No. 15-1315, 15-1326

In The Supreme Court of the United States

JULIAN KENNETH ARMEL, JR.,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Other Authorities

On July 20, 2016, the Respondent Commonwealth of Virginia filed its Brief in Opposition to Petitions for Writs of Certiorari. This is Petitioner Armel's Reply:

ARGUMENT

I.
The Commonwealth of Virginia errs by contending that *Lawrence v. Texas*[1] did not strike the Texas sodomy statute as being facially invalid.

At the outset, Armel emphasizes that although the Commonwealth would have the Court believe that this case is about child sex abuse and prostitution, Armel was not indicted for, prosecuted, or convicted of those offenses. Therefore, the age of the alleged victims and whether the offenses were in public or private were not elements of the offense or at issue in these cases. The Commonwealth instead chose to charge Armel *only* with sodomy, under what Professor Erwin Chemerinsky has termed a "sodomy-only" statute.[2] This is pivotal.

Apparently realizing the significance of *MacDonald*'s[3] finding that *Lawrence* struck down the Texas sodomy statute *on its face*, the Commonwealth contends that *MacDonald* erred in this regard, and

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[1] *Lawrence v. Texas*, 539 U.S. 558 (2003).

[2] *Amicus curiae* brief of Professor Erwin Chemerinsky in *MacDonald v. Moose,* 710 F.2d 154 (4th Cir. 2013).

[3] *MacDonald v. Moose*, 710 F.2d 154 (4th Cir. 2013).

that *Lawrence* did not hold the Texas statute to be facially invalid. This argument cannot be sustained.

Three reasons compel the conclusion that *Lawrence* struck down the Texas statute on its face:[4]

First, from the beginning in *Lawrence*, the Court stated: "The question before the Court is the validity of a Texas statute making it a crime for two persons of the *same* sex to engage in certain intimate sexual conduct." 539 U.S. at 562. Thereafter, *Lawrence* repeatedly emphasized that laws targeting intimate sexual behavior, including what Professor Chemerinsky has termed "sodomy-only statutes," were constitutionally deficient. The Court specifically cited *Bowers*:[5] "The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences. . . ." *Id.* at 567. *Lawrence* saw that such laws "impermissibly reach into the sexual intimacies of adults free to exercise their liberty to engage in such conduct without government interference, and contribute to stigma and discriminatory treatment toward gay people." Chemerinsky, *supra*, at 7, citing David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. Rev. 1333, 1379-80 (2005). *Lawrence* concluded: "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.* at 578. Finally, as

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[4] These reasons were most ably presented to the Fourth Circuit in the *amicus curiae* brief submitted in *MacDonald* by Professor Erwin Chemerinsky, pp 5-12, from whose brief Armel has liberally borrowed.

[5] *Bowers v. Hardwick*, 478 U.S. 186 (1986).

Professor Chemerinsky noted, Justice O'Connor concurred that "Texas' statute banning same-sex sodomy is unconstitutional." 539 U.S. at 579. This language leaves no question as to the *facial* invalidity of the Texas' "sodomy-only" statute. And as previously shown,[6] the statute under which Armel was convicted is virtually the same as that which the Court invalidated in *Lawrence*.

The second reason why *Lawrence* must be seen as having struck the Texas statute on its face is that it invalidated *all* sodomy-only statutes on due process rather than equal protection grounds, lest "some might question whether a prohibition would be valid if drawn differently . . . to prohibit the conduct both between same-sex and different-sex participants." *See* Chemerinsky, at 8, quoting *Lawrence*, 539 U.S. at 575. This fact is critical, for by holding as it did, *Lawrence* targeted not only statutes prohibiting the same-sex conduct before the Court, but also those statutes that prohibiting conduct *not* before it, *i.e.*, opposite-sex sodomy. *Lawrence*, therefore, simply could not have been an "as-applied" case. The Commonwealth itself was sufficiently convinced of this that, in 2014 — after *MacDonald*—it amended § 18.2-361(A) "to remove the anti-sodomy provision at issue here." Resp. Br., p. 3.

The third reason for seeing *Lawrence* as having struck the Texas statute on its face is that, as *MacDonald* itself made plain, *Lawrence* reversed *Bowers*, which had upheld Georgia's sodomy statute against a *facial* challenge.[7] *MacDonald* correctly

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[6] Petition for Writ of Certiorari, at 5-7.

[7] *Lawrence* noted that "Hardwick was not prosecuted, but he brought an action in federal court to declare the state

observed:

> [T]he [*Lawrence*] Court readily concluded that "[t]he rationale of *Bowers* does not withstand careful analysis . . . . *Bowers* was not correct when it was decided, and it is not correct today . . . . *Bowers v. Hardwick* should be and now is overruled.

710 F.3d at 163, quoting *Lawrence*, 539 U.S. at 577–78. Thus, as Professor Chemerinsky argued, "The *Lawrence* Court recognized *Bowers* as a facial challenge that should have prevailed." Chemerinsky Brief, at 11.

Finally, as *MacDonald* recognized: "Because the invalid Georgia statute in *Bowers* is *materially indistinguishable*[8] from the anti-sodomy provision being challenged here, the latter provision likewise does not survive the *Lawrence* decision." *Id.* at 163. This is unassailable. Virginia's statute, former § 18.2-361(A), like the statutes in *Lawrence* and *Bowers*, is a "sodomy-only" statute. There is no

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statute invalid." 539 U.S. at 566. *Bowers* also noted that the State had declined to prosecute Hardwick, and that he then sought a declaratory relief challenging the validity of the statute.

[8] The statute in *Bowers*, Ga. Code § 16-6-2(a)(1) (1984), provided that sodomy is committed by person who "performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." The Virginia statute, Code § 18.2-361(A), said that "If any person . . . carnally knows any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge. . . .").

principled reason why it should fare any better than the statutes in those cases.

II.
The Commonwealth of Virginia errs by stating there is no conflict between *Toghill*[9] and *MacDonald*.

The Commonwealth also argues that the Court should deny Armel's writ because "there is no conflict between *Toghill* and *MacDonald*." Resp. Br., p. 7. The Commonwealth bases this contention on the notion that "the Virginia Supreme Court properly adopted a narrowing construction of Virginia Code § 18.2-361(A)." *Id.* The Commonwealth further argues that when a State's highest court "narrows the reach of the statute that might otherwise be unconstitutional, federal courts are obligated to follow that narrowing construction as an authoritative interpretation of State law." Resp. Br., p. 7, citing *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971). At the outset, the Court should note that the Commonwealth's reliance on *Thirty-Seven Photographs* is unwarranted. *Thirty-Seven Photographs* did not involve a state court's narrowing of the reach of an otherwise unconstitutional state statute; rather, the proceeding involved a federal prosecution for violation of a federal statute. Said the Court: "We do nothing in this case but construe [19 U.S.C.] § 1305(a)." 402 U.S. at 374.

Further, the Virginia Supreme Court did not merely construe the statute in question. Indeed,

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[9] *Toghill v. Commonwealth*, 768 S.E.2d 674 (Va. 2015).

that statute is quite plain on its face. The question is not how to construe it, but whether, its plain language renders it invalid on its face. That question, as shown above, has been decisively answered by *Lawrence*. Thus, the rule on which the Commonwealth relies is inapplicable.

Beyond this, the Commonwealth's unqualified statement that federal courts must follow a highest State court's narrowing construction of an otherwise unconstitutional statute is simply incorrect. While it is generally true that a lower federal court must accept the construction of a state statute placed on it by the State's highest court, the Commonwealth overlooks a critical exception to this rule: A lower federal court need not defer to the construction of a state statute placed on it by the State's highest court when that construction is an "obvious subterfuge to evade consideration of a federal issue." *Mullaney v. Wilbur*, 421 U.S. 684, 691 n.11 (1975); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 (1945).

That is what occurred here: an "obvious subterfuge to evade consideration of a federal issue." The Virginia Supreme Court narrowed the construction of Virginia's sodomy statute—a statute identical to that which *Lawrence* invalidated as unconstitutional *on its face*—for no reason other than to "evade consideration of a federal issue," namely, whether Virginia's statute should be struck on its face for the same reasons as the Court struck the statute in *Lawrence*. Stated another way: Only by holding what in light of *Lawrence* is untenable to hold — that Virginia's sodomy statute is not unconstitutional on its face — can the Virginia Supreme Court assert the validity of § 18.2-361(A). Indeed, the *only* way Virginia could have avoided

federal review of the statute *on its face*—and thereby avoid the same result as in *Lawrence* — was to construe the statute as applying only to minors, prostitutes, etc. This, of course, is an absurd reading of the statute *as written*. The statute under consideration here, Va. Code § 18.2-361(A), contained no element regarding minors or prostitutes. Its *sole* element was the commission of oral or anal sex. *Lawrence* plainly held such statutes to be unconstitutional on their face.

The Virginia Supreme Court's decision was thus an "obvious subterfuge," because it is inherent in the very concept of facial invalidity that "no set of circumstance exists under which the [statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). It is thus a self-contradiction for Virginia to say that a statute held unconstitutional on its face can be saved by the Virginia Supreme Court's "narrowing construction." Resp. Br., p. i. Thus, *MacDonald* was right to say that "[t]he matter before us evidences a rather plain example of state action that is flatly contrary to controlling Supreme Court precedent." *Id.* at 166, n. 17.

Beyond this, however, is that in both *Toghill* and the proceedings below, the Virginia Supreme Court plainly attempted to circumvent *Lawrence*, which binds the lower courts as though it were a part of the Constitution itself—"the supreme law of the land." U.S. Const. art. VI. Thus, contrary to the Commonwealth's contention, the conflict between *MacDonald* and *Toghill* exists and requires resolution. Only this Court can resolve it.

CONCLUSION

The Court is in the same position vis-à-vis the Virginia statute as it was in *Lawrence* toward the Texas statute and the statute in *Bowers*. Accordingly, Petitioner's Writs for Certiorari should be granted.

Respectfully submitted, this 2nd day of August, 2016.

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