&T Inc.*, 709 F.3d 343, 354 (4th Cir. 2013); *Martin v. Am. Bancorp. Ret. Plan*, 407 F.3d 643, 652 (4th Cir. 2005).

II. *Lawrence* did not invalidate State statutes prohibiting sodomy involving minors, prostitution, and public places.

Armel is also wrong in claiming that Virginia Code § 18.2-361(A), as authoritatively construed in *Toghill*, violates *Lawrence*. In *Lawrence*, the Court found unconstitutional a Texas statute criminalizing sodomy between "two adults who [acted] with full and mutual consent from each other."[59] But *Lawrence* expressly stated that:

> 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.[60]

In light of those express carve-outs, *Lawrence* held only that States may not criminalize private, consensual sodomy between adults.

Thus, Armel is wrong in suggesting that any constitutional infirmity in Virginia's statute could not be cured through a narrowing construction. Because *Lawrence* expressly excepted State statutes criminalizing

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[59] 539 U.S. at 578. *See also MacDonald*, 710 F.3d at 170 (Diaz, J., dissenting) (noting the split in authority over "whether *Lawrence* represented a facial or as-applied invalidation of the Texas sodomy statute") (citing *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 8 n.4 (1st Cir. 2012); *Sylvester v. Fogley*, 465 F.3d 851, 857 (8th Cir. 2006); *Muth v. Frank*, 412 F.3d 808, 812 (7th Cir. 2005); *D.L.S. v. Utah*, 374 F.3d 971, 975 (10th Cir. 2004)).

[60] *Lawrence*, 539 U.S. at 578.

sodomy involving minors, prostitution, and public places, Armel plainly has not met his burden of demonstrating "'that no set of circumstance exists under which the Act would be valid,' i.e., that the law is unconstitutional in all of its applications."[61] That § 18.2-361(A) could have "operate[d] unconstitutionally under some conceivable set of circumstances" before *Toghill* "is insufficient to render [the statute] wholly invalid."[62]

Because § 18.2-361(A), as narrowed by *Toghill*, criminalizes only conduct that is not protected by *Lawrence*, and because Armel has not asked this Court to expand *Lawrence*, there is no certworthy issue presented in this case.

[61] *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (citation omitted).

[62] *United States v. Salerno*, 481 U.S. 739, 745 (1987) (explaining that there is no "'overbreadth doctrine' outside the limited context of the First Amendment").

CONCLUSION

Armel's petitions for writs of certiorari should be denied.

Respectfully submitted,

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