No. 10-__

IN THE

Supreme Court of the United States

WILLIAM S. MACDONALD,
Petitioner,

v.

GENE M. JOHNSON,
Director, Virginia Department of Corrections,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

JACOB H. HUEBERT
Counsel of Record
HUEBERT LAW OFFICE
605 North High Street
Suite 149
Columbus, Ohio 43215
(614) 386-2063
jhhuebert@huebertlaw.com

Counsel for Petitioner

QUESTION PRESENTED

Whether the Court of Appeals erred in denying a certificate of appealability under 28 U.S.C. § 2253 on a claim that Virginia's sodomy statute violates the Due Process Clause as explained in *Lawrence v. Texas*, 539 U.S. 558 (2003).

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

William S. MacDonald respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported but can be found at 384 Fed. Appx. 273. App. 1a. The opinion of the United States District Court for the Eastern District of Virginia is unreported. App. 2a.

The Virginia Supreme Court's decision on direct appeal is published and can be found at *McDonald* (sic) *v. Commonwealth*, 645 S.E.2d 918 (Va. 2007). App. 14a. The Virginia Court of Appeals' decision on direct appeal is also published and can be found at *McDonald* (sic) *v. Commonwealth*, 630 S.E.2d 754 (Va. Ct. App. 2006). App. 27a.

JURISDICTION

The Fourth Circuit Court filed its opinion on June 24, 2010 and denied a timely petition for rehearing on July 27, 2010. This Court granted an extension of time to file the petition for writ of certiorari to December 23, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides that no State "[s]hall * * *

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Virginia Code § 18.2-361(A) provides that "[i]f 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, he or she shall be guilty of a Class 6 felony * * * *"

STATEMENT

In *Lawrence v. Texas*, this Court declared a Texas statute prohibiting same-sex sodomy unconstitutional under the Due Process Clause of the Fourteenth Amendment, recognizing that individuals' "right to liberty under the Due Process Clause" includes the freedom to engage in private, consensual sexual conduct. 539 U.S. 558, 578 (2003).

After the Court decided *Lawrence*, it was widely acknowledged that the decision also invalidated sodomy statutes in the twelve other states that had them. For example, several state Attorneys General – including Virginia's – stated that they believed their states' respective sodomy statutes were no longer enforceable. *See* Charles Lane, *Justices Overturn Texas Sodomy Ban; Ruling Is Landmark Victory for Gay Rights*, Wash. Post, June 27, 2003, at A1 ("Virginia Attorney General Jerry W. Kilgore (R) expressed disappointment with the ruling, which he said invalidates a state statute banning oral and anal sex between consenting gay and heterosexual couples."); Elizabeth Neff, *Laws on Consensual Sodomy, Premarital Sex Targets of Suit*, Salt Lake Trib., July 17, 2003, at C3 ("Utah Attorney General

Mark Shurtleff readily admits a U.S. Supreme Court ruling issued last month has already nullified both [sodomy and premarital sex laws]."). Scholars noted this as well. *See, e.g.,* David H. Gans, *Strategic Facial Challenges*, 85 B.U.L. Rev. 1333, 1380 (2005) ("[T]he Court invalidated the Texas law on its face, rather than only as applied to the defendants challenging the statute."); Roger Pilon, *Facial v. As-Applied Challenges: Does It Matter?*, 2008-09 Cato Sup. Ct. Rev. vii, x (2008-09) ("[T]he Court upheld a facial challenge to a state statute" in *Lawrence* because "[n]o set of circumstances could justify the law.").

Virginia, however, has since chosen to disregard *Lawrence*'s apparent invalidation of all sodomy statutes and continues to sporadically enforce its sodomy statute. Even worse, the court below countenanced Virginia's inconsistent and unconstitutional application of the sodomy statute by refusing to review it, despite the statutory command to do so when a defendant makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because the lower courts decided and failed to decide a significant federal question in a way that conflicts with this Court's decisions, the Court should grant review.

Virginia's sodomy statute prohibits an extremely broad swath of conduct, including the commission of oral or anal sex with any person, regardless of age, sex, or marital status. Va. Code § 18.2-361(A). The statute is not limited to public or forced sexual acts; indeed, on its face it applies equally to acts occurring in the home between consenting adults.

Here, Virginia convicted Petitioner William MacDonald, who is over the age of 18, on four counts of sodomy for having oral sex with a 16-year-old and a 17-year-old – even though this conduct would have been legal but for the general sodomy statute.

At Mr. MacDonald's bench trial, his counsel argued that prosecution under the statute violated the Due Process Clause:

> My argument would be you have testimony from these two girls they consented, they were not forced, they were not threatened, they were not paid. These were not public acts, they were private, concealed from other people. My argument would be that I believe that the age of consent in Virginia would be sixteen * * * * And so what I would argue is that because they are of the age of consent and they're old enough to give that consent, there is no crime here, and to punish him would be in violation of the due-process clause of the 14th Amendment, just taking the Commonwealth at its evidence.

App. 17a-18a.

The trial court denied Mr. MacDonald's motion to dismiss, stating: "I don't find that the due-process clause or the case that you cite would abrogate the law as it relates to juveniles and the code section that they're charged under, and I don't find any constitutional violation." App. 19a. Mr. MacDonald was then convicted, though the court made no

finding that the other parties to the acts were forced, threatened, or paid to participate in the acts.

The trial court imposed a prison sentence of five years for each of the four counts, with four of the years suspended on the first three counts and all five years suspended on the fourth count. As a result of his conviction for the sodomy offenses, Petitioner was required to register as a sex offender, which places severe restrictions on his ability to find housing or employment.[1] *See* Va. Code § 9.1-902.

On direct appeal, the Virginia Court of Appeals stated that a facial challenge to the law was inappropriate but nonetheless added that "nothing in *Lawrence* * * * facially invalidates [the sodomy statute]." App. 33a.

The court also rejected Mr. MacDonald's as-applied challenge, in which he argued that his conviction was unconstitutional under *Lawrence* because all parties involved in his alleged offense were above Virginia's age of consent and therefore under *Lawrence*'s protection. The appellate court acknowledged that the sodomy statute does not contain an age element but rather "serves to outlaw the behavior at issue in this case between any parties, regardless of age or consent," and also acknowledged that Virginia generally allows for people age 15 to 17 to consent to sexual intercourse. App. 34a. Nevertheless, the court concluded that 16-

---

[1] Indeed, despite a 17-year career in the Marine Corps, an additional 18 years of service in the National Guard, and years of service as a volunteer firefighter, Mr. MacDonald's career prospects have been destroyed, and he and his wife face high obstacles to even finding a place to live.

and 17-year-olds are not "adults" under state law and thus held that the liberty to engage in private sexual conduct described in *Lawrence* does not protect the parties' conduct in this case. App. 35a-36a.

Mr. MacDonald then appealed to the Virginia Supreme Court, which began its opinion by stating that it was "consider[ing] a constitutional challenge to Va. Code § 18.2-361 prohibiting sodomy." App. 16a. Like the intermediate appellate court, the Virginia Supreme Court focused on the age of the participants and concluded that the statute did not violate the Due Process Clause. App. 25a-27a. Although Mr. MacDonald had challenged the statute under the Due Process Clause and *Lawrence* before the trial court and the lower appellate court, the Virginia Supreme Court nonetheless held that Petitioner had failed to preserve a facial challenge. App. 26a-27a.

The court considered and rejected Mr. MacDonald's as-applied challenge because, in the court's view, "(1) the sodomy statute stands alone and without age restrictions concerning consent in this case, and (2) the real issue in this case is the victims' legal status as minors." App. 27a. With regard to the first point, the court concluded that because the sodomy statute contains no age restriction, the court could limit the law's application to cases in which a party is under the age of consent, as "such matters are for legislative consideration * * * *" App. 28a. The court also noted that the Virginia Code elsewhere defines an adult as someone 18 years or older and defines a child as someone under 18. App. 28a. *See* Va. Code §§ 1-203, 1-204, 1-207.

Although the court admitted that the sodomy statute contains no age restriction, it nonetheless decided that it could "construe the plain language of [the] statute to have limited application if such a construction will tailor the statute to a constitutional fit." App. 29a (marks and citation omitted). It did so by holding that the general sodomy statute could be constitutionally applied to prohibit sodomy for persons over the age of 15, even though 15 is the age of consent in Virginia. App. 29a.

Mr. MacDonald's state post-conviction motion, again challenging the constitutionality of the statute under *Lawrence*, was denied by the trial court and, without comment, by the Virginia Supreme Court.

Next, Mr. MacDonald sought habeas relief in the federal district court under 28 U.S.C. § 2254, again arguing that the state sodomy statute is unconstitutional. The District Court rejected the claim on the merits:

> The [Virginia] Court of Appeals' determination is based on clearly established federal law. As the court noted, Virginia considers persons aged sixteen and seventeen to be children, and the Supreme Court in *Lawrence* explicitly stated that the ruling did not apply to sexual acts involving children. *McDonald*, R. No. 1180-05-2 (citing *Lawrence,* 539 U.S. at 578). Thus, as the Court of Appeals of Virginia found, the statute is not unconstitutional as applied to MacDonald, and Claim 3 fails.

App. 14a.

The District Court denied Petitioner a certificate of appealability ("COA"), as did the Fourth Circuit Court of Appeals, which concluded that Petitioner had "not made the requisite showing" of a "debatable claim of the denial of a constitutional right." App. 2a.

This petition seeks review of the Court of Appeals' refusal to consider Mr. MacDonald's argument that Virginia's sodomy statute is unconstitutional, both facially and as applied to him.

REASONS FOR GRANTING THE WRIT

Lawrence v. Texas established that state governments cannot interfere with individuals' private, consensual, non-commercial sexual conduct. The Court therefore struck down Texas's statute prohibiting same-sex sodomy and reversed its decision in *Bowers v. Hardwick*, which had upheld Georgia's statute prohibiting all sodomy.

Despite *Lawrence*, the Commonwealth of Virginia has continued to prosecute people under its sodomy statute – which includes a blanket prohibition on all oral and anal intercourse – for acts that are not otherwise illegal. Here, the state convicted Mr. MacDonald of sodomy – and branded him a "sex offender" – for acts of consensual oral sex with a 16-year-old and a 17-year-old, even though those acts did not violate the state's laws against statutory rape, forcible sodomy, or corruption of a minor.

Mr. MacDonald argues that Virginia's law is facially invalid in light of *Lawrence*, rendering his conviction unconstitutional – but the Court of

Appeals refused to even grant a certificate of appealability to consider this claim.

Mr. MacDonald therefore asks this Court to address this important issue by either accepting this case for plenary review or remanding it to the Court of Appeals for the consideration it deserves.

I. The lower courts erred in denying a certificate of appealability because Virginia's sodomy statute is unconstitutional under *Lawrence v. Texas*.

The lower courts erred in denying Mr. MacDonald a certificate of appealability ("COA") because substantial arguments support his claim that Virginia's sodomy statute is unconstitutional under *Lawrence v. Texas*, 539 U.S. 558 (2003).

To be entitled to a COA, Mr. MacDonald needed to show only "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Mr. MacDonald has satisfied this requirement because he can show not only that reasonable jurists could disagree with the District Court's conclusions but also that his position is correct.

A. *Lawrence* invalidated all state sodomy laws, including Virginia's.

1. *Lawrence* found Texas's sodomy statute facially unconstitutional.

In *Lawrence*, this Court facially invalidated Texas's same-sex sodomy statute because it violated individuals' right under the Due Process Clause to engage in private, consensual, non-commercial sexual activity.

The Texas statute's problem was not merely that it discriminated against homosexuals. Indeed, the Court specifically declined to decide the case on Equal Protection grounds because to do so might lead some to question – wrongly – "whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex partners." *Lawrence*, 539 U.S. at 575. Moreover, the Court recognized that striking down only the portion of the law limiting its application to activities between members of the same sex could still cause collateral harm to homosexuals: "If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons." *Id.* Thus, the Court made clear that it intended to take the Texas statute and all general sodomy statutes off the books.

In addition, the Court's language in general indicates that it intended nothing less than facial invalidation of the statute. At the outset, the Court stated that the issue before the Court was "*the validity of a Texas statute* making it a crime for two persons of the same sex to engage in certain intimate sexual conduct." *Id.* at 562 (emphasis added). And, in concluding, the Court stated: "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 (emphasis added); see also *id.*

at 579 (O'Connor, J., concurring) ("I agree with the Court that Texas' statute banning same-sex sodomy is unconstitutional.").

The Court also stated that its previous decision in *Bowers v. Hardwick* – which considered a *facial* challenge to Georgia's sodomy statute – "was not correct when it was decided, and * * * is not correct today," indicating that the *Bowers* Court should have found the law facially invalid. *Lawrence*, 539 U.S. at 578 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

2. Virginia's sodomy statute is facially invalid for the same reasons that the statutes in *Lawrence* and *Bowers v. Hardwick* were unconstitutional.

Virginia's sodomy statute is comparable to the Texas statute in *Lawrence* – except that Virginia's intrusion upon private sexual conduct is much greater, prohibiting both heterosexual and homosexual sodomy. And where the Texas statute made sodomy a misdemeanor, Virginia's law makes it a felony. *See Lawrence*, 539 U.S. at 575 ("The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system."); Va. Code § 18.2-361 (making sodomy a "Class 6 felony"). This makes Virginia's law substantially identical to the now-invalidated Georgia statute at issue in *Bowers*. *See Bowers*, 478 U.S. at 197-98 (Powell, J., concurring) ("Under the Georgia statute a single act of sodomy, even in the private setting of a home, is a felony * * *.").

Thus, if the statues in *Lawrence* and *Bowers* are facially invalid – and they are – then Virginia's

statute is also facially invalid, and Mr. MacDonald's conviction under it cannot stand.

B. The Virginia Supreme Court's attempt to rewrite the statute to evade *Lawrence* must fail.

The Virginia Supreme Court attempted to rescue the Virginia statute from invalidation by concluding that "[n]othing in *Lawrence* * * * prohibits the application of the sodomy statute to conduct between adults and minors." App. 29a. The state court's approach, however, essentially re-wrote the statute to add a new element that the legislature did not include: that the sodomy must be with a person who is under age 18.

In effect, then, the court turned Virginia's sodomy statute into a statutory-rape law. But Virginia *already has* a statutory rape law, and statutes prohibiting sodomy with persons age 13 and under, sodomy with persons ages 13 and 14, and contribution to the delinquency of a minor – none of which prohibit the conduct at issue in this case. *See* Va. Code §§ 18.2-63 ("carnal knowledge" statute making sexual intercourse and sodomy with 13- and 14-year-olds a felony), 18.2-67.1 ("forcible sodomy" statute making sodomy with persons 13 or younger a felony), 18.2-371 (contributing-to-delinquency statute). Thus, when the Virginia legislature addressed sexual conduct involving persons under 18, it chose not to criminalize the behavior for which Petitioner was convicted.

The court's revision of the statute was improper. As an initial matter, as discussed above, *Lawrence* required that state sodomy statutes be *abolished*; it

did not leave Texas with the option of enforcing its sodomy statute even on a limited basis. Indeed, this Court specifically rejected that possibility when it noted that leaving the statute on the books to be applied in a different manner would allow the "stigma" against homosexuals to persist. *Lawrence*, 539 U.S. at 576.

In addition, this Court has long cautioned against "rewrit[ing] a law to conform it to constitutional requirements," particularly where, as here, legislative line-drawing is necessary. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (citing *Virginia v. Am. Booksellers Ass'n, Inc.,* 484 U.S. 383, 397 (1988)); *see also, e.g., Marchetti v. United States*, 390 U.S. 39, 60 n.18 (1968) (Court cannot render statute constitutional where it "would be required not merely to strike out words, but to insert words that are not now in the statute"); *Butts v. Merchants & Miners Transp. Co.*, 230 U.S. 126, 134-35 (1913) (refusing to add words to limit statute to constitutional applications); *United States v. Reese*, 92 U.S. 214, 221 (1876) (refusing to add words to make statute enforceable).

More importantly, leaving an extremely broad statute on the books, most applications of which would be unquestionably unconstitutional, prevents citizens from knowing in advance whether certain actions violate the law because they cannot know the circumstances under which a court would find the law's application constitutional. Thus, this Court has been "wary of legislatures who would rely on [the courts'] intervention, for '[i]t would certainly be dangerous if the legislature could set a net big large enough to catch all potential offenders, and leave it to the courts to step inside' to announce to whom the

statute may be applied." *Ayotte*, 546 U.S. at 330 (quoting *Reese*, 92 U.S. at 221). As one court put it, "[c]ourts cannot save a penal statute by imposing *post facto* limitations on official discretion through case by case adjudications where no such restraints appear on the face of the legislation." *State v. Newstrom*, 371 N.W.2d 525, 529 (Minn. 1985).

Moreover, a statute cannot simply announce that every activity that is not protected under the Constitution is prohibited; it must state specifically what conduct constitutes a criminal offense. *See United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921) (striking down statute where any "attempt to enforce [it] would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury"); *State v. Richardson*, 300 S.E.2d 379, 381 (N.C. 1983) (noting that if the legislature wishes to criminalize certain sexual acts, "it should do so with specificity since [it] is a criminal statute").

Here, if Mr. MacDonald had consulted Virginia law and *Lawrence* in advance, he would have had no reason to know that his conduct was illegal. None of Virginia's statutes addressing sexual activity with individuals under age 18 criminalized his conduct, and the sodomy statute, which targets conduct that is constitutionally protected under *Lawrence*, makes no mention of minors.

If the Virginia legislature had determined that 16- and 17-year-olds are incapable of giving consent and wanted to ban sexual activity with them, as it did with 13- and 14-year-olds, *Lawrence* suggests that it

could have done so. In fact, however, the legislature did not choose to do so – and the Virginia court therefore lacked any constitutional basis for writing a new statutory-rape statute on the legislature's behalf for the purpose of evading this Court's ruling in *Lawrence*.

C. Even with the Virginia Supreme Court's revision, Virginia's sodomy statute is unconstitutional under *Lawrence*.

Even if courts were permitted to add elements to criminal statutes to make them constitutional, Virginia's "revised" sodomy statute would still be facially invalid under *Lawrence* because it still discriminates against sodomy and, by extension, the private conduct of homosexuals.

According to the reasoning employed by the Virginia courts in this case, acts of sodomy with and between 15-, 16-, and 17-year-olds are punishable as felonies under the general sodomy statute. At the same time, however, heterosexual intercourse between 15-, 16-, and 17-year-olds is fully legal because Virginia's age of consent is fifteen. *See Martin v. Commonwealth*, No. 1966-04-4, 2005 Va. App. LEXIS 337, *6 (Va. Ct. App. Sept. 6, 2005). And heterosexual intercourse between a person 18 or older and a 15-, 16-, or 17-year-old is, unlike sodomy, punishable only as contributing to the delinquency of a minor, which is a misdemeanor, not a felony. Va. Code § 18.2-371.

Thus, Virginia law still punishes sodomy as a felony under circumstances where it does not punish heterosexual intercourse at all, and it punishes sodomy severely under circumstances where it

punishes heterosexual intercourse relatively lightly. Thus, heterosexual teens can engage in sexual intercourse without running afoul of the law, while homosexual teens cannot engage in homosexual conduct without committing a felony. *See Lawrence*, 539 U.S. at 578 (sodomy law improperly prohibited "sexual practices common to a homosexual lifestyle").

Accordingly, the Virginia court's current treatment of sodomy runs directly contrary to *Lawrence*'s command that governments not discriminate between different types of private, consensual, non-commercial sexual conduct, appears to reflect a moral judgment that sodomy is somehow worse than heterosexual intercourse, and serves to perpetuate the demeaning "stigma" against homosexuals that sodomy laws create, and which *Lawrence* sought to eliminate. *See Lawrence*, 539 U.S. at 575 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.").

Thus, the Virginia courts have not saved the statute from invalidation under *Lawrence* – and in attempting to do so, they have illustrated why facial invalidation of all general sodomy statutes was necessary. If Virginia wishes to punish the conduct at issue in this case, its legislature must craft a statute that respects the liberty interest that *Lawrence* recognized and does not discriminate against particular forms of private, consensual, non-commercial sexual conduct. Virginia's legislature has not done this, and Mr. MacDonald's conviction therefore cannot stand.

D. Even if the Virginia statute were not facially invalid, it would still be unconstitutional as applied to Petitioner.

Even if Virginia's sodomy statute were not facially invalid, it would still be invalid as applied to Mr. MacDonald because, as discussed above, all parties involved in the underlying conduct were above Virginia's age of consent and therefore protected under *Lawrence*.

Virginia law defines sodomy as "forcible" – that is, non-consensual – only when it is committed with a person age 13 or younger. Va. Code § 18.2-67.1. Virginia law also prohibits carnal knowledge, including but not limited to sodomy, with a person age 13 or 14. Va. Code § 18.2-63. Sex with anyone above age 14, however, does not constitute statutory rape or any other felony; in other words, "in Virginia, the age of consent is fifteen years." *Martin*, 2005 Va. App. LEXIS 337 at *6 (quoting *Stump v. Commonwealth*, 119 S.E. 72, 73 (Va. 1923)).

Although *Lawrence* left open the possibility that states could limit the ability of "minors" to engage in sodomy, its focus in doing so was on parties' ability to consent, not on their age. The Court noted, for example, that in the nineteenth century "[a] substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against *those who could not or did not consent*, as in the case of a minor or the victim of an assault," and one participant in an act of sodomy could testify against the other "if he or she * * * was a minor *and therefore incapable of consent*." *Lawrence*, 539 U.S. at 569 (emphasis added).

At the conclusion of *Lawrence*, the Court suggested possible exceptions to the right of sexual privacy it had just recognized:

> 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.

Id. at 578. This discussion appears to contemplate laws other than general sodomy statutes that remain valid after *Lawrence*. For example, the reference to "minors" apparently refers to individuals who are under the age of consent and thus contemplates crimes such as statutory rape and contributing to the delinquency of a minor. The second sentence appears to refer to victims of sexual assault ("injured") and incest ("coerced or who are situated in relationships where consent might not easily be refused"). And the final sentence refers to offenses related to commercial sexual activity, such as solicitation and prostitution.

Nothing in *Lawrence* indicates that states may still prosecute anyone under a general sodomy statute for consensual conduct that would be wholly legal in the absence of the sodomy statute; rather, *Lawrence* protects such conduct. Thus, Virginia's statute fails not only facially but also as applied to Mr. MacDonald.

II. The due process claim is a federal issue of considerable importance.

Although Mr. MacDonald's due process claim is ripe for review, it is true that the Court normally does not grant plenary review for cases with this case's procedural posture. The lower court's denial of a COA did not create a conflict among the Circuits, and the Court of Appeals did not review the underlying merits of the due process question, a factor this Court uses in deciding whether to grant plenary review.

Nevertheless, this Court should grant the writ for three reasons.

First, the lower court's treatment of Mr. MacDonald's request for a COA clearly contravened this Court's decisions holding that a defendant need only show that the district court's decision was "debatable." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The effect of the lower court's refusal to grant the COA was to deny Mr. MacDonald not one but two rights: the benefit of federal appellate review of his habeas claim and his due process right to privacy. Given the importance this Court has placed on habeas rights and the longstanding primacy of due process, the denial of the COA alone warrants review.

In addition, this Court invalidated all general sodomy laws seven years ago in *Lawrence* – yet Mr. MacDonald was charged, convicted of a felony, sentenced to imprisonment, and branded a sex offender – and thus must register wherever he lives and suffer a permanent stigma[2] – for participating in

---

[2] *Lawrence* recognized the "collateral consequences" this can entail, "such as notations on job application forms, to mention but one example." 539 U.S. at 576.

an act that a large percentage of Americans perform with regularity.[3] Because this practice is so widespread, the risk of arbitrary enforcement against only a select few participants based on moral considerations *Lawrence* deemed improper is high. The cornerstone of due process is that the law must not be arbitrarily applied – but Virginia's application of its statute has been and can only be arbitrary. The Court should therefore grant the writ here because both lower courts decided a "federal question in a way that conflicts with the relevant decisions of this Court." S. Ct. R. 10(c).

Second, the practical effect of the Virginia Supreme Court's ruling is that, although the state has granted people over 15 to the ability to legally consent to sex, those individuals nevertheless have no right of privacy with respect to sexual conduct. In other words, if a 15- or 16-year old has consensual private oral sex, he or she can be charged with a felony – even though he or she could not be charged with anything if the conduct had been heterosexual intercourse, and even though a large percentage of 15-to-18-year-olds participate in this activity,[4] which

---

[3] *See* Debby Herbenick, et al., *Sexual Behaviors, Relationships, and Perceived Health Status Among Women in the United States*, J. of Sexual Medicine, Vol. 7, Supplement 5, at 282 (2010) (reporting that over 50% of women ages 18 to 39 had participated in oral sex in the past 90 days); Michael Reece, et al., *Sexual Behaviors, Relationships, and Perceived Health Status Among Men in the United States*, J. of Sexual Medicine, Vol. 7, Supplement 5, at 296 (2010) (reporting that over 40% of men age 19 to 24 and over 60% of men age 25 to 39 had participated in oral sex in the past 90 days).

[4] *See* W. Mosher, et al., *Sexual Behavior and Selected Health Measures: Men and Women 15-44 Years of Age, United States, 2002*, Advanced Data from Vital and Health Statistics, Sept. 15,

no law other than the general sodomy statute prohibits. The question of whether these younger citizens are conferred the same rights as their older counterparts is a question of significant impact that warrants federal appellate review. In sum, the resolution of the due process question will affect more than just Mr. MacDonald; it will affect young people in Virginia and the other states that have not repealed their sodomy statutes after *Lawrence*.

Third, although seven years have passed since *Lawrence* overturned all state general sodomy statutes, the scope of *Lawrence* continues to divide the 12 states (other than Texas) that possessed sodomy or crimes-of-nature statutes when *Lawrence* was decided.[5] In Louisiana, for example, a trial court declared the state's sodomy statute facially unconstitutional on the basis of *Lawrence*, and the Louisiana Attorney General declined to even defend the statute on appeal. *See La. Electorate of Gays & Lesbians, Inc. v. Connick*, 902 So.2d 1090, 1094 (La. Ct. App. 2005). In addition, a number of states with sodomy statutes still on the books have not prosecuted anyone for sodomy after *Lawrence*.[6]

2005 at 21-22 (CDC study finding more than half of teenagers age 15 to 19 have engaged in oral sex).

[5] *See* Ala. Code § 13A-6-60(2); Fla. Stat. Ann. § 800.02; Idaho Code § 18-6605; Kan. Stat. Ann. § 21-3505; La. Rev. Stat. Ann. 14:89; Miss. Code Ann. 97-29-59; Mo. Rev. Stat. § 558.011; N.C. Gen. Stat. §§ 14-177, 15A-1340.17 (one year); Okla. Stat. tit. 21, § 886, *amended by* 2002 Okla. Sess. Law Serv. ch. 460, § 8; S.C. Code Ann. § 16-15-120; Utah Code Ann. §§ 76-5-403(1), 76-3-204(2); Va. Code Ann. § 18.2-361.

[6] It appears that only two states, Virginia and North Carolina, both in the Fourth Circuit, have enforced crimes-against-nature

On the other hand, Virginia has continued to apply its sodomy statute – but only on a limited, inconsistent basis. Thus, while there is no definitive split among the states' high courts, there is a real difference in how the states apply their sodomy statutes. And, as noted above, this difference has a real-world impact for the many people who engage in this type of sexual conduct, who may fear that a state may strike out against them as it did against Mr. MacDonald. Indeed, even in states that have not yet enforced their sodomy statutes after *Lawrence*, people face the prospect of sudden, arbitrary enforcement of the statute against them under circumstances where the state has decided – without warning – that it is still entitled to enforce it. Thus, this Court's clarification on the scope of *Lawrence* is necessary to quell the arbitrary application of the criminal law against people engaging in private and consensual sex.

IV. This case warrants an exercise of this Court's summary disposition powers.

The administration of justice would benefit from an exercise of this Court's summary disposition powers in this case. There can be little question that the Court of Appeals misunderstood its role in reviewing habeas claims when it denied the request for COA. This Court often summarily reverses when a court of appeals simply misunderstands the Court's precedents. *See, e.g., Presley v. Georgia*, 558 U. S. __, 130 S.Ct. 721 (2010); *Spears v. United States*, 555 U.S. __, 129 S.Ct. 840 (2009). It also does so where the lower court's decision was unreasonable. *See, e.g.*,

---

or sodomy laws post-*Lawrence*. *See, e.g., State v. Whiteley*, 616 S.E.2d 576 (N.C. Ct. App. 2005).

Porter v. McCollum, 558 U.S. __, 130 S.Ct. 447 (2009). The Court also summarily reverses where the court below did not review the merits of a particular claim. *See, e.g*., *Corcoran v. Levenhagen*, 558 U.S. __, 130 S.Ct. 8 (2009). Thus, it would be appropriate for the Court to summarily reverse so here.

The Court has also granted the writ, vacated the judgment, and remanded to allow the Court of Appeals to reconsider in light of precedent, *see e.g*., *Webster v. Cooper*, 558 U. S. __, 130 S. Ct. 456 (2009), or to give the lower court another try in light of new understanding, *see, e.g*., *Youngblood v. West Virginia*, 547 U.S. 867 (2006). This Court issues a GVR to conserve "the scarce resources of this Court that might otherwise be expended on plenary consideration" and to "assist[] the court below by flagging a particular issue that it does not appear to have fully considered * * * *" *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996). Here the Court's resources could be conserved by summarily reversing the lower court's judgment or, in the alternative, issuing a GVR order in light of *Miller-El v. Cockrell*, *Lawrence v. Texas*, or both.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB H. HUEBERT
Counsel of Record
HUEBERT LAW OFFICE

605 North High Street
Suite 149
Columbus, Ohio 43215
(614) 386-2063
jhhuebert@huebertlaw.com

Counsel for Petitioner