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## Perez v. City of Roseville: Constitutional Protection For the Public Employee in Matters Pertaining To Sex

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NOTE

*PEREZ V. CITY OF ROSEVILLE:*  
CONSTITUTIONAL PROTECTION FOR  
THE PUBLIC EMPLOYEE IN  
MATTERS PERTAINING TO SEX

ALLYSON M. MCCAIN\*

INTRODUCTION

The late Judge Reinhardt posited the following:

As a society, we must remain solicitous of the constitutional liberties of public employees, as of any citizens, to the greatest degree possible, and should be careful not to allow the State to use its authority as an employer to encroach excessively or unnecessarily upon the areas of private life, such as family relationships, procreation, and sexual conduct, where an individual's dignitary interest in autonomy is at its apex. Nor can or should we seek to eliminate the development of ordinary human emotions from the workplace where we spend a good part of our waking hours, unless such development is incompatible with the proper performance of one's official duties.<sup>1</sup>

The Ninth Circuit recently addressed the relationship between the government's interests as an employer and the employee's interest in personal autonomy in *Perez v. Roseville*. In *Perez*, probationary police officer Janelle Perez was terminated after an internal affairs investigation

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<sup>1</sup> *Perez v. Roseville*, 882 F.3d 843, 847 (9th Cir. 2018) (citing *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1174 (9th Cir. 2003)), *superseded by*, 926 F.3d 511 (9th Cir. 2019).

revealed that she engaged in an off-duty, extramarital affair with another officer.<sup>2</sup> In her subsequent claim against the City of Roseville, Perez argued that the termination violated her rights to privacy and intimate association guaranteed by the First and Fourteenth Amendments because it was partially based upon the department's disapproval of her off-duty sexual conduct.<sup>3</sup>

In its initial decision, the Ninth Circuit held that taking adverse action against an employee based only on moral disapproval of their private sexual conduct violates their constitutionally protected privacy and intimate association rights.<sup>4</sup> Discipline, including termination, is only appropriate upon a showing that the employee's conduct affects their on-the-job performance, or otherwise violates a narrowly-tailored, constitutionally valid departmental policy.<sup>5</sup>

Following the publication of the original decision, Judge Reinhardt, the opinion's author, passed away.<sup>6</sup> The Ninth Circuit thereafter issued a replacement opinion that draws a contrary conclusion.<sup>7</sup> This Note demonstrates that the Ninth Circuit's original opinion properly interpreted the facts and the law with regard to the freedoms of privacy and intimate association. By re-deciding this issue, the Ninth Circuit missed an opportunity to clarify the appropriate relationship between the interests of the government employer and the personal autonomy rights of its employee. A person should not have to sacrifice aspects of their constitutional rights to personal autonomy when they accept a position with a government employer.<sup>8</sup>

Section I of this Note summarizes both of the Ninth Circuit's opinions in the *Perez* matter. Section II analyzes the need to prevent the government employer from intruding on its employees' personal autonomy rights. Section III discusses why the court's second opinion is problematic. Section IV demonstrates why the Ninth Circuit's first opinion is an appropriate application of the law considering the facts of the case. Sec-

<sup>2</sup> *Perez v. Roseville*, No. 2:13-CV-2150-GEB-DAD, 2015 U.S. Dist. LEXIS 80060, at \*5-6 (E.D. Cal. 2015), *aff'd*, 926 F.3d 511 (9th Cir. 2019).

<sup>3</sup> *Perez*, 882 F.3d at 848.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 855-56; *see also* *Thorne v. El Segundo*, 726 F.2d 459, 471 (9th Cir. 1983).

<sup>6</sup> *Perez v. Roseville*, 926 F.3d at 525-526 (9th Cir. 2019). The Ninth Circuit held that an opinion can be amended or withdrawn at any point before the mandate has issued. *Carver v. Lehman*, 558 F.3d 869 (9th Cir. 2009). Because the initial *Perez* opinion "was only part way through its finalization process," the court had the authority to withdraw the opinion, and issue a replacement. *Perez*, 926 F.3d at 525 (quoting *Carver*, 558 F.3d at 878). However, Judge Reinhardt himself opined that, in the interest of "maintaining the stability and legitimacy of the court's decisions," a new majority that disagrees with a court decision should only seek to correct that decision through the en banc process. *Carver*, 558 F.3d at 880-81 (Reinhardt, J., concurring).

<sup>7</sup> *Perez*, 926 F.3d at 525-26.

<sup>8</sup> *See Perez*, 882 F.3d at 847.

tion V argues that the test furthered by the first *Perez* decision should be used as a standard going forward. Finally, Section VI illustrates how competing decisions in other circuits would have been decided under the *Perez* framework.

#### I. *PEREZ V. ROSEVILLE* AND POLICING SEXUAL PRIVACY

The Supreme Court has held that the Constitution limits the ability of a public employer to leverage the employment relationship to incidentally or intentionally restrict the liberties government employees enjoy as private citizens.<sup>9</sup> While government employment necessarily includes certain limitations on individual freedoms, “a citizen who works for the government is nonetheless a citizen.”<sup>10</sup>

In *Perez v. City of Roseville*, Janelle Perez challenged the district court’s grant of qualified immunity to her commanding officers.<sup>11</sup> The officers, after investigating a false accusation of on-duty sexual conduct, terminated Perez based on their discovery of her extramarital affair with a fellow officer.<sup>12</sup>

On appeal, the Ninth Circuit initially confirmed that, while the district court’s finding that the investigation into Perez’s affair was warranted, it erred by failing to consider whether Perez’s subsequent termination violated her constitutional rights.<sup>13</sup> The Ninth Circuit initially concluded that the evidence presented a genuine factual dispute of whether Perez’s commanding officers terminated her employment based, at least in part, on their moral disapproval of her extramarital affair in violation of 42 U.S.C. section 1983.<sup>14</sup> The court later withdrew this opinion and replaced it with a decision that reached contrary conclusions.<sup>15</sup> In both opinions, the court reaffirmed the notion that a government employer may not take adverse employment action against an employee based on private sexual conduct when such conduct does not negatively affect the employee’s on-the-job performance.<sup>16</sup> However, the opinions

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<sup>9</sup> See *Garcetti v. Ceballos*, 547 U.S. 410, 418–19 (2006).

<sup>10</sup> *Id.* (holding that while public employees are entitled to certain protections of their individual liberties, a citizen who speaks in his official capacity as a public employee is not speaking as a “private citizen” for purposes of First Amendment protection).

<sup>11</sup> See Plaintiff-Appellant Janelle Perez’s Opening Brief at 11, *Perez*, 926 F. 3d 511 (No. 15-16430), 2016 WL 3586832.

<sup>12</sup> *Perez*, 882 F.3d at 848.

<sup>13</sup> *Id.* at 858.

<sup>14</sup> *Id.*

<sup>15</sup> See *Perez*, 926 F.3d. 511.

<sup>16</sup> See *id.* at 521; see also *Perez*, 882 F.3d at 857–58 (citing *Thorne*, 726 F.2d at 471).

differ on the correct interpretation of the reasoning for Perez's termination, and how prior precedent should apply.<sup>17</sup>

#### A. FACTUAL AND PROCEDURAL BACKGROUND

Janelle Perez began working at the Roseville Police Department (“Department”) in January 2012.<sup>18</sup> Shortly after her appointment, Perez and another department officer, Shad Begley, began a romantic relationship.<sup>19</sup> Both Perez and Begley were separated from, though still legally married to, their respective spouses.<sup>20</sup> Approximately six months later, the Department initiated an internal affairs investigation into Perez's and Begley's conduct after Begley's estranged wife filed a citizen complaint suggesting that Perez and Begley engaged in sexual conduct while on duty.<sup>21</sup> Although the officers were romantically involved, the investigation revealed that the allegation of on-duty sexual conduct was false.<sup>22</sup> The investigation also revealed that the officers were using their cellular phones excessively while they were working.<sup>23</sup> Captain Moore enlisted Lieutenant Walstad to review the internal affairs report.<sup>24</sup> Walstad determined that Perez's and Begley's cell-phone usage violated Department policy.<sup>25</sup> Captain Moore thereafter concluded that Officer Perez should be terminated in light of the investigation's findings.<sup>26</sup> Both Moore and Walstad later made comments indicating that they morally objected to Perez's extramarital sexual conduct.<sup>27</sup>

Despite finding no merit to the allegations of on-duty sexual conduct, the Department issued Perez and Begley written reprimands, which charged them with “Unsatisfactory Work Performance” and “Conduct Unbecoming.”<sup>28</sup> For unknown reasons, Begley's estranged wife was also

<sup>17</sup> See *Perez*, 926 F.3d at 514; see also *Perez*, 882 F.3d at 848.

<sup>18</sup> Plaintiff-Appellant Janelle Perez's Opening Brief at 1–2, *Perez*, 926 F.3d 511 (No. 15-16430).

<sup>19</sup> *Id.*

<sup>20</sup> *Perez*, 2015 U.S. Dist. LEXIS 80060, at \*4.

<sup>21</sup> *Id.* at \*5.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at \*5–6.

<sup>26</sup> *Id.* at \*6.

<sup>27</sup> *Perez*, 882 F.3d at 849.

<sup>28</sup> *Id.* at 848–49. The Roseville Police Department's Policy Manual defines “Unsatisfactory Work Performance” as “including, but not limited to, failure, incompetence, inefficiency or delay in performing and/or carrying out proper orders, work assignments or instructions of supervisors without a reasonable and bona fide excuse.” Memorandum in Support of Defendants' Motion for Summary Judgment and, in the Alternative, for Partial Summary Judgment at n.1, *Perez*, No. 2:13-CV-2150-GEB-DAD, 2015 WL 3833749 (E.D. Cal. 2015), *aff'd*, 926 F.3d 511 (9th Cir. 2019) (No. 15-16430), 2015 WL 13688484. “Conduct Unbecoming” refers to conduct that “is unbecoming of a

notified of the charges.<sup>29</sup> Three weeks later, Perez appealed her reprimand in an appeal meeting with Chief Daniel Hahn.<sup>30</sup> At the meeting, Perez received a written notice of dismissal, which had been prepared in advance.<sup>31</sup> The department offered no explanation for Perez's termination.<sup>32</sup>

In the three weeks between the written reprimand and Perez's termination, Perez received a citizen complaint that she was rude and insensitive while responding to a domestic violence call.<sup>33</sup> During that time, her supervisor also reported an incident to Chief Hahn in which Perez questioned her supervisor, and displayed an angry and agitated demeanor.<sup>34</sup> Neither report was investigated further.<sup>35</sup> However, both incidents provided support for the Department's proffered reasons for firing Perez—namely that a complaint was submitted regarding Perez's conduct during a service call, and that Perez had exhibited a “bad attitude” toward her supervisor.<sup>36</sup> The department also cited a complaint that Perez “did not get along well with other female officers” as a reason for her dismissal.<sup>37</sup>

Nearly a week after her termination, Perez received a revised, written reprimand which reversed the findings of “Unsatisfactory Work Performance” and “Conduct Unbecoming,” but introduced new charges of “Use of Personal Communication Devices.” The officers' on-duty phone use, although a concern, was not one that would “warrant termination.”<sup>38</sup> Subsequently, Perez sued the City of Roseville, the Department, and the officers involved in her termination for infringing her rights to privacy and free association in violation of 42 U.S.C. section 1983.<sup>39</sup> Perez also alleged a violation of her right to due process, as well as sex discrimination under Title VII of the Civil Rights Act of 1964.<sup>40</sup>

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member of the Department or which is contrary to good order, efficiency or morale, or which tends to reflect unfavorably upon the Department or its members.” *Id.*

<sup>29</sup> *Perez*, 882 F.3d at 849 (9th Cir. 2018) *superseded by* 926 F.3d 511 (9th Cir. 2019).

<sup>30</sup> *Perez*, 2015 U.S. Dist. LEXIS 80060, at \*6.

<sup>31</sup> *Id.* at \*6–7.

<sup>32</sup> Plaintiff-Appellant Janelle Perez's Opening Brief at 9, *Perez*, 926 F. 3d 511 (No. 15-16430).

<sup>33</sup> *Perez*, 2015 U.S. Dist. LEXIS 80060, at \*8.

<sup>34</sup> *Perez*, 882 F.3d at 849.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 853.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 855 n.7. Although the officers' phone records, were deemed “abnormal,” the investigation concluded that they had not texted each other excessively during their shifts. *Id.* Further, Chief Hahn himself testified that the phone use alone was “not enough to warrant termination.” *Id.*

<sup>39</sup> *Perez*, 2015 U.S. Dist. LEXIS 80060, at \*29-30.

<sup>40</sup> *Id.*

B. THE NINTH CIRCUIT ORIGINALLY CONCLUDES THAT PEREZ'S TERMINATION MAY HAVE BEEN UNCONSTITUTIONALLY MOTIVATED.

Initially, the Ninth Circuit held that the court's precedent set by *Thorne v. City of El Segundo*, as well as the Supreme Court's decision in *Lawrence v. Texas* governed the Department's conduct and protected the employee's privacy rights.<sup>41</sup> The court's first opinion, however, reached a different conclusion than more recent jurisprudence in the Fifth and Tenth Circuits, creating a split in authority.<sup>42</sup>

1. *Thorne v. El Segundo Sets a Standard for the Protection of Employee Privacy.*

The Ninth Circuit first acknowledged a public employee's right to privacy and free association in *Thorne v. El Segundo*.<sup>43</sup> In *Thorne*, the City of El Segundo ("City") denied a clerk-typist within the department a promotion to police officer.<sup>44</sup> An investigation of the denial revealed that the City forced Thorne to disclose details about her personal sexual matters, and that it ultimately denied Thorne employment based in part on the nature of such activities.<sup>45</sup>

The court held that the benefits of public employment do not require a potential employee to sacrifice her constitutionally protected rights.<sup>46</sup> The court noted that the inquiry by the police department involved the core constitutional guarantees of privacy and free association.<sup>47</sup> For this reason, the City needed to show that its inquiry was narrowly-tailored to meet a legitimate interest.<sup>48</sup> This level of "heightened scrutiny" is essen-

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<sup>41</sup> *Perez*, 882 F.3d at 848, 855 N.8.

<sup>42</sup> Compare *Perez*, 882 F.3d (holding that a government employer may not terminate an employee based on her off-duty sexual conduct, unless such conduct interferes with her work performance or violates a constitutionally valid department policy), with *Seegmiller v. LaVerkin City*, 528 F.3d 762, 770–72 (10th Cir. 2008), (holding that the asserted liberty interest "to engage in a private act of consensual sex" was not fundamental, and the City needed only to survive a rational basis review to restrict the interest), and *Coker v. Whittington*, 858 F.3d 304, 306–07 (5th Cir. 2017) (holding that the expansion of rights regarding personal sexual choices promulgated by *Lawrence v. Texas* did not warrant a change in public employment policies, and that by accepting the privilege of public employment, individuals necessarily give up some of their constitutional rights).

<sup>43</sup> See generally *Thorne*, 726 F.2d. 459.

<sup>44</sup> *Id.* at 461–62.

<sup>45</sup> *Id.* at 468.

<sup>46</sup> *Id.* at 469 (citing *Kelley v. Johnson*, 425 U.S. 238, 245 (1976)).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

tial to protect individual liberties from “majoritarian or capricious coercion.”<sup>49</sup>

The Ninth Circuit concluded that the City impermissibly denied Thorne’s employment based in part on its disapproval of her affair with a married police officer.<sup>50</sup> The court thus set the standard for evaluating the relationship between an employee’s private conduct and her job performance.<sup>51</sup> Unless there is evidence that “private, off-duty, personal activities” negatively affect an applicant’s job performance, the State may not consider such information in its decision to reject an applicant for employment.<sup>52</sup> The court explained that such an intrusion “cannot be upheld under any level of scrutiny.”<sup>53</sup>

2. *Lawrence v. Texas Further Acknowledges That the Government’s Conception of Morality Should Not Govern Personal Intimate Choices.*

Thirty years after the Ninth Circuit’s decision in *Thorne*, the Supreme Court addressed whether the liberty interest protected by the Fourteenth Amendment<sup>54</sup> encompasses “an autonomy of self that includes freedom [to engage in] certain intimate conduct.”<sup>55</sup> In *Lawrence v. Texas*, the Court invalidated Texas statute that criminalized “deviate sexual intercourse”<sup>56</sup> between two persons of the same sex, but did not criminalize the same conduct for two persons of different sexes.<sup>57</sup>

In *Lawrence*, the Court found that it was inappropriate for the State to use only majoritarian bias to “mandate [its] own moral code.”<sup>58</sup> Thus, the Court held that “[t]he State cannot demean a . . . person’s existence or control their destiny by making their private sexual conduct a crime.”<sup>59</sup> The Court concluded that the Texas statute unconstitutionally violated Petitioners’ rights under the Due Process Clause because adult

<sup>49</sup> *Id.* at 470 (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)).

<sup>50</sup> *Id.* at 466 nn.7–8.

<sup>51</sup> *See id.* at 471.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> The Fourteenth Amendment to the United States Constitution prohibits states from depriving citizens of “life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1.

<sup>55</sup> *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

<sup>56</sup> Texas defines “deviate sexual intercourse” as “any contact between any part of the genitals of one person and the mouth or anus of another person; or . . . the penetration of the genitals or the anus of another person with an object.” TEX. PENAL CODE §21.01 (2005).

<sup>57</sup> *Lawrence*, 539 U.S. at 578-79.

<sup>58</sup> *Id.* at 571 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992) (internal quotation marks omitted)).

<sup>59</sup> *Id.* at 578.

citizens have a liberty interest in conducting themselves as they choose with regards to private sexual decision-making.<sup>60</sup>

The Court did not expressly identify the appropriate standard of review for analyzing an intrusion of an individual's sexual autonomy.<sup>61</sup> However, Justice Kennedy suggested that the Texas law would not survive the minimum rational basis review, by indicating that it "furthers no legitimate state interest."<sup>62</sup>

### 3. *Applying Thorne and Lawrence, the Ninth Circuit Finds Perez's Termination Unconstitutional.*

Based on the precedent set by *Thorne* and *Lawrence*, the court found that Perez's private sexual conduct fell within the constitutional protections of privacy and intimate association, the violations of which cannot be maintained "under any level of scrutiny."<sup>63</sup> Evidence in the record sufficiently suggested that Perez's superiors were motivated to terminate her, at least in part, by her extramarital affair.<sup>64</sup> For example, Hahn provided inconsistent testimony with regard to whether the investigation into Perez's affair was a factor in his decision to terminate her.<sup>65</sup> Similarly, Moore expressed concern that the affair "could reflect unfavorably on the police department."<sup>66</sup> Walstad also indicated disapproval of Perez's private sexual conduct, in light of the fact that both Begley and Perez "were married and have young children."<sup>67</sup> Additionally, the court found that, based on the proximity to the internal affairs investigation, the three "reasons" given for Perez's termination<sup>68</sup> could be found to be pretexts for the true reason for Perez's termination: disapproval of her extramarital affair.<sup>69</sup>

The court further concluded that, while the Roseville Police Department was justified in its investigation due to the allegations of on-duty

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<sup>60</sup> *Id.* at 572.

<sup>61</sup> *See id.* at 586 (2003) (Scalia, J., dissenting) (arguing that the majority fails to announce a specific standard of review).

<sup>62</sup> *See id.* at 578 (2003). Under rational basis review, a law is presumed valid so long as it "is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

<sup>63</sup> *Perez*, 882 F.3d at 854 (quoting *Thorne*, 726 F.2d at 471).

<sup>64</sup> *Id.* at 851.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 852.

<sup>67</sup> Plaintiff-Appellant Janelle Perez's Opening Brief at 4, *Perez*, 926 F.3d. 511 (No. 15-16430).

<sup>68</sup> The Department cited the following as reasons for Perez's termination: (1) she did not get along with other female officers; (2) the Department received a complaint about her from a domestic violence victim; and (3) she had a "bad attitude[.]" *Perez*, 882 F.3d at 853.

<sup>69</sup> *Id.*

conduct, the Department was not permitted to terminate Perez on the basis of such conduct when it found that Begley's work-related allegations lacked merit.<sup>70</sup> The precedent set by *Thorne* provided fair notice to all reasonable police officials that such a termination was not permitted.<sup>71</sup> Consequently, neither the Department nor the individual officers could assert qualified immunity for their subsequent violation.<sup>72</sup>

For these reasons, the court found that there was sufficient evidence that the Roseville Police Department violated Perez's constitutional rights to privacy and free association, and that the claim should thereby survive summary judgment.<sup>73</sup> Absent any indication that Perez's off-duty conduct had a substantial effect on her job performance or violated a "narrowly tailored department regulation," the court concluded that the defendants violated Perez's constitutional rights by making her extramarital affair the basis for her termination.<sup>74</sup>

#### 4. *The Fifth and Tenth Circuits Differ from The Ninth Circuit's Initial Holding.*

The Ninth Circuit's initial opinion differs from recent cases out of the Fifth and Tenth Circuits.<sup>75</sup> In *Coker v. Whittington*, the Fifth Circuit resolved that public employees relinquish some of their constitutional rights in exchange for the privilege of public employment.<sup>76</sup> In *Coker*, two sheriff's deputies in Bossier Parish, Louisiana took up residence in the other's house and exchanged spouses without first divorcing their own respective wives.<sup>77</sup> The Chief Deputy Sheriff found both officers in violation of the Sheriff's Code of Conduct.<sup>78</sup> The Code provides that officers "[shall] not engage in any illegal, immoral, or indecent conduct, nor engage in any *legitimate* act which, when performed in view of the public, would reflect unfavorabl[y] upon the Bossier Sheriff's Office."<sup>79</sup> The officers were directed to cease living with the other's spouse, and warned that a failure to comply would be considered equivalent to a vol-

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<sup>70</sup> *Id.* at 857.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 848. At the summary judgment stage, the judge does not evaluate whether the facts alleged are true, but whether, taken as true, present a genuine issue of material fact to proceed to trial. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 249 (1986).

<sup>74</sup> *Perez*, 882 F.3d at 855.

<sup>75</sup> See *Seegmiller*, 528 F.3d. 762; see also *Coker*, 858 F.3d. 304.

<sup>76</sup> *Coker*, 858 F.3d at 306 (citing *Garcetti*, 547 U.S. at 426).

<sup>77</sup> *Id.* at 305.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

untary termination.<sup>80</sup> The officers filed suit shortly after their termination.<sup>81</sup>

The Fifth Circuit found that, despite the expansion of rights involving personal sexual choices recognized in *Lawrence*, no decisions existed suggesting that public employees have a right to “associate” with another’s spouse.<sup>82</sup> Further, *Lawrence* does not call for policy changes in the context of public employment generally.<sup>83</sup> Sexual decisions by law enforcement officers are not comparable to those made by private individuals.<sup>84</sup> Since the officers’ conduct could damage the reputation and credibility of the Sheriff’s Office, and could potentially be used against the department in litigation, the court found that the order to cease living with the other’s spouse and subsequent termination for failing to comply did not violate the officers’ constitutional rights.<sup>85</sup>

Based on similar reasoning, in *Seegmiller v. LaVerkin City*, the Tenth Circuit determined that a police department’s decision to reprimand an officer for her private, off-duty sexual activity was not unconstitutional, because it was reasonably related to the department’s interests.<sup>86</sup> Officer Sharon Johnson engaged in a brief affair with an officer from a different department while at a training conference.<sup>87</sup> Although an investigation revealed that the affair was consensual, Johnson received a verbal reprimand from the City Manager.<sup>88</sup> The content of the reprimand indicated that Johnson failed to comply with a provision of the law enforcement ethics code that required officers to “keep [their] private lives unsullied as an example to all and [to] behave in a manner that does not bring discredit to [the officer] or [the] agency.”<sup>89</sup> Further, the City Manager’s reprimand warned Johnson to “avoid the appearance of impropriety” and cautioned that additional violations would result in additional discipline and/or termination.<sup>90</sup>

Shortly after these incidents, Johnson resigned from her position with the LaVerkin City Police Department, believing that her credibility was significantly compromised as a result of the City’s actions.<sup>91</sup> Johnson thereafter sued the City and the City Manager for “infring[ing] on

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<sup>80</sup> *Id.* at 306.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *See id.*

<sup>85</sup> *Id.* at 306–07.

<sup>86</sup> *Seegmiller*, 528 F.3d at 764.

<sup>87</sup> *Id.* at 765.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 765–66 (alteration in original) (quoting Aplt App. Vol II, at 337).

<sup>90</sup> *Id.* at 766 (quoting depo. p. 82).

<sup>91</sup> *Id.*

her fundamental liberty interest in sexual privacy,” in violation of her Due Process rights under the Fourteenth Amendment.<sup>92</sup>

According to the Tenth Circuit, the Supreme Court has never recognized a broadly defined right to sexual privacy.<sup>93</sup> The court noted, however, that the Supreme Court has acknowledged that interests in marital privacy and bodily integrity are fundamental rights.<sup>94</sup> Following in the footsteps of *Williams v. Attorney General of Alabama*, the court read the *Lawrence* decision as declining to recognize either a fundamental right to sexual privacy or a “general right to engage in private sexual conduct.”<sup>95</sup>

Because the court held that Johnson had not established a fundamental right in this case, it subjected the City’s policy to the more lenient rational basis review, which would require Johnson to show that the purported action was not rationally related to a legitimate government purpose.<sup>96</sup> The court concluded that the LaVerkin City law enforcement code could have been reasonably related to the City’s interest in “further[ing] internal discipline or the public’s respect for its police officers and the department they represent.”<sup>97</sup> As such, the City’s encroachment on Johnson’s privacy interest was not unconstitutional.<sup>98</sup>

The Ninth Circuit defended its departure from the Fifth and Tenth Circuits’ rationale by asserting that (a) *Thorne* is controlling in the Ninth Circuit, and (b) “the Fifth and Tenth Circuits fail to appreciate the impact of *Lawrence* . . . on the jurisprudence of the constitutional right to sexual autonomy.”<sup>99</sup> First, as illustrated in *Thorne*, the State’s actions must be analyzed under “heightened scrutiny” because the actions impact Perez’s “constitutionally protected privacy and associational interests.”<sup>100</sup> However, the court noted that such an intrusion could not “survive any level of scrutiny” under the circumstances of this case.<sup>101</sup> Therefore, in order to receive the appropriate treatment, the right to engage in private sexual

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<sup>92</sup> *Id.* at 769.

<sup>93</sup> *Id.* at 770.

<sup>94</sup> *Id.* at 771 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that the Due Process protection of “liberty” includes the right to marital privacy)).

<sup>95</sup> *Id.* (citing *Williams v. Att’y Gen. of Ala.*, 378 F.3d 1232, 1236 (11th Cir. 2004) (stating that the Supreme Court resisted the “opportunity to recognize a fundamental right to sexual privacy” when it was “expressly invited . . . to do so.”)).

<sup>96</sup> *Seegmiller*, 528 F.3d at 771. A legitimate purpose is one that is plausibly connected to the police power of the states. *See generally* Don Welch, *Legitimate Government Purposes and State Enforcement of Morality*, 1993 U. ILL. L. REV. 67, 68 (1993). The states’ police powers include the regulation of its citizens’ health, welfare, safety and morals. *Barnes v. Glen Theatre*, 501 U.S. 560, 569 (1991).

<sup>97</sup> *Seegmiller*, 528 F.3d. at 772.

<sup>98</sup> *Id.*

<sup>99</sup> *Perez*, 882 F.3d at 855-56.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 855.

activity free from government interference must either be fundamental, or else be specifically subject to the type of “heightened scrutiny” described in *Thorne*.<sup>102</sup>

Following the court’s disposition on February 9, 2018, a member of the court petitioned for en banc rehearing sua sponte,<sup>103</sup> and on March 15, 2018, the court instructed the parties to submit briefs as to whether the matter should be reheard.<sup>104</sup> Before he was able to issue a final mandate, Judge Reinhardt, the author of the 2018 opinion, passed away.<sup>105</sup>

C. THE NINTH CIRCUIT SUBSEQUENTLY CHANGES COURSE, AND AFFIRMS THE DISTRICT COURT’S GRANT OF SUMMARY JUDGMENT.

1. *The Precedent Does Not Clearly Establish Whether Private Conduct Can Be Relied Upon in an Adverse Employment Decision.*

The court’s 2019 replacement and currently binding opinion relied on the revised phone-usage reprimand issued to Perez after she was terminated, and concluded that Perez’s extramarital relationship did, in fact, affect her on-the-job performance.<sup>106</sup> The court determined that Perez was not terminated because of department disapproval of her extramarital affair, but because of her excessive cell phone use in connection with that affair.<sup>107</sup> Further, the Ninth Circuit interpreted *Thorne* as “explicitly reject[ing] a per se rule that a police department can never consider its employees’ sexual relations.”<sup>108</sup> In reaching this conclusion, the Ninth Circuit relied on its decisions in *Fugate v. Phoenix Civil Service Board* and *Fleisher v. City of Signal Hill*.<sup>109</sup>

In *Fugate*, two officers were terminated from—and later reinstated to—their positions with the City of Phoenix Police Department, after an

<sup>102</sup> *Thorne*, 726 F.2d at 470; *Perez*, 882 F.3d at 855.

<sup>103</sup> *Perez*, 926 F.3d at 525.

<sup>104</sup> *Perez v. Roseville*, No. 15-16430, 2018 U.S. App. LEXIS 6544 at \*1 (9th Cir. 2018).

<sup>105</sup> *Perez*, 926 F.3d at 525–26. The Ninth Circuit has previously held that an opinion can be amended or withdrawn at any point before the mandate has issued. *Carver*, 558 F.3d 869. Because the initial *Perez* opinion “was only part way through its finalization process,” the court has the authority to withdraw the opinion, and issue a replacement. *Perez*, 926 F.3d at 525 (quoting *Carver*, 558 F.3d at 878). However, Judge Reinhardt himself opined that, in the interest of “maintaining the stability and legitimacy of the court’s decisions,” a new majority that disagrees with a court decision should only seek to correct that decision through the en banc process. *Carver*, 558 F.3d at 880–81 (Reinhardt, J., concurring).

<sup>106</sup> *Perez*, 926 F.3d at 522–23.

<sup>107</sup> *See id.* at 522.

<sup>108</sup> *Id.* at 520 (citing *Thorne*, 726 F.2d at 470).

<sup>109</sup> *Perez*, 926 F.3d at 521–22.

investigation revealed that they had both engaged in sexual relationships with sex workers while on duty.<sup>110</sup> The relationships were not private, and one sex worker also received city money as a paid informant.<sup>111</sup> The court held that the officers' constitutional rights to privacy and intimate association had not been violated because *Thorne's* protections did not extend to conduct that was neither private nor separate from the officers' on-the-job performance.<sup>112</sup>

*Fleisher* involved a probationary officer who was terminated in part because of private sexual activity that amounted to criminal sexual misconduct.<sup>113</sup> *Fleisher*, when he was 19, engaged in a sexual relationship with a 15-year-old, as a member of the police department's "Explorer Program."<sup>114</sup> *Fleisher* was later hired as a probationary police cadet, and was then terminated after an investigation revealed the sexual encounters.<sup>115</sup> The City of Signal Hill argued, and the court concluded, that *Fleisher* was barred from recovery, because his constitutional rights to privacy and free association did not protect illegal sexual conduct.<sup>116</sup>

Taking into consideration *Thorne*, *Fugate*, and *Fleisher*, the court held that the "precedents are not so clear that every reasonable official would understand that" considering *Perez's* extramarital affair as part of her termination decision would violate her constitutional privacy rights, when that relationship led to "inappropriate personal cell phone use while on the job."<sup>117</sup> Because the precedents are unclear, the court found that the officers were entitled to qualified immunity on *Perez's* privacy violation claim.<sup>118</sup>

## 2. *The Court is Within Its Rights to Substitute a Different Opinion.*

The General Orders for the Ninth Circuit provide that if a judge becomes unavailable while a matter is under submission, and the remaining two judges are not in agreement as to the outcome of the matter,<sup>119</sup>

<sup>110</sup> *Fugate v. Phx. Civil Serv. Bd.*, 791 F.2d 736, 737 (9th Cir. 1986).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 741.

<sup>113</sup> *Fleisher v. Signal Hill*, 829 F.2d 1491, 1492–93, 1496 (9th Cir. 1987).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 1493.

<sup>116</sup> *Id.* at 1496, 1500.

<sup>117</sup> *Perez*, 926 F.3d at 522.

<sup>118</sup> *Id.* at 514.

<sup>119</sup> Judge Tashima filed a concurring opinion in the 2018 matter, stating that he agreed with the summary judgment reversal, but disagreed with the majority's reasoning. *Perez*, 882 F.3d at 861–62 (Tashima, J., concurring). In the 2019 opinion affirming the grant of summary judgment, Judge Tashima aligned with Judge Ikuta, appointed in Judge Reinhardt's place, thereby creating a new majority. Compare *Perez v. Roseville*, 926 F.3d with 882 F.3d at 861-65 (Tashima, J., concurring).

the Clerk of the Court shall assign a replacement judge to decide the matter as a quorum.<sup>120</sup> Under the precedent established in *Carver v. Lehman*, the court held that “[u]ntil the mandate has issued, opinions can be, and regularly are, amended or withdrawn.”<sup>121</sup> Because no mandate had issued on the original decision, and a judge had requested an en banc rehearing sua sponte, the court was within its authority to withdraw the initial opinion, and to substitute a new one.<sup>122</sup>

Incidentally, Judge Reinhardt himself filed a concurring opinion in *Carver*, in which he agreed that the remaining judges were within their authority to withdraw and replace the previous opinion.<sup>123</sup> Despite its clear authority, Judge Reinhardt posited that it was “unwise for a court, once it has published an opinion on a constitutional question, to change its mind for so fortuitous and subjective a reason.”<sup>124</sup> The en banc<sup>125</sup> procedure should be the primary avenue for correcting a decision that the court believes should be reassessed.<sup>126</sup>

### 3. *Judge Molloy Dissents: the En Banc Process Is the Proper Vehicle for Reconsidering a Published Opinion.*

Judge Molloy dissented to the 2019 *Perez* opinion on the grounds that (1) the majority in the 2018 opinion correctly resolved the matter, and (2) substituting a different judge when the author of a published opinion passes away is inappropriate in this case.<sup>127</sup>

The second of these reasons is particularly problematic for Judge Molloy, because the en banc rehearing is available specifically “to correct the application of law by a three-judge panel of the Circuit.”<sup>128</sup> On a panel of three judges, two constitute a quorum and are able to decide an appeal, provided that they agree.<sup>129</sup> In this case, Judge Molloy joined in the majority opinion with Judge Reinhardt in 2018, and Judge Reinhardt’s vote on the matter was published before his death.<sup>130</sup> Further, General Order 3.2(h) does not apply, because “[once] the case is decided

<sup>120</sup> U.S. Ct. App. 9th Cir., Gen. Order. 3.2(h).

<sup>121</sup> *Perez*, 926 F.3d at 525 (quoting *Carver*, 558 F.3d) (internal quotations omitted).

<sup>122</sup> *Id.* at 525–26.

<sup>123</sup> *Carver*, 558 F.3d at 881 (Reinhardt, J., concurring).

<sup>124</sup> *Id.* (Reinhardt, J., concurring).

<sup>125</sup> Litigants to an appeal or procedure may suggest that the matter be heard “en banc”—that is, by all active judges of the court. *W. Pac. R. R. Corp. v. W. Pac. R. R. Co.*, 345 U.S. 247, 261 (1953). The court may also propose an en banc proceeding “sua sponte”—on its own motion. *See W. Pac. R. R. Corp. v. W. Pac. R. R. Co.*, 345 U.S. 247, 262 (1953).

<sup>126</sup> *Perez*, 926 F.3d at 525 (citing *Carver*, 558 F.3d at 881 (Reinhardt, J., concurring)).

<sup>127</sup> *Id.* at 526 (Molloy, J., dissenting).

<sup>128</sup> *Id.* (Molloy, J., dissenting).

<sup>129</sup> *Id.* at 527 (Molloy, J., dissenting) (citing *Yovino v. Rizo*, 139 S. Ct. 706, 709 (2019)).

<sup>130</sup> *Id.* at 526–27 (Molloy, J., dissenting).

by a quorum of the panel judges it is no longer under submission,” and General Order 3.2(h) only applies to matters that are “under submission.”<sup>131</sup> For this reason, the *Perez* case was completely decided in 2018.<sup>132</sup> If the opinion is incorrect, it should proceed to a rehearing en banc, and the parties must be provided with the opportunity to be heard at that proceeding.<sup>133</sup>

## II. PROHIBITING GOVERNMENTAL INTRUSION INTO EMPLOYEES’ SEXUAL PRIVACY

The Constitution is credited as conferring upon citizens a general “right to be let alone.”<sup>134</sup> The Court has gradually expanded on this right by acknowledging that there are zones of individual privacy that should be free from government interference,<sup>135</sup> and, more specifically, that “choices central to personal dignity and autonomy[ ] are central to the liberty protected by the Fourteenth Amendment.”<sup>136</sup> This “emerging awareness” culminated in *Lawrence* with the Court’s acknowledgement that the right to be let alone extends to all private, consensual, sexual conduct.<sup>137</sup> The original *Perez* opinion furthers this awareness by urging caution “not to let the State use its power as an employer to encroach excessively or unnecessarily upon the areas of private life . . . where an individual’s dignity interest in autonomy is at its apex.”<sup>138</sup>

Although *Lawrence* symbolizes a freedom from governmental influence with regard to individual autonomy generally, it set the stage for the recognition of those rights in the sphere of public employment specifically.<sup>139</sup> A government actor cannot undermine individual liberties merely because it is acting as an employer as opposed to acting as a governing body. The cornerstone of this recognition turns on the notion that government employers can no longer be permitted to take adverse employment action against an employee who “does not live up to the employer’s conception of morality in how she lives her private and personal life (especially in matters pertaining to sex).”<sup>140</sup> If a government

<sup>131</sup> *Id.* at 527 (Molloy, J., dissenting).

<sup>132</sup> *Id.* at 528 (9th Cir. 2019) (Molloy, J., dissenting).

<sup>133</sup> *Id.* at 527-28 (9th Cir. 2019) (Molloy, J., dissenting).

<sup>134</sup> *Omstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

<sup>135</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

<sup>136</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

<sup>137</sup> *See Lawrence*, 539 U.S. at 572.

<sup>138</sup> *Perez*, 882 F.3d at 847.

<sup>139</sup> *See* Paul M. Secunda, *The (Neglected) Importance of Being Lawrence: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85, 89 (2006).

<sup>140</sup> *Id.* at 89–90.

employer must interfere in the personal off-duty conduct of the individual employee, the employer must be required to show a substantial interest in doing so.<sup>141</sup> That is, the government's interest must be related to the employment relationship in order to justify its intrusion into the employee's private life. The employer's own conception of morality is simply not sufficient to meet this standard.<sup>142</sup>

A contrary analysis suggests that the principles in *Lawrence* do not affect other historically outlawed private conduct, such as adultery.<sup>143</sup> This view maintains that the circumstances in *Lawrence* did not involve "persons who might be injured,"<sup>144</sup> and adultery has the potential of harming innocent spouses and children.<sup>145</sup> To be sure, many states still criminalize adultery, although it is rarely enforced.<sup>146</sup> However, to suggest that *Lawrence* does not apply to other private sexual activities that are contrary to the Nation's history and tradition is to, once again, misinterpret the overall holding in *Lawrence*. As the Court noted in *Lawrence*, history and tradition are merely a starting point, and the evolution of laws and traditions "show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."<sup>147</sup> This language suggests that the Court intended a broad interpretation of *Lawrence*, and that the principles acknowledged do not apply exclusively to homosexual sodomy, as opponents may suggest.<sup>148</sup> Rather, the decision in *Lawrence* promotes a more general right of the individual to make intimate decisions free from government interference.<sup>149</sup> While even the broadest interpretation of *Lawrence* does not exempt all sexual decision-making from government interference, it does require the government to meet a heightened standard of review when it seeks to limit those decisions.<sup>150</sup>

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<sup>141</sup> *Id.* at 118.

<sup>142</sup> *Id.* at 126.

<sup>143</sup> Matthew W. Green Jr., *Lawrence: An Unlikely Catalyst for Massive Disruption in the Sphere of Government Employee Privacy and Intimate Association Claims*, 29 BERKELEY J. EMP. & LAB. L. 311, 338 (2008).

<sup>144</sup> *Lawrence*, 539 U.S. at 578.

<sup>145</sup> Matthew W. Green Jr., *Lawrence: An Unlikely Catalyst for Massive Disruption in the Sphere of Government Employee Privacy and Intimate Association Claims*, 29 BERKELEY J. EMP. & LAB. L. 311, 339 (2008).

<sup>146</sup> Jolie Lee, *In Which States is Cheating on Your Spouse Illegal?*, DETROIT FREE PRESS, (Apr. 17, 2014, 4:48 PM), <https://www.freep.com/story/life/family/2014/04/17/in-which-states-is-cheating-on-your-spouse-illegal/28936155/>.

<sup>147</sup> *Lawrence*, 539 U.S. at 571–72.

<sup>148</sup> See *Lawrence*, 539 U.S. at 586 (Scalia, J. dissenting) ("[N]owhere does the court declare that homosexual sodomy is a fundamental right under the due process clause" (internal quotations omitted)).

<sup>149</sup> See generally, *Lawrence*, 539 U.S. 558.

<sup>150</sup> See generally, *id.*

As the original decision in *Perez* acknowledged, *Lawrence* established a right of all adults to engage in consensual sexual activity, in whatever form that might take.<sup>151</sup> This means that “the State may not stigmatize private sexual conduct simply because the majority has ‘traditionally viewed a particular practice,’ [including] extramarital sex, ‘as immoral.’”<sup>152</sup> As the *Perez* court concluded in its initial ruling, a government actor may not use its position as an employer to escape its responsibility to respect an individual’s personal autonomy rights.<sup>153</sup>

### III. THE NINTH CIRCUIT’S SECOND OPINION MISAPPLIES RELEVANT FACTS, AND MISINTERPRETS RECENT PRECEDENT.

The Ninth Circuit’s 2019 decision is problematic for a number of reasons. First, it fails to consider the impact of the supervising officers’ disapproving statements about the affair.<sup>154</sup> The first memorandum issued to Perez and Begley specifically discussed the unprofessionalism of their affair and its unfavorable reflection on the police department.<sup>155</sup> Further, Hahn, Moore, and Walstad all testified as to their personal feelings about the affair.<sup>156</sup> These testimonies suggest that the officers could have been motivated to terminate Perez, at least in part, because of their disapproval of her affair.<sup>157</sup>

Secondly, the Ninth Circuit’s 2019 opinion affords no weight to the suspicious timing of Perez’s reprimand for violating the department’s phone policies.<sup>158</sup> The phone policy reprimand, which the court points to as the ultimate justification for Perez’s termination, was issued nearly a week after her termination.<sup>159</sup> The original reprimand, which cited the unprofessional nature of Perez’s sexual relationship, was thereafter removed from her file.<sup>160</sup> The “shifting justifications for [Perez’s] termination” present, at the very least, a questionable issue of fact as to the true reason for Perez’s termination.<sup>161</sup>

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<sup>151</sup> See *Perez*, 882 F.3d at 856 (citing *Lawrence*, 539 U.S. at 578) (“the liberty protected by the Due Process Clause must extend *equally* to *all* intimate sexual conduct between consenting adults”).

<sup>152</sup> *Id.* (quoting *Lawrence*, 539 U.S. at 578).

<sup>153</sup> See *id.*

<sup>154</sup> See *id.* at 851–53.

<sup>155</sup> *Id.* at 853.

<sup>156</sup> *Id.* at 852–53.

<sup>157</sup> See *id.*

<sup>158</sup> See *Perez*, 926 F.3d at 517–18.

<sup>159</sup> *Id.* at 518.

<sup>160</sup> *Id.*

<sup>161</sup> *Perez*, 882 F.3d at 854.

Finally, by considering its decisions in *Fugate* and *Fleisher*, in conjunction with its conclusions in *Thorne*, the court finds that the officers could not have been expected to know that terminating Perez because of her extramarital affair would violate Perez's constitutional rights.<sup>162</sup> However, *Fugate* and *Fleisher* were distinguished from *Thorne*,<sup>163</sup> and are likewise distinguishable from *Perez*.<sup>164</sup> Perez neither conducted an on-duty sexual relationship, nor engaged in criminal sexual misconduct.<sup>165</sup> While the Ninth Circuit concluded in its 2019 opinion that Perez was ultimately terminated for excessive cell phone use in connection with her affair, Chief Hahn specifically stated that her cell phone use was not a violation warranting termination.<sup>166</sup> Moreover, as the Ninth Circuit originally concluded, there is insufficient evidence to suggest that the "affair had any meaningful impact upon [Perez's] job performance."<sup>167</sup> *Thorne* is therefore directly applicable here, and establishes that a government employer cannot base termination decisions on an employee's off-duty sexual conduct, when such conduct does not impact her on-the-job performance.<sup>168</sup>

Furthermore, as Judge Molloy acknowledged in his dissenting opinion, "the substitution of a judge who legitimately disagrees with the original opinion should not change the outcome" of the case.<sup>169</sup> The Ninth Circuit's 2019 opinion offers a different interpretation of the facts, which at the very least, suggests a triable issue sufficient to defeat summary judgment.<sup>170</sup> By avoiding the privacy and associational questions in-

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<sup>162</sup> *Perez*, 926 F.3d at 522.

<sup>163</sup> Compare *Thorne*, 726 F.2d at 471 (holding that a employer may not rely on an employee's off-duty, private conduct in withholding employment, when such conduct does not impact her on-the-job performance or violate a specific department policy), with *Fugate*, 791 F.2d at 741 (holding that while *Thorne* protected sexual behavior occurring off-duty, it does not protect officers' privacy when such behavior occurs "on-the-job"), and *Fleisher*, 829 F.2d at 1499 (holding that the *Thorne* protections do not apply to actions that are specifically identified by the employer as being grounds for termination).

<sup>164</sup> Compare *Perez*, 882 F.3d at 857 n.10 (holding that neither adverse action, nor termination may be sought against an employee based on her off-duty, private sexual conduct when such conduct does not affect her job performance or violate a narrowly-tailored regulation), with *Fugate*, 791 F.2d at 741 (holding that privacy protections for an employee's off-duty conduct do not apply when the employee engages in sexual conduct while on-duty), and *Fleisher*, 829 F.2d at 1499 (holding that an employee's privacy rights are not violated when he is terminated for engaging in sexual conduct that is specifically prohibited by the department's established policies).

<sup>165</sup> See *Perez*, 2015 U.S. Dist. LEXIS 80060, at \*29–30.

<sup>166</sup> *Perez*, 926 F.3d at 518.

<sup>167</sup> *Perez*, 882 F.3d at 854–55.

<sup>168</sup> *Thorne*, 726 F.2d at 471.

<sup>169</sup> *Perez*, 926 F.3d at 526 (Molloy, J. dissenting).

<sup>170</sup> See *Perez*, 882 F.3d at 858.

volved in this case, the Ninth Circuit misses an opportunity to clarify an issue that has not been definitively resolved since *Lawrence*.<sup>171</sup>

IV. THE NINTH CIRCUIT’S CONCLUSIONS IN ITS FIRST OPINION  
APPROPRIATELY APPLY CONTROLLING PRECEDENT AND  
APPROPRIATELY INTERPRET THE FACTS OF THE CASE.

Contrary to the Ninth Circuit’s conclusions in its 2019 opinion, the question here is not whether a government employer can ever consider an employee’s sexual activity when making employment decisions.<sup>172</sup> Rather, this case asks whether the employer can consider the employee’s off-duty conduct, when it does not substantially affect her job performance.<sup>173</sup>

In its initial opinion, the Ninth Circuit interpreted *Lawrence* to recognize that “intimate sexual conduct represents an aspect of substantive liberty protected by the Due Process Clause.”<sup>174</sup> Because Perez’s commanding officers stated that they morally disapproved of the affair, and considering that the Department’s proffered reasons for Perez’s termination<sup>175</sup> came in quick succession after the internal affairs investigation, there was sufficient evidence to suggest that the termination was uncon-

<sup>171</sup> See generally, *Perez*, 882 F.3d 843; *Seegmiller*, 528 F.3d 762; *Coker*, 858 F.3d 304.

<sup>172</sup> See *Perez*, 926 F.3d at 520.

<sup>173</sup> See *Perez*, 882 F.3d at 848.

<sup>174</sup> *Id.* at 856 (citing *Lawrence*, 539 U.S. at 564). Although Perez’s other claims are not the subject of this Note, they are illustrative of her plight as a public employee, and perhaps worthy of further research. First, while Perez conceded that her termination was based on her affair with another officer (see *Perez*, 926 F.3d at 515), her observations of sex discrimination by the Department were plausible. Specifically, Perez noted that Begley, who was equally engaged in an extramarital affair with a fellow officer, was neither terminated because of the affair, nor reprimanded as a result of a “heated exchange” with his superiors. Plaintiff-Appellant Janelle Perez’s Opening Brief at 22, *Perez*, 926 F.3d 511 (No. 15-16430). Conversely, Perez was both terminated at least in part for the affair, and retroactively reprimanded for having a “bad attitude” with a supervisor. *Id.* at 22.

Second, the court concluded that, even if Perez’s due process rights were violated with the disclosure of the disciplinary action against her to Begley’s wife, the Department was entitled to qualified immunity, as there was no clearly set standard for determining a sufficient nexus between the public revelation and the termination. *Perez*, 926 F.3d at 524. In an earlier case, the court found there was not a sufficient nexus when a stigmatizing statement was released 19 days after the employee’s termination. *Id.* at 524 (citing *Tibbetts v. Kulongoski*, 567 F.3d 529, 538 (9th Cir. 2009)). The court concluded that the same standard should apply to this case, given that the disclosure to Begley’s wife occurred 19 days before Perez’s termination. *Id.* This is arguably an incorrect application, as a disclosure of stigmatizing information after the employee’s termination could have a significantly different effect on the termination decision than would the same disclosure occurring before the termination. In absence of a “bright line rule[.]” there is no clear guidance on how to evaluate similar facts going forward. *Id.*

<sup>175</sup> The Department cited the following as reasons for Perez’s termination: (1) she did not get along with other female officers; (2) the Department received a complaint about her from a domestic violence victim; and (3) she had a “bad attitude[.]” *Perez*, 882 F.3d at 853 (9th Cir. 2018).

stitutionally motivated.<sup>176</sup> Further, the fact that the Department withdrew its reprimand for “Unsatisfactory Work Performance” and “Conduct Unbecoming” and replaced it with a reprimand for “Use of Communication Devices” only after Perez had been terminated, despite noting that Perez’s cell-phone use did not “warrant[ ] termination,”<sup>177</sup> raises questions regarding the true motive for the Department’s actions.

The *Lawrence* Court found that individuals have a right to engage in private sexual conduct without intrusion by the government.<sup>178</sup> Nowhere in the *Lawrence* opinion does the Court specify that this principle applies to a government actor only when it is acting as a sovereign. Nor does the *Lawrence* opinion only apply to homosexual conduct.<sup>179</sup> Because of these omissions, the Ninth Circuit inferred that a state actor cannot hide behind the guise of “employer” in order to stigmatize a particular sexual activity based exclusively on its own traditional views of morality.<sup>180</sup>

Even if the right to engage in private sexual conduct is not fundamental, and therefore not entitled to a heightened degree of scrutiny, the Ninth Circuit concluded early on that government intrusion into an employee’s privacy and associational rights when not relevant to her on-the-job performance could not withstand “any level of scrutiny.”<sup>181</sup> Thus, a government employer’s invasion of an individual’s rights to privacy and free association can only be appropriate upon a showing that the employee’s conduct has had an adverse effect on his or her job performance, or violates a narrowly-tailored, constitutionally-sound departmental policy.<sup>182</sup>

It is certainly important that a police department maintain order within the department, as well as the confidence of the public it serves. However, the right to engage in private, sexual conduct free of government intervention is arguably more important, regardless of whether the government is acting as a sovereign or as an employer. Furthermore, employment with law enforcement does not minimize an employee’s right to personal autonomy.<sup>183</sup> Because the state cannot “demean [an individual’s] existence” by penalizing their private sexual conduct,<sup>184</sup> a government employer must show “more than a de minimis adverse impact on

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 850.

<sup>178</sup> *Lawrence*, 539 U.S. at 578.

<sup>179</sup> *See id.*

<sup>180</sup> *See Perez*, 882 F.3d at 856.

<sup>181</sup> *Thorne*, 726 F.2d at 471 (emphasis added).

<sup>182</sup> *See Perez*, 882 F.3d at 856.

<sup>183</sup> *See, e.g.,* Steve Hartsoe, *ACLU Challenges N.C. Cohabitation Law*, WASH. POST (May 10, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/09/AR2005050901091.html>.

<sup>184</sup> *Lawrence*, 539 U.S. at 578.

the employer's work place" to justify an unwanted interference.<sup>185</sup> As the initial *Perez* opinion suggests, "[c]onduct unbecoming an officer" is not a legitimate reason to permit the State's intrusion on an individual's rights to privacy and free association.<sup>186</sup>

V. THE INITIAL *PEREZ* TEST SHOULD BE USED AS A MODEL FOR FUTURE CASES.

It is not surprising that the government is generally prohibited from conditioning a government benefit on the surrender of a constitutional right.<sup>187</sup> However, the government employer stands in the unique position of controlling the terms and conditions of employment.<sup>188</sup> Moreover, the government employer has an interest in providing an efficient and responsive government service.<sup>189</sup> Nonetheless, discipline or termination of a government employee solely on the basis of moral disapproval of their off-duty conduct is constitutionally impermissible.<sup>190</sup>

The *Perez* and *Thorne* decisions account for this by providing a workable standard for analyzing similar situations going forward.<sup>191</sup> To withstand heightened scrutiny, the state actor must first identify a legitimate interest: while maintaining an effective government service may be a legitimate interest, moral disapproval of private conduct is not.<sup>192</sup> Second, the policy must be narrowly-tailored to achieve that interest: the government must show that the employee's conduct either interferes with her on-the-job performance or violates a constitutionally valid department regulation.<sup>193</sup>

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<sup>185</sup> Paul M. Secunda, *The (Neglected) Importance of Being Lawrence: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85, 124 (2006).

<sup>186</sup> *Perez*, 882 F.3d at 856. See also *Lawrence*, 539 U.S. at 578.

<sup>187</sup> See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (holding that if a university's decision not to renew a teacher's contract was based upon the teachers exercise of his free speech rights, such a decision would violate the Due Process clause).

<sup>188</sup> See Paul M. Secunda, *The (Neglected) Importance of Being Lawrence: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85, 97 (2006).

<sup>189</sup> See *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) (holding that a government may not rescind or decline to renew an at-will contract with an independent contractor in retaliation for exercising his free speech rights).

<sup>190</sup> *Perez*, 882 F.3d at 848.

<sup>191</sup> *Id.* at 857–58 (citing *Thorne*, 726 F.2d at 471).

<sup>192</sup> Paul M. Secunda, *The (Neglected) Importance of Being Lawrence: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85, 132 n.237 (2006).

<sup>193</sup> *Perez*, 882 F.3d at 857-858 (citing *Thorne*, 726 F.2d at 471).

Incidentally, there are circumstances when government interference with an employee's personal autonomy rights would be justified.<sup>194</sup> Generally, these circumstances would involve some "detriment to the employer's public image, the inability of the worker to interact with her co-employees, or the employee's simple inability to carry out the essential functions of her position as a result of her private conduct."<sup>195</sup> For example, some government employers have regulations in place that would meet the standard set forth by *Perez*, meaning that an employer could base a personnel decision on an employee's private sexual activity.<sup>196</sup> Such a decision, however, would not be overtly based upon the government's moral disapproval of the employees' conduct. Rather, the government's decision would be a response to an actual or potential negative impact to the work environment.

For example, some employers have specific departmental policies against nepotism,<sup>197</sup> which provide for comparable reassignment in the event that a personal relationship exists within certain employment relationships.<sup>198</sup> If the City of Roseville had a similar provision in place, it would not have violated *Perez*'s privacy and associational interests by transferring her to another police department. Similarly, California government employees are prohibited from engaging in certain conduct, including using the prestige of the agency for the employee's private advantage; misusing state time or resources; and misusing confidential information.<sup>199</sup> In this regard, if *Perez* actually engaged in sexual activity while on duty, the department would have been permitted to terminate her without violating her sexual autonomy rights. Dereliction of duty is a legitimate reason to dismiss an employee; moral disapproval of their sexual decisions is not.

These regulations satisfy the *Perez* requirements because they are narrowly-tailored and constitutionally sound.<sup>200</sup> Moreover, neither of

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<sup>194</sup> Paul M. Secunda, *The (Neglected) Importance of Being Lawrence: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85, 124 (2006).

<sup>195</sup> *Id.*

<sup>196</sup> See, e.g., CAL. DEP'T OF HUMAN RES., AGREEMENT BETWEEN THE STATE OF CALIFORNIA AND CAL FIRE LOCAL 2881 COVERING BARGAINING UNIT 8 FIREFIGHTERS, 23 (2017), <http://calhr.ca.gov/labor-relations/Documents/mou-20170101-20210701-bu8.pdf>. Accord Paul M. Secunda, *The (Neglected) Importance of Being Lawrence: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85, 124 (2006).

<sup>197</sup> *Id.* "Nepotism" is defined as a situation in which one employee uses his or her influence or power to positively or negatively affect another employee because of a personal relationship between them.

<sup>198</sup> See, e.g., *id.*

<sup>199</sup> CAL. GOV. CODE § 19990 (2018).

<sup>200</sup> See generally *Perez*, 882 F.3d at 857–58 (citing *Thorne*, 726 F.2d at 471).

these examples involves a subjective, purely moral limit on the employee's off-duty conduct, such as a requirement not to engage in "immoral or indecent conduct,"<sup>201</sup> or to "keep [one's] private life unsullied."<sup>202</sup>

VI. APPLICATION OF THE *PEREZ* TEST MAY HAVE CAUSED THE FIFTH AND TENTH CIRCUITS TO DECIDE DIFFERENTLY.

The courts in *Seegmiller* and *Coker* misapplied the principles announced in *Lawrence* when they concluded that the asserted rights were anything less than personal rights to sexual autonomy, and were thus not fundamental. Although the police departments may have ultimately been able to show that their work-related interests were sufficient to survive heightened scrutiny, analyzing such rights under a rational basis review was not appropriate.

Application of the *Perez* standard to the *Seegmiller* case would likely have resulted in a favorable decision for the police department. Like California, Utah also expressly prohibits government employees from using state resources for private gain.<sup>203</sup> While the *Perez* standard recognizes that Officer Johnson had a constitutional right to make personal intimate decisions,<sup>204</sup> it does not support a conclusion that she had a right to use department resources to her own advantage. By engaging in an extramarital affair while at a department-sponsored event, the department could have determined that Officer Johnson was in violation of a narrowly-tailored department regulation.

Conversely, the decision in *Coker* would likely have favored officers, if the court applied the *Perez* test.<sup>205</sup> Despite the Fifth Circuit's determination that the officers did not "have constitutional rights to 'associate' with [the] other's spouse," there was no evidence that the officers' decisions to engage in private, consensual, sexual conduct affected their respective on-the-job performances.<sup>206</sup> Furthermore, the Sheriff's Department Code of Conduct was neither narrowly-tailored, nor constitutionally valid, as it merely prohibited subjectively "immoral" conduct.<sup>207</sup>

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<sup>201</sup> *Coker*, 858 F.3d at 305.

<sup>202</sup> *Seegmiller*, 528 F.3d at 772.

<sup>203</sup> UTAH ADMIN. CODE r. 477-9-3 (2018).

<sup>204</sup> *Perez*, 882 F.3d at 856 (citing *Thorne*, 726 F.2d at 471).

<sup>205</sup> See generally *Perez*, 882 F.3d at 857-58 (citing *Thorne*, 726 F.2d at 471).

<sup>206</sup> *Coker*, 858 F.3d at 306.

<sup>207</sup> *Id.* at 305.

## CONCLUSION

The jurisprudence regarding personal autonomy shows that individuals have a right to make decisions about their private and personal lives free from unwanted government intrusion.<sup>208</sup> Some circuit courts are resistant to the broad application of sexual autonomy rights identified in *Lawrence v. Texas*.<sup>209</sup> Those courts maintain that *Lawrence* was not intended to extend an unfettered right to sexual privacy;<sup>210</sup> and even if it did, that right was certainly not meant to apply to public employment.<sup>211</sup> This is not a proper understanding of the *Lawrence* decision.

As the Ninth Circuit initially acknowledged in *Perez v. Roseville*, *Lawrence* stood for the notion that the Constitution protects individual autonomy in all areas of sexual decision-making.<sup>212</sup> It is not a proper application of the law to conclude that a government actor, acting as an employer, does not have to abide by the same constitutional protections that guide the government actor acting as a sovereign. In *Perez*, the Ninth Circuit recognized that government employees are nonetheless citizens, and are entitled to protection of those rights guaranteed by the Constitution.<sup>213</sup>

The Ninth Circuit's second decision in *Perez* is problematic because it misinterprets the facts and controlling precedent in determining that the Roseville Police Department did not violate *Perez*'s constitutional privacy rights.<sup>214</sup> Thus, the Ninth Circuit's first opinion should have remained in place.<sup>215</sup>

While a government employer has an interest in maintaining an efficient government service, the subjective morality of the employer does not outweigh the employee's liberty interest in making personal, off-duty decisions without government interference.<sup>216</sup> For these reasons, courts

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<sup>208</sup> See, e.g., *Lawrence*, 539 U.S. 558 (2003) (right to engage in private sexual conduct); *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965) (right of married couples to purchase contraceptives); *Eisenstadt v. Baird*, 405 U.S. 438, 453–55 (1972) (right of all couples to purchase contraceptives); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (right to marry, regardless of the race of the respective individuals); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (right to marry extends to same sex couples); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (right to terminate a pregnancy prior to viability).

<sup>209</sup> See *Seegmiller*, 528 F.3d at 771. See also *Coker*, 858 F.3d at 306.

<sup>210</sup> *Seegmiller*, 528 F.3d at 771.

<sup>211</sup> *Coker*, 858 F.3d at 306.

<sup>212</sup> *Perez*, 882 F.3d at 856.

<sup>213</sup> See generally *id.*

<sup>214</sup> Compare *Perez*, 926 F.3d 511 (9th Cir. 2019) with *Perez*, 882 F.3d 843 (9th Cir. 2018).

<sup>215</sup> See *Perez*, 926 F.3d at 526 (Molloy, J., dissenting).

<sup>216</sup> Paul M. Secunda, *The (Neglected) Importance of Being Lawrence: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85, 126 (2006).

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should adopt the *Perez* standard, which provides that an employee may only be subject to adverse employment action for their off-duty conduct when such conduct substantially interferes with their on-the-job performance, or violates a narrowly-tailored, constitutionally valid department policy.<sup>217</sup> This test appropriately balances the government's interest in effective service against the employee's interest in individual autonomy. Applying this standard, courts in other jurisdictions would have decided similar cases different

An individual does not relinquish their constitutionally-protected personal autonomy rights when they accept the benefit of public service. Nor is a state actor permitted to compromise individual liberties, merely because it is acting as an employer. The public employee remains a citizen, and the State cannot be allowed to use its position as an employer to subject her to its own perceptions about morality.

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<sup>217</sup> *Perez*, 882 F.3d at 855–56 (citing *Thorne*, 726 F.2d at 471).

