No. 20-__

IN THE

SUPREME COURT OF FREMONT

DOHN AND DAMES DMITH,
Petitioners,

v.

STATE OF FREMONT,
Respondent,

IN THE MATTER OF
PENAL CODE SECTION 285

PETITION FOR A WRIT OF CERTIORARI AND MOTION FOR LEAVE TO FILE IN EXCESS OF WORD LIMIT

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INTRODUCTION

Dohn and Dames Dmith are twins. They look remarkably like John and James Smith of *In re: 720 ILCS 5/11-11*, Case No. 20-12 (Lincoln, July 12, 2020), Bohn and Bames Bmith of *In re: 720 ILCS 5/11-11 II*, Case No. 20-14 (Lincoln, August 26, 2020), and Cohn and Cames Cmith of *In re 720 ILCS 5/12-35*, Case No. 20-19 (Lincoln, December 11, 2020) but wear paper bags over their heads with little holes cut out for their eyes.

Dohn and Dames are members of an obscure religious sect; the doctrines of this sect, to which they adhere, compel them to engage in sexual relations with, and marry, their blood relatives. One evening, Dohn and Dames were discovered together by law enforcement engaged in sexual acts with each other, after Dohn's bitter former girlfriend and current sister-cousin called in a tip to the police. For some time prior to their arrest they had cohabited with each other and held themselves out as married.

They were arrested and convicted pursuant to Penal Code Section 285, which provides:

> Persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who intermarry with each other, or who being 14 years of age or older, commit fornication or adultery with each other, are punishable by imprisonment in the state prison.

The statute under which Petitioners were convicted violates both the state constitution and federal constitution. Specifically, the statute violates:

> 1. The right to privacy enshrined in the Fourteenth and Ninth Amendments to the federal constitution and Article I, section 1 and Article I, section 23(b) of the Fremont Constitution by infringing upon Petitioners' right of privacy, which includes the freedom to engage in private sexual conduct within their own home;
>
> 2. The right to marry guaranteed by the Fourteenth Amendment to the United States Constitution; and
>
> 3. The right to free exercise of religion guaranteed by Article I, section 4 of the Fremont Constitution and the First Amendment of the United States Constitution.

For these reasons, those that follow, and any other as this Court sees fit, Petitioners' convictions are unconstitutional, void *ab initio*, and accordingly should be vacated forthwith.

QUESTIONS PRESENTED

The instant case presents the following questions:

1. Does the Ninth Amendment protect a right to privacy that precludes criminal punishment of sexual relations with a blood relative?

2. Does the right to privacy enshrined in Article I, section 1 of the Fremont Constitution preclude

criminal punishment of sexual relations with a blood relative?

3. Does the fundamental right to marry apply to persons who are blood relatives?

4. Does the right to free exercise of religion prevent a state from criminalizing consensual sexual conduct in which the participants are religiously commanded to participate?

MOTION FOR LEAVE TO
FILE IN EXCESS OF WORD LIMIT

Pursuant to Part IV § 2 of the Supreme Court of Fremont's rules of court, Petitioners move for leave to file in excess of the word limit of 2,000 words imposed upon petitions for certiorari. In light of the complex legal questions raised by the instant matter, additional space is required to fully address relevant authority and constitutional provisions.

ARGUMENT

I. The Statute Violates the Right to Privacy

A. Article I, section 1

Article I, 1 of the Fremont Constitution provides in relevant part: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." By its text, therefore, section 1 guarantees a right to privacy.

Section 1 notably differs from the Fourth Amendment to the federal constitution in that it is far broader. Rather than enumerating in what things persons have security--the Fourth Amendment identifies "persons, houses, papers, and effects"--section 1 explicitly creates a broad, constitutionally protected right to privacy.

Though section 1 does not set forth under what conditions the right might be circumscribed, for the reasons discussed below there is no justification for the infringement of Petitioners' privacy right.

B. Ninth Amendment to the United States Constitution

In addition to violating Petitioners' state right to privacy, the statute also violates Petitioners' federal right to privacy as protected by the Ninth Amendment to the United States Constitution.

The Ninth Amendment does not specifically enumerate the rights it protects--but that is the entire point of the Amendment. The purpose of the Ninth Amendment was to ensure that by enumerating *some* rights in the

Constitution (or amendments thereto), the Constitution did not undermine or deprive of legal protection *other rights*. Those other rights did not lose their constitutional protection simply by virtue of their nonenumeration. *See* Thomas Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 170 (1975) ("[T]here was an original understanding, both implicit and textually expressed, that higher law principles had constitutional status.").

For example, in *Corfield v. Coryell*, 6 F.Cas. 656 (C.C.E.D. Pa. 1823), Justice Bushrod Washington held that the the Privileges and Immunities Clause guaranteed unenumerated rights that "are, in their nature, fundamental" and that "belong, of right, to the citizens of all free governments." Id. at 551. As Justice Washington observed, "[w]hat these fundamental principles are, it would perhaps be more tedious than difficult to enumerate." *Id*. Though that case concerned Article IV of the Constitution, it is emblematic of the broader consensus of the founding era that nonenumerated rights were afforded constitutional protection against infringement. See also Kurt T. Lash, *The Fourteenth Amendment and the Privileges and Immunities of American Citizenship* 9-67 (2014) (discussing understanding of 'rights' during the founding era and shortly thereafter).

Among the rights protected by the Ninth Amendment is the right to privacy. Only a few months ago the high court of Lincoln proclaimed: “At the very least, the 9th Amendment protects individual rights to engage in wholly private conduct without fear of government reprisal.” *In re: 720 ILCS 5/11-11 II*, Case No. 20-14 at *3 (Lincoln, August 26, 2020); *see also Joyner v. United States*, No. 20-21 at *44 (Dec. 24, 2020) (Cheatem, J., concurring) (observing that “the Ninth Amendment is not a nullity and, in particular, protects a right to privacy”).

The pedigree of the right to privacy in the Ninth Amendment has a long pedigree. As recognized in *Griswold*, the right to privacy emanates from, *inter alia*, the Ninth Amendment. *Id.* at 484. The right to privacy cannot be exclusively located in the Due Process Clause of the Fourteenth Amendment because *Griswold* "*expressly disclaimed* any reliance on the doctrine of 'substantive due process' . . . ." *Lawrence v. Texas*, 539 U.S. 558, 594 (2003) (Scalia, J., dissenting).

The right to privacy is also rightly protected by the Ninth Amendment because it was one of those unenumerated rights the Founders intended to accord constitutional protection by enacting the Ninth Amendment. For example, in *Boyd v. United States*, 116 U.S. 616 (1886), the Supreme Court considered a customs statute which allowed government agents to obtain a court order compelling individuals to produce private documents and papers (there, customs invoices). In considering the case, the Court first held that the Fourth and Fifth Amendment apply to "invasions on the part of the government and its employees of the sanctity of a man's home and privacies of life." *Id.* at 630. The Court also pointed out that the drafters of the Constitution intended the protection of a privacy right in light of their experience with the English "writs of assistance," by which, during the colonial era, government officers could search the homes of colonists' under suspicion of tax evasion. *Id.* at 625.

Likewise, in 1890, future Supreme Court Justice Louis Brandeis published a law review article titled *The Right to Privacy*, in which he argued for the existence of this unenumerated right. He explained that the right of the individual to "full protection in person and property . . . is a principle as old as the common law." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

"The rumors of the Ninth Amendment's second death following *Griswold* are greatly exaggerated." *Joyner v. United States*, No. 20-21 at *42 (Dec. 24, 2020) (Cheatem, J., concurring). Indeed, following *Griswold*,

> a three-judge district court found the right to an abortion to be encompassed by the Ninth Amendment under Justice Goldberg's theory of the Amendment. *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970). And though the Supreme Court located a similar right within the right to privacy, it also noted that it could be found in "the Ninth Amendment's reservation of rights to the people." *Roe v. Wade*, 410 U.S. 113, 152 (1973). Likewise, in *Stanley v. Illinois*, 405 U.S. 645 (1972), the Court again gave support to Justice Goldberg's conception of the Ninth Amendment. In the course of noting that "[t]he Court has frequently emphasized the importance of the family," *Stanley* observed that "[t]he integrity of the family unit has found protection in . . . the Ninth Amendment." *Id*. at 651 (citing Griswold, 381 at 496 (Goldberg, J., concurring).

Joyner, No. 20-21 at *42-43.

The right to privacy in turn protects the Petitioners' conduct. In *Lawrence*, the Supreme Court held that "criminal convictions for adult consensual sexual intimacy in [one's] home violate[s] . . . vital interests in liberty and privacy." 539 U.S. at 563. As Justice Scalia, in dissent, recognized, this holding is fundamentally incompatible with criminal prohibitions on adult incest:

> State laws against . . . *adult incest*. . . are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices.

> Every single one of these laws is called into question by today's decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.

539 U.S. at 590 (Scalia, J., dissenting) (emphasis added). Though in *Lawrence* the Court located that privacy interest in the Due Process Clause of the Fourteenth Amendment, it is no less powerfully protected by the Ninth Amendment.

While the Supreme Court has not established a test for when state action may yet be constitutional even when it violates a Ninth Amendment right, the Court's fundamental rights jurisprudence is again instructive: when a fundamental right is at issue, it "trigger[s] strict scrutiny." *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 458 (1988). Furthermore, the Lincoln high court has recently applied heightened scrutiny in considering challenges to statutes under the privacy right guaranteed by the Ninth Amendment.

To the extent that the Fourteenth Amendment does not compel this result, this Court should find that Article I section 23(b) of Fremont constitution does, as "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." Fremont Const. Art. I § 23(a).

C. Fourteenth Amendment

For similar reasons, the Fourteenth Amendment prohibits the regulation of private, consensual conduct between two consenting adults: "[t]he United States Supreme Court has held that individuals have rights to privacy and bodily autonomy and that criminal law that would touch on consensual sexual acts must establish that the challenged law is narrowly tailored to address a compelling state interest." *In re: 720 ILCS 5/11-11 II*,

Case No. 20-14 at *3 (Lincoln, August 26, 2020). As explained below, the challenged statute does not meet that standard.

III. The Statute Violates the Right to Marry

The Statute also violates the fundamental right to marry protected by the federal constitution. That such a right exists and is protected by the United States Constitution is beyond dispute. *See, e.g., Loving v. Virginia*, 388 U. S. 1, 12 (1967); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Turner v. Safley*, 482 U. S. 78, 95 (1987); *M. L. B. v. S. L. J.*, 519 U. S. 102, 116 (1996) ; *Cleveland Bd. of Ed. v. LaFleur*, 414 U. S. 632 640 (1974). Indeed, "[t]he right to marry 'is a fundamental right inherent in the liberty of the person' which originates "under the Due Process and Equal Protection Clauses of the Fourteenth Amendment." *Dewey-Cheatem v. _MyHouseIsOnFire_, in re: Penal Code section 255.15*, No. 20-04 at *10 (Jul. 20, 2020) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015))

Under that fundamental right, the ability to marry--and receive state recognition for such marriage--has been extended to interracial couples (*Loving*), same-sex couples (*Obergefell*), and even prisoners (*Turner*). In none of these cases has the Supreme Court articulated any coherent limit on the ability of persons to participate in the marriage relationship; to the contrary, the Court has consistently expanded the ability of new groups to participate. Indeed, several state courts have followed the Supreme Court's lead in extending the right to marry to polygamous relationships. *E.g.*, *In re: Virginia Code 18.2-362 et al.*, No. 19-10 (Chesa. 2019).

This Court should find no differently here. To the extent that the Fourteenth Amendment does not compel this result, this Court should find that the Fremont constitution does, as "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by

the United States Constitution." Fremont Const. Art. I § 23(a).

V. The Statute Violates the Free Exercise of Religion

It is by now beyond dispute that strict scrutiny is the appropriate standard governing First Amendment claims. As the Supreme Court held only a year ago, actions, "as manifestations of the religious beliefs (whatever they are) can be regulated, but only when such regulations are necessary to a compelling state interest, are narrowly tailored to achieve the purpose, and use the least restrictive means of achieving the purpose." *In re: Robert Carey v. Dixie Inn, LLC*, 101 M.S.Ct. 112 (2019) (emphasis added); *see also In re: Stopping Abuse and Indoctrination of Children Act of 2015*, 100 M.S. Ct. 111 (2016) (applying strict scrutiny to neutral and generally applicable statute challenged on free exercise grounds). *See also Carey v. Dixie Inn*, Case No. 19-21 (DX Ct. 2019) (observing that Supreme Court has overturned *Smith*); *In re B.093*, No. 20-04, at *4 (DX Ct. 2020) ("[I]t has become increasingly apparent that the standard governing First Amendment free exercise claims is no longer the relaxed standard of "rational basis" set forth in *Employment Division v. Smith*, 494 U.S. 872 (1990), but rather strict scrutiny"); *In re AB. 468 - Dixie Sexual Education Act of 2020*, No. 20-05 (DX Ct. 2020) ("Under our free exercise jurisprudence, state action is subject to strict scrutiny when it imposes a substantial burden upon an individual's exercise of religion"); *Dewey-Cheatem v. _MyHouseIsOnFire_ in re Atlantic Commonwealth Penal Law section 255.15*, No. 20-04 at *12 (Atl. 2020) ("[T]he Supreme Court plainly requires the application of strict scrutiny to all religious freedom claims brought under the Free Exercise Clause of the First Amendment.").

The ability to marry, particularly in a manner commanded by one's religion, is part of the exercise of

one's religion. For this reason, the Atlantic Commonwealth Court of Chancery struck down a prohibition on polygamy as failing to meet the requirements of strict scrutiny. *See Cheatem*, No. 20-04 at *12.

Here, like the petitioners in *Cheatem*, Petitioners are religiously commanded to engage in marriage in a particular kind of way--in the instant case, with relatives. Also as in *Cheatem*, Petitioners are prohibited from doing so by statute. Because, as described below, there is no compelling interest in maintaining this prohibition, this Court should reach the same conclusion that the Atlantic court did in *Cheatem* and strike down the law.

VI. The Statute Advances No Legitimate Government Interest In Any Reasonable Manner

Regardless of the constitutional provision or standard applied, the challenged statute fails. "Under strict scrutiny, the government has the burden of proving that racial classifications are narrowly tailored measures that further compelling governmental interests." *Johnson v. California*, 543 U.S. 499, 505 (2005). A statute is not "narrowly tailored" when it is either "seriously underinclusive or seriously overinclusive." *Brown v. Entertainment Merchants Assn.,* 564 U.S. 786, 805 (2011).

Here, the challenged Act is both "seriously underinclusive" and "seriously overinclusive." While the State may have a "compelling government interest to regulate behavior in the name of public health and safety," Resp. Br., the Act is not "narrowly tailored" to advance that interest.

Petitioners predict that, as in Lincoln, the state will attempt to defend its statute by asserting that "[i]ncestuous relationships by their very nature endanger the health of potential children born of those unions

through the heightened potential for genetic disorders and other birth defects." In fact, the sole possible "harm" to be addressed by this criminal statute is supposed harm to "potential children of [incestuous] relationships." But there is no evidence that persons in incestuous relationships would be per se inferior parents or would necessarily harm children in their care.

To the extent that the harm might be biological in nature--"increased risk of genetic disorders"--such a claim would merely highlight the constitutional defect of the statute: Petitioners are two cisgender men, biologically incapable of bearing children. Counsel for Petitioners can speak from his own personal experience in attesting to the fact that two men can engage in sexual intercourse many times over and still be unable to conceive a child. There are likewise many other types of couples and persons covered by the Act who could not possibly bear children, including elderly persons, persons using contraception, and more.

Furthermore, if the State's genuine concern were the possibility of genetic defects in children of intrafamily couples, it had a less burdensome way of achieving that interest: by requiring opposite-sex couples to use contraception when engaging in intrafamily sexual relations. If this requirement sounds unduly intrusive into the sex lives of private individuals, that it remains still *less* intrusive than the challenged statute should be quite telling.

At the same time, the Act is underinclusive. The State claims that it seeks to prevent the conception of children likely to have genetic disorders. Yet it cannot reasonably accomplish this goal by prohibiting intrafamily couples from procreating while at the same time allowing people with genetic disorders themselves to procreate.

Because the statute is both overinclusive and underinclusive, and because regardless its aims could be advanced through a less-burdensome requirement (use of contraception), it necessarily fails to meet the high standard of strict scrutiny and must fail.

Even if the Court were to apply merely a “rational basis” standard, the statute would still need to fall. Fremont’s anti-incest statute does not advance any discernable legitimate government interest, let alone a compelling government interest. It cannot be justified on moral grounds, as moral grounds are not a legitimate government interest. In *Lawrence*, the Supreme Court explicitly rejected "morality" as justification for the regulation of sex. Noting that "for centuries there have been powerful voices to condemn homosexual conduct as immoral," the Court held that "this Court's obligation is to define the liberty of all, not to mandate its own moral code." 539 U.S. at 571.

Because the State cannot even establish a legitimate government interest, it fails constitutional muster.