2013 J. Will Pless International Graduate of the Year Award

David C. Soutter

Application Materials
2013 J. WILL PLESS INTERNATIONAL GRADUATE OF THE YEAR - FORM S

PREPARE IN TRIPLICATE: □ Original to HQ □ Copy to Province President □ Copy for Inn files.

NOMINEE OF REHNQUIST INN

(Please read Instructions and review all four pages of this form before beginning to complete form.)

(PLEASE PRINT)

Full name of nominee  David Charles Soutter

First Middle (no initials) Last

Address 131 Boston St #2 Boston, MA 02125

E-mail address dcsoutter@suffolk.edu

Age 34

Member of Rehnquist Inn at Suffolk University Law School

(School)

Date of Expected Graduation from Law School May 20, 2013

SELECTION CRITERIA

The Court of Appeals believes that student Inns should know in advance the selection process criteria, which the Court will use in selecting the winner. Accordingly, the Court has assigned a maximum of 100 points to the four sections dealing with scholastic data, law school activities, Phi Delta Phi activities and other achievements. The Court has also listed the subcategories that it will take into consideration within each category.

The four categories are broken down as follows:

I. PHI DELTA PHI ACTIVITIES AND SERVICES (25)
   Offices
   Performance
   Attendance Record
   Program Activities
   Financial Standing
   Other Contributions

II. LAW SCHOOL ACTIVITIES (25)
   Law Review
   Moot Court
   Legal Aid Clinic
   Student Bar Association
   Class Offices Held
   Legal Research or Work Outside of Regular Course Work
   Recognition or Awards Received

III. OTHER ACHIEVEMENTS/ACTIVITIES (25)

   Pre-Law Degrees
   Social and Honor Organizations
   Offices, honors, awards during pre-law college or equivalent
   Other personal achievements such as:
   family obligations, community service, athletic achievements, and military service

IV. SCHOLASTIC DATA (25)
   Class Rank
   Outside Employment while attending Law school
   Academic Recognition or Awards Other
I. PHI DELTA PHI ACTIVITIES AND SERVICES (25)

What offices, if any, has nominee held in your Inn?

Magister (2012-13), Member (2011-13)

Attendance Record: 100%


Is nominee in good financial standing with the Inn? ☑Yes □No

Describe performance of duties and achievements while in office, and any other services or activities which you regard as a contribution to the Society's welfare: After a year of relative inactivity, David ran for Magister with the goal of and has endeavored to create a more visible presence on campus. He helped organize an alumni happy hour, an end of semester pizza party and has planned to hold social and academic events in the spring semester. In addition he has updated the member email lists and kept all members informed in a timely fashion of upcoming PDP, Rehnquist Inn and school-wide programs.

II. LAW SCHOOL ACTIVITIES (25)

Does your school publish a law review? ☑Yes □No If so, what part did nominee take in it? David is a member of the Suffolk University Law Review. He is currently the Lead Articles Editor which is a Front Office position and gives him primary responsibility for reviewing, selecting, and managing articles written by professors and practitioners and for coordinating four annual Donahue Lecture Series events in 2012-13 which bring distinguished speakers to Suffolk Law. He also is responsible for inviting speakers for the 2013-14 Series. In addition, David launched a new year-long, inter-journal competition called “The Journal Games” which fosters camaraderie among all five of Suffolk’s Journals. Finally, David along with the Editor-in-Chief has worked to launch a new companion journal to the Law Review called Suffolk University Law Review Online. This project required constant effort for the past 8 months to receive approval from the Administration, establish a new position to oversee the online journal’s content, hire a designer and work with him to build the new website, coordinate with Suffolk Law departments, develop types and standards for content and solicit Suffolk Professors and other academics to write and publish content online.
Is there an advocacy program? □ Yes □ No  If so, describe nominee's participation: David was part of the first ever two-year National Moot Court (NMC) Team at Suffolk Law. NMC is the nation’s oldest and most prestigious Moot Court competition. Suffolk Law usually selects its three-person team from among the top Third-Year Students, but David was selected as a Second Year. The team won the Region 1 competition and competed at the NMC Nationals in New York City. The team also won Region 1 Best Brief in 2011. David was individually recognized at the 2011 Region 1 Top Oralist in the Finals. David was also a quarterfinalist in the 2011 McLaughlin Competition which is an invitation only Suffolk Law Oral Advocacy Competition. David is competing in Spring 2013 in the Tom C. Clark Appellate Advocacy Competition which is also a Suffolk Law competition.

Do you operate a legal aid clinic or social or community service? □ Yes □ No

If so, what was nominee's function in connection with it, if any? David volunteered as a clerk at the Massachusetts Superior Court in the Summer of 2011 for Judge Bonnie MacLeod. He also volunteers to supply his class notes to students with learning disabilities through Suffolk’s Academic Support Program.

Do you have a student bar association or similar all school organization? □ Yes □ No

If so, what offices or other major assignments has nominee assumed? David is a member of the Student Bar Association’s Council of Presidents which makes administrative decisions for student groups.

Has nominee held any class offices in the law school? □ Yes □ No  What offices and when? 

Describe any other activities of nominee which have contributed to the welfare of the law school:

David was the featured speaker in the Office of Professional and Career Development’s annual “Callback” Program which helps students trying to gain summer employment through the Fall Recruiting process. David also serves as a teaching assistant (TA) for a First-Year Contracts Class helping students prepare for exams, understand concepts and succeed in law school.

III. OTHER ACHIEVEMENTS (25)

Pre-law Degrees: B.A. in International Affairs, minors in French and German, the George Washington University, Washington, DC (2000); M.A. in National Security Studies, American Military University, Charlestown, WV (2011).

Social and Honorary organizations: Theta Delta Chi International Fraternity; Omicron Delta Kappa.
National Leadership Fraternity: Delta Phi Alpha, German Honor Society.

Offices, honors, and awards during pre-law college or equivalent: President, Chi Deuteron Charge, Theta Delta Chi International Fraternity, Captain, George Washington Cheerleading Team

Other personal achievements such as: Family Obligations, Community Service, Athletic Achievements, Military Service, etc.: In 2001, David enlisted in the United States Army. After attending Basic Combat Training and Officer Candidate School, David was commissioned as an officer in the Military Intelligence Corps. David served on Active Duty for 8.5 years earning the rank of Captain. During that time, David earned a Meritorious Service Medal, two Army Commendation Medals, and three Army Achievement Medals. In 2010, David transitioned to the United States Army Reserves serving as an Intelligence Analyst in the 2200th Military Intelligence Group. In 2012, David was promoted to the rank of Major.

Along with his family, David organizes Mary’s Firemen for a Cure. This is an annual ski race in Maine that gives firefighters the opportunity to raise awareness and much needed research dollars to fight breast cancer. David’s mother, Mary, started the race in 2004. After Mary lost her own struggle with breast cancer in 2005, David and his family took over the race, renaming it after her. In the past nine years, Mary’s Firemen for a Cure has raised over $100,000 for the Maine Affiliate of Susan G. Komen For the Cure.

IV. SCHOLASTIC DATA (25)

At present, nominee ranks ___ 3 __ scholastically in a class of ___ 377 ___ or has a class average of ___ 3.840 ___.

Nominee's grade averages by terms have been as follows (if available): End of First-Year GPA: 3.814; End of Summer 2011 GPA: 3.828; End of Second-Year GPA: 3.851

If term averages are not available, state whether nominee has raised or lowered grade average during law school career, and roughly how much. N/A

Has nominee ever been enrolled in other law schools and if so, what was the school and scholastic record there? No

While attaining these grades, has nominee ever been employed outside of law school, or participated in military service or other work or activity that took a substantial amount of time? Yes No

If so, please describe the nature of the work and amount of time consumed. David is an active member of
the Army Reserves, which in addition to serving for one weekend a month and two weeks a year, he has ongoing commitments that average to 15 hours per week. In his capacity as a TA for the First-Year Contracts class, David works 10 hours per week helping students.

EXHIBITS

One copy of the following exhibits should be sent to the Province President along with one copy of Form S:

1. A letter of recommendation from the Dean of the law school. (If not possible, include an explanation of why not.) APPLICATIONS NOT COMPLYING WITH THIS PROVISION WILL BE AUTOMATICALLY DISQUALIFIED.

2. One copy of all legal writings of the nominee, if any. (Include law review articles but it is not necessary to send the entire issue in which a law review article appears.) Clearly mark all materials that the nominee would like returned and include return address.

3. A supplementary biographical sketch (short essay description or résumé) if available.

4. Supplemental pages containing detailed information if desired.

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FOR USE BY PROVINCE PRESIDENTS ONLY

The names and addresses of Selection Committee Members are: (This information is necessary only on the form of the Province Winner.)
I am writing to the selection committee to provide a more complete picture of my experiences and to convey the richly rewarding experience Phi Delta Phi, and Rehnquist Inn in particular, have given me. I hope that my record of academic excellence and achievements, active involvement on campus and in the community, and military experience demonstrate the values that Phi Delta Phi emulates. Succeeding at Suffolk Law and earning employment afterwards has been a challenge unlike any I had faced before. Phi Delta Phi helped me tackle this challenge. I am particularly excited and honored to be considered for this prestigious award.

Going to law school had been a dream of mine since high school. A number of factors shifted my focus away from this path upon graduating from the George Washington University in 2000, principal among them were the attacks of September 11th. Like so many young Americans, I had considered joining the military, but it was not until that fateful morning when a consideration became a calling. I promptly enlisted in the United States Army and became a commissioned officer in Military Intelligence. Unbeknownst to me, the calling to serve my country would one day lead me back to the law as a profession.

The highlight of a military career is command. It requires strong leadership and management abilities. A commander’s decisions carry the weight of law and must be rooted in the Uniform Code of Military Justice (UCMJ) as well as Army policies and regulations as she is responsible for everything the unit does or fails to do. Every commander knows that the wrong choice can have disastrous consequences, so decisions must strike a balance of instincts and acumen. It is a truly awesome responsibility with few parallels in the civilian work sector.

I was truly honored and humbled to assume command of the Combat Training Company in January 2008. The responsibility level of my company was vast, spanning over 50,000 acres at
Fort Leonard Wood in Missouri. For 18 months, I was responsible for the lives, welfare and professional development of nearly 200 military and civilian personnel as well as for property valued in excess of 14 million. In this capacity, I had to develop an in-depth understanding of military property, administrative, family and criminal law contained within Army regulations and the UCMJ. This first-hand experience with the law re-ignited the dream I once held to attend law school. I decided to forego my military career and pursue a career as an attorney.

Upon entering Suffolk Law, I decided my sole focus needed to be on succeeding academically. Even though I was serving in the Army Reserves, I devoted my remaining time to pursuing excellence. The discipline I developed in the Army was my foundation and continued to assist me on the Suffolk University Law Review and as a two-year member of the National Moot Court Team. I firmly believe that hard work lays the ground work for success, which is how I have tackled the challenges that law school poses.

I was asked to join Phi Delta Phi during my First Year and accepted because I was drawn to the history of the organization at Suffolk, its presence internationally and the commitment to excellence. I was fortunate to develop a strong friendship with the Magister who mentored me throughout my Second Year. His example compelled me to run for Magister because I wanted to continue the strong traditions of the Rehnquist Inn. Upon election and along with the new executive board, I have worked to not only maintain our presence at Suffolk as the law school’s largest student organization, but to reach out to alumni and other Inns within Boston. Being a member of Phi Delta Phi has been such an incredibly rewarding experience. Phi Delta Phi has been a strong example for me, and I hope that I can give back by being the sort of mentor and example that will help other students not only at Suffolk but within our international community.
Camille A. Nelson  
Suffolk University Law School  
120 Tremont Street  
Boston, MA 02108

January 24, 2013

To: J. Will Pless International Graduate of the Year Selection Committee

It is with great pleasure and enthusiasm that I offer my recommendation to the selection committee for an outstanding student and person, David Soutter.

I first met David when I was a judge in the finals of the National Moot Court Region 1 Competition. David was articulate and personable, and he impressed me by answering a barrage of questions with ease. In addition to his team winning the round, David also won the Top Oral Advocate in the Finals Award.

David is truly one of Suffolk Law’s best. In addition to being an exceptional advocate, David is the Lead Articles Editor on the Suffolk University Law Review. In that capacity, he regularly interacts with professors and practitioners, selects relevant and timely articles for publication, and helps to bring well-known judges and academics to Suffolk Law as part of the Donahue Lecture Series. This year, he spearheaded a new year-long, inter-journal competition between Suffolk Law’s five journals to foster a greater sense of community. David was also an integral part of the Law Review launching a new online companion journal, which required building a new website, generating new types of content, and coordinating with various departments at Suffolk Law to make this new venture a reality.

David has made great contributions at Suffolk Law in other ways as well. As Magister, he has worked to revitalize Rehnquist Inn of Phi Delta Phi by increasing the group’s on-campus presence through activities and outreach campaigns. He regularly volunteers to take notes for students with learning disabilities through our Academic Support Program and serves as a Teaching Assistant for one of our First-Year Contracts classes. He has also given back by assisting with programs with the Office of Professional and Career Development to help future lawyers in their job searches. On top of all this, he still finds time to be a student and is in the Top 1% of his class! Importantly he is also an incredibly nice and decent person.
Next year, David will be a law clerk for the Honorable Francis X. Flaherty in the Supreme Court of Rhode Island. After he completes his clerkship, he will start at Ropes and Gray, LLP as an associate.

David has my highest recommendation. I would be happy to discuss David further with the committee if necessary. Please do not hesitate to contact me.

Sincerely,

[Signature]

Camille A. Nelson
DAVID C. SOUTTER  
131 Boston St. #2 • Boston, MA 02125 • (207) 838-7909 • dcsoutter@suffolk.edu

EDUCATION

Suffolk University Law School, Boston, MA  
*Candidate for Juris Doctor, May 2013*

- **Class Rank:** 3/377 (Top 1%)  
- **GPA:** 3.840/4.0

- **Journal:** Suffolk University Law Review, Lead Articles Editor, 2012-present, Staff Member, 2011-present
- **Competition:** National Moot Court Team (2011-13), 2011 Region 1 Champion, Top Oralist in Finals, Best Brief (2011)  
  Tom C. Clark Appellate Advocacy Competition, Champion (2013)  
  McLaughlin Oral Advocacy Competition, Quarterfinalist (2011)
- **Honors:** Phi Delta Phi, Rehnquist Inn (Magister, 2012-present, member, 2011-present)  
  Jurisprudence Awards in Contracts and Civil Procedure (2011)  
  Top Oral Advocate and Honorable Mention Best Brief, LPS (2010)  
  Dean’s List (all semesters)

- **Scholarships:** Leadership Academic Scholarship (2011-2012)  
  Post-9/11 GI Bill (2010-2012)  
  Yellow Ribbon (2010-2012)


American Military University, Charlestown, WV  
*Master of Arts, National Security Studies, November 2011*  
*GPA:* 4.0/4.0

The George Washington University, Elliot School of International Affairs, Washington, DC  
*Bachelor of Arts, cum laude, International Affairs, Minors in French and German, May 2000*  
*Honors:* Omicron Delta Kappa (National Leadership Fraternity); Delta Phi Alpha (German Honor Society)  

LEGAL EXPERIENCE

Suffolk University Law School  
*Teacher’s Assistant, Professor Jeff Lipshaw*  
*September 2012-Present*

- Conduct weekly office hours for First-Year Contracts, attend class and assist the students in understanding assigned materials and adapting to law school pressures.

Ropes & Gray LLP, Boston, MA  
*Summer Associate*  
*May-July 2012*

- Researched and drafted legal memoranda for mutual fund disclosure provisions, property tax exemptions for charitable organizations, and standards for persecuted refugees seeking asylum.
- Edited and revised mutual fund prospectuses, documents for SEC filings and board meetings, a counteroffer for a pharmaceutical collaboration, and due diligence requests.
- Assisted with pro-bono projects including preparing the Country Conditions Report for an asylum application, and conducting mock interviews preparing the client for her asylum interview.

Office of Counsel, Massachusetts House of Representatives, Boston, MA  
*Legal Intern*  
*May-August 2011*

- Researched, drafted and prepared for filing over twenty-five pieces of new legislation on issues ranging from veteran’s benefits and disclosure requirements to home rule petitions and mandatory sentencing.
- Conducted legal research and composed briefs on a variety of topics including public finance and jury instructions.

Massachusetts Superior Court, Boston, MA  
*Intern, The Honorable Bonnie H. MacLeod*  
*May-August 2011*

- Researched and drafted legal memoranda on issues such as contract interpretation and tort-based indemnification.
- Drafted two decisions on a motion for summary judgment and a motion to dismiss.
MILITARY EXPERIENCE

UNITED STATES ARMY

Major, Military Intelligence
Date of Current Rank: October 19, 2012
Security Clearance: TS/SCI

2200th Military Intelligence Group (USAR), Fort Devens, MA
Intelligence Analyst
November 2002-Present

- Research and draft intelligence assessments in support of strategic intelligence assignments for the National Ground Intelligence Center, Charlottesville, VA.

Counter Explosives Hazard Center, Fort Leonard Wood, MO
Intelligence Analyst
October 2010-Present

- Researched and drafted reports and provided instruction on the Improvised Explosive Device (IEDs) threat in Iraq and Afghanistan.

Combat Training Company, Fort Leonard Wood, MO
Commander
January 2008-July 2009

- Applied the Uniform Code of Military Justice to administrative and criminal offenses involving non-judicial punishment, and worked with JAG Attorneys to effectively investigate and charge more serious violations.

511th Military Intelligence Company, Fort Irwin, CA
Executive Officer
August 2005-June 2006

Assistant Chief, G3 Plans and Operations
July 2004-August 2005

Counter Intelligence/Human Intelligence Platoon Leader
May 2003-August 2004

Awards: Meritorious Service Medal, Army Commendation Medal (with Oak Leaf Cluster), Army Achievement Medal (with 2 Oak Leaf Clusters), Parachutist’s Badge, German Armed Forces Proficiency Badge (Gold).

Training: Basic Combat Training (2002), Officer Candidate School (2002); Military Intelligence (MI) Officer Basic Course (2003); Scout Leader’s Course (2004); Airborne School (2005); MI Captain’s Career Course (2006); Signals Intelligence Officers Course (2007), Pre-Command Course (2008).

OTHER EXPERIENCE

The Maine Senate- 120th Legislature, Augusta, ME
Chamber Staff, Office of the Secretary
February-October 2001

Oxford Hills Comprehensive High School, South Paris, ME
Freshman English Teacher
September 2000-January 2001

COMMUNITY INVOLVEMENT

Mary’s Firemen for a Cure
Organizer
March 2004-present

- Organize and conduct annual breast cancer awareness ski race at Shawnee Peak in Bridgton, ME raising over $100,000 in donations for the Maine Affiliate of Susan G. Komen for a Cure.

Suffolk University Law School, Academic Support Program
Note Taker
August 2010-present

- Donate typed notes to assist fellow law students with disabilities in classes designated by the program manager.

LANGUAGES

Proficient in German and French.
To: The J. Will Pless International Graduate of the Year Selection Committee  
From: David C. Soutter  
Date: February 7, 2013

I completed the following brief for my Appellate Practice class in the Fall of 2012. This course is taught by the Honorable (Ret.) John Greaney who served on the Massachusetts Supreme Judicial Court for twenty years. The brief is the largest component of the overall grade. I received an A in this class.

This brief is presented with the Massachusetts Rules of Appellate Procedure. I wrote this brief without any assistance from my colleagues or the professor.

In this brief I represent the State of Mississippi. The professor assigned an equal number of students to each side. This case is fictional and represents the contentious issue of adoption by homosexual couples which in Mississippi is specifically barred by statute. My task was to represent Mississippi and argue for the constitutionality of the statute. This position does not represent my personal views on the subject.
THE COURT OF APPEALS
OF THE THIRTEENTH CIRCUIT

No. 05-3975 MT

___________________________
M.F., ET AL,

PLAINTIFFS-APPELLANT

V.

CHANCERY COURT OF VAN BUREN COUNTY, MISSISSIPPI, ET AL,

DEFENDANTS-APPELLEE.

__________________________
BRIEF OF THE DEFENDANTS-APPELLEE CHANCERY COURT OF VAN
BUREN COUNTY, MISSISSIPPI; LUCAS RHODES, INDIVIDUALLY
AND IN HIS OFFICIAL CAPACITY AS CHANCELLOR OF THE
CHANCERY COURT FOR VAN BUREN COUNTY, MISSISSIPPI; CODY
ELLISON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS
DIRECTOR OF THE MISSISSIPPI DEPARTMENT OF HUMAN
SERVICES; AND TOMMY FENDER, INDIVIDUALLY AND IN HIS
OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF
MISSISSIPPI

David C. Soutter, BBO# 123456
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Deputy Attorney General
State of Mississippi,
Office of the Attorney General
131 Boston St. #2
Boston, MA 02125
207-838-7909

Counsel for the State
I. THE STATUTE DOES NOT VIOLATE SUBSTANTIVE DUE
PROCESS BECAUSE IT DOES NOT BURDEN A FUNDAMENTAL
RIGHT, BUT EVEN IF IT DOES, THE STATUTE PASSES STRICT
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CONSTITUTIONAL PROVISIONS

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ISSUES PRESENTED FOR REVIEW

1. Miss. Code § 93-17-3 ("the Statute") does not implicate any fundamental rights under the U.S. Constitution; however, the Statute still meets strict scrutiny if it does involve a fundamental right.

2. The Statute does not violate equal protection because unmarried cohabitating couples regardless of sexual orientation are not a suspect class; however, should this Court find otherwise, the Statute also meets heightened scrutiny.

3. Because the Statute does not violate substantive due process or equal protection, it is constitutional because it is rationally related to a legitimate state interest.

4. Defendants did not waive sovereign immunity because the defense was raised prior to any litigation on the merits.

5. The district court improperly asserted supplemental jurisdiction under 28 U.S.C. 1367 because the state law claim substantially predominates over the case.
STATEMENT OF THE CASE

Marissa Franco, Claire Whitney and Ms. Whitney’s adopted daughter K.G. ("Plaintiffs") were denied a petition for adoption on June 29, YR-00.\(^1\) Plaintiffs appealed to the Mississippi state courts and also filed a civil rights action against the Chancery Court, Chancellor Rhodes; Cody Ellison, Director of the Mississippi Department of Human Services ("the Department"); and Tommy Fender, Attorney General of Mississippi ("Defendants"). Plaintiffs bring this action pursuant to 42 U.S.C. § 1983 for declaratory judgment on three counts:

1. The Statute is unconstitutional for deprivation of liberty without due process of law;

2. The Statute’s same-sex couple prohibition deprives the Plaintiffs of equal protection of the law.

3. The Chancellor’s findings denying the petition so lacked in evidentiary support as to be insufficient under Mississippi law.\(^2\)

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\(^1\) R. at 23-24.
\(^2\) R. at 26, 28.
Plaintiffs claim that there is a fundamental right to create a family and that K.G., a minor, has a fundamental right to have her family’s choices for her welfare be unimpeded by state interference.\(^3\)

On August 1, YR-00, Defendants filed a motion to dismiss Count III of the Complaint for lack of subject matter jurisdiction asking the court to refrain from asserting supplemental jurisdiction.\(^4\) On September 2, YR-00, Defendants filed a motion to dismiss Counts I and II for failure to state a claim.\(^5\)

On September 23, YR-00, the District Court for the Middle District of Mississippi denied Defendants’ motion to dismiss.\(^6\) The court found that the Statute did not burden any fundamental right, but decided additional facts would be needed to determine if the Statute met rational basis review.\(^7\) The court also asserted supplemental jurisdiction under 28 U.S.C. § 1367(c) because of similar questions about needed factual determinations.\(^8\)

\(^3\) R. at 32.
\(^4\) R. at 35.
\(^5\) R. at 39-40.
\(^6\) R.S. at 11.
\(^7\) R.S. at 12-13.
\(^8\) R.S. at 13-14.
On October 3, YR-00, Defendants answered Plaintiffs’ Complaint asserting that the Complaint failed to state a claim upon which relief could be granted and that the court lacked subject matter jurisdiction.⁹

At the pretrial conference on October 10, YR-00, Defendants anticipated filing a motion for summary judgment and raised the issue of sovereign immunity under the Eleventh Amendment.¹⁰ The Plaintiffs argued at the conference that this defense was waived because it should have been raised sooner, but did not contest that had the defense been raised in a timely fashion, Defendants would have been entitled to sovereign immunity.¹¹

On November 18, YR-00, the district court published its opinion granting summary judgment in favor of Defendants. The court reiterated its finding that the Statute did not burden a fundamental right and further found that the Statute did not violate the Equal Protection Clause of the Fourteenth Amendment.¹² Because there were no substantive due process or equal

⁹ R. at 43-45.
¹⁰ R.S. at 21-22.
¹¹ R.S. at 22.
¹² R.S. at 28, 31-32.
protection violations, the court analyzed the Statute under rational basis and found the Statute satisfied it.\textsuperscript{13} The court also reviewed the timeliness of Defendants’ Eleventh Amendment sovereign immunity claim and found that the Defendants had not waived the defense because they had not litigated on the merits before raising the defense.\textsuperscript{14}

\textbf{STATEMENT OF FACTS}

On May 3, 2000, the Governor of the State of Mississippi signed an amendment to the Statute that prohibited “adoption by couples of the same gender.”\textsuperscript{15} Even though the Statute already made clear that only unmarried individuals and married couples could adopt—thereby already excluding same-sex couples—the Legislature acted to preserve traditional family values in the wake of court decisions in other states that had conferred the benefits of marriage onto homosexuals.\textsuperscript{16} Because this recognition of some rights had come from those states’ courts, the Legislature moved preemptively to provide clear guidance to the

\begin{flushleft}
\textsuperscript{13} R.S. at 32-33.  \\
\textsuperscript{14} R.S. at 35.  \\
\textsuperscript{15} R. at 56-57.  \\
\textsuperscript{16} R. at 55-56.
\end{flushleft}
Chancery Court—the judicial body charged with reviewing and approving adoptions—that couples of the same gender could not adopt under Mississippi Law. Among the stated reasons by Legislators at that time as to why this bill passed were instability and imbalance that children in households would experience where both adopted parents were of the same gender.

At the time, several studies had concluded there was at least a question as to whether same sex couples were as effective parents as opposite sex couples.

On June 29, YR-00, the Chancery Court denied the application of Ms. Franco, an adult woman, to adopt K.G., an 11-year old child, who was already the adopted child of Ms. Whitney, an adult woman. The court denied the application because allowing the adoption would run counter to the public policy of Mississippi and would violate the Statute because Ms. Franco and Ms. Whitney were a couple of the same gender. The court reasoned that allowing this adoption would not be in the best interests of K.G.

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17 R. at 59.
18 R. at 60-62.
20 R. at 25.
21 R. at 21.
because there was reason to believe that the outcomes of homosexual adoptions are generally less successful than heterosexual adoptions.22

K.G. was born on June 6, YR-11 in California.23 Her birth father abandoned the family in November of the same year, and her birth mother was killed in a car crash in YR-08.24 Six months prior to her mother’s death and pursuant to the laws of California, Ms. Whitney, who had entered into a homosexual relationship with K.G.’s mother, adopted K.G.25 Ms. Whitney, a forty-nine year old clinical psychologist, moved to Bristol, MS in YR-07 and within four months began co-habitating with Ms. Franco in a homosexual relationship.26 Both women share in the parenting of K.G. and the illegitimate daughter of Ms. Franco.

Ms. Franco is twenty-nine years old and had an unstable upbringing. She left her life on the road in the circus at fifteen and wandered for two years.27 During that time she regularly abused drugs and was

22 R. at 22.
23 R. at 28.
24 R. at 28.
25 R. at 28.
26 R. at 28-29.
27 R. at 16.
sexually promiscuous, which resulted in giving birth
to a child out of wedlock.\textsuperscript{28} Currently, Ms. Franco
makes her income as an artist and could support
herself and her daughter, but would be unable to also
support K.G. by herself.\textsuperscript{29}

In April, YR-04, Ms. Whitney was diagnosed with
multiple sclerosis.\textsuperscript{30} Because of the uncertainty of
Ms. Whitney’s future, Ms. Whitney decided that Ms.
Franco should adopt K.G.\textsuperscript{31} Ms. Whitney’s will
currently places all of her assets in trust for the
benefit of both girls and Ms. Franco.\textsuperscript{32} Knowing that
K.G. was already the adopted child of Ms. Whitney, the
Department investigated and concluded that adoption by
Ms. Franco would be in K.G.’s best interest, but
failed to disqualify Ms. Franco who was clearly part
of a couple of the same gender.\textsuperscript{33}

After considering all of the factors to determine
Ms. Franco’s fitness as an adoptive parent including
the report of the Department, Chancellor Rhodes, in

\textsuperscript{28} R. at 16.
\textsuperscript{29} R. at 18-19.
\textsuperscript{30} R. at 17.
\textsuperscript{31} R. at 29.
\textsuperscript{32} R. at 19.
\textsuperscript{33} R. at 20.
his authority to approve or deny petitions for adoption in the Chancery Court, denied the petition because the adoption would be contrary to state law.\textsuperscript{34}

\textbf{STANDARD OF REVIEW}

On appeal, the standard of review for the entry of summary judgment is \textit{de novo}. \textit{Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.}, 831 F.2d 77, 79 (5th Cir. 1987). The court must view all evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party. \textit{St. Charles Foods, Inc. v. America’s Favorite Chicken Co.}, 198 F.3d 815, 819 (11th Cir. 1999). Summary judgment is appropriate only if there is no genuine issue of material fact so that the moving party is entitled to judgment as a matter of law. \textit{See Whatley v. CNA Ins. Co.}, 189 F.3d 1310, 1313 (11th Cir. 1999); \textit{see also} Fed. R. Civ. P. 56(c).

\textbf{SUMMARY OF THE ARGUMENT}

\textbf{The Statute Does Not Violate Substantive Due Process}. No court has found that there is a right to adopt or be adopted. Plaintiffs instead claim that the denial of their petition for adoption violated

\textsuperscript{34} R. at 23.
their fundamental right to create a family, and it also violated K.G.’s fundamental right to have choices about her welfare be unimpeded by state interference.

The district court properly found the Statute did not burden a fundamental right because the Plaintiffs sought state recognition of Ms. Franco as a parent; a public act that did not interfere with their rights. In the history and tradition of the United States, adoption has always been a creation of the state with states given wide latitude to determine fit parents by conducting close review of all applicants. In the alternative, if there is a fundamental right to adopt or be adopted, the Statute passes strict scrutiny because Mississippi has a compelling interest in the physical and psychological well-being of children and this Statute is narrowly-tailored for that interest.

The Statute Does Not Violate Equal Protection.

Courts determine the level of scrutiny appropriate under equal protection if the statute violates the rights of a suspect or quasi-suspect class. The Statute discriminates against unmarried couples without regard to sexual orientation who are not a suspect or quasi-suspect class. Even if the Statute
discriminated against homosexuals specifically, homosexuals are not a suspect or quasi-suspect class. Neither group meets the qualifications laid out by the Supreme Court. Based on the vast body of case law in agreement with the district court, the district court properly found that the Statute only involves a nonsuspect class. In the alternative, the Statute passes heightened scrutiny because of the important interest in familial stability.

**The Statute Passes Rational Basis Review.** When no fundamental right is burdened and when there is not a suspect class involved, the proper standard of review is rational basis. Statutes are provided a strong presumption of validity and will only be struck down if there is no plausible set of facts that establish a rational basis. Mississippi has a legitimate government interest in the welfare of those children up for adoption. Through the democratic process, the Legislature reasonably relied upon evidence that homosexual adoption may not be as effective as heterosexual adoption, but restricted the provision to only same-sex couples allowing homosexual individuals to adopt. Whether children raised by
same-sex couples develop in a similar fashion to children raised by opposite-sex couples is an open question, and Mississippi was not willing to experiment.

**Sovereign Immunity Defense Was Raised In A Timely Fashion.** After the district court asserted supplemental jurisdiction, Defendants raised the defense of sovereign immunity under the Eleventh Amendment. Even though recent decisions by the Supreme Court have indicated that states may waive sovereign immunity if the defense is not raised in a timely fashion, the current split in the circuits has developed on whether the case has been litigated on the merits. The district court properly found the defense was not waived because the issues had not been litigated on the merits, and the tests of fairness and consistency in the raising of the defense were met.

**The District Court Lacked Subject Matter Jurisdiction.** The district court improperly asserted supplemental jurisdiction over this claim because Plaintiffs’ claims raised a novel issue of state law and the claim substantially predominated over the claims which the court has original jurisdiction.
ARGUMENT

I. THE STATUTE DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS BECAUSE IT DOES NOT BURDEN A FUNDAMENTAL RIGHT, BUT EVEN IF IT DOES, THE STATUTE PASSES STRICT SCRUTINY ANALYSIS.

The Due Process Clause of the 14th Amendment of the U.S. Constitution provides no State shall “deprive any person of life, liberty, or property, without due process of law.”35 The Due Process Clause guarantees more than fair process, providing greater protection for fundamental rights and liberty interests. Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997). Fundamental rights go beyond those listed in the Bill of Rights, but with respect to defining new fundamental rights, the Supreme Court carefully exercises this authority because the Court understands recognition of a new fundamental right “place[s] the matter outside the arena of public debate and legislative action.” Id. None of the judicially recognized rights of the Court is implicated by the Statute, and those advocated by Plaintiffs, the right to adopt or be adopted has not been recognized by any court. Plaintiffs would have this Court either establish sua sponte the right of an unmarried, same-

35 U.S. CONST. amend XIV.
sex couple to adopt or construe a current fundamental right to include this right to adopt or be adopted.

A. There is no right to adopt or be adopted.

The district court properly found that the Statute did not burden a fundamental right because no court has found that denying a party the privilege of adoption involves a fundamental right. R.S. at 12. The claim of nonmarital couples, that a fundamental right to adopt exists, has been considered in a variety of ways, by many different courts and under the guise of other fundamental rights; yet no court has found a fundamental right to adopt. See Lynn D. Wardle, Preference for Marital Couple Adoption—Constitutional and Policy Reflections, 5 J.L. & Fam. Stud. 345, 353 (2003).

The unanimity in rejecting the existence of this right does not surprise when viewed under the established test the Supreme Court uses to recognize a fundamental right. First, a right must be “so rooted in the traditions and conscience of our people” to make it fundamental. Snyder v. Mass., 291 U.S. 97, 105 (1934). And second, the right must be carefully described because the Court will take the “utmost
care” whenever it is asked to break new ground in a field. *Reno v. Flores*, 507 U.S. 292, 302 (1993). Application of this test to a right to adopt demonstrates why this alleged right is not so fundamental such that “neither liberty nor justice would exist if [it were] sacrificed.” *Palko v. Conn.*, 302 U.S. 319, 326 (1937).

Modern adoption has always been a creation of the state. Defendants did not interfere with family choices, as Plaintiffs contend, because Plaintiffs sought public approval of the family make up they chose. The concept of adoption is not deeply rooted in the Nation’s history or tradition because adoption was never part of the common law and did not become part of American culture until Massachusetts passed the first adoption law in 1851. *Wardle*, *supra* at 358. In 1989, the Seventh Circuit in *Lindley for Lindley v. Sullivan*, rejected a fundamental right to adopt for several reasons including that the adoption process has its basis only in statutory construction, adoption is not older than the Constitution or Bill of Rights, and applicants must submit to an intensive scrutiny of their personal lives before the state may approve the
adoption. 889 F.2d 124, 130-31 (7th Cir. 1989). The fact that a state may approve or reject any applicant cuts strongly against a fundamental right to adopt.

The Eleventh Circuit addressed a similar substantive due process claim when it analyzed a Florida statute that prohibited homosexuals from adopting. Lofton v. Sec’y Dept. of Child & Fam. Servs., 358 F.3d 804 (2004). States act in loco parentis for children needing adoption with the primary concern of the best interests of the child. Id. at 809-10. Because of this concern, the state may make classifications that would be constitutionally suspect otherwise such as requiring good moral character, mental health, stable finances and racial heritage. Id. at 810. As the court stated, adoption is a public act where prospective adoptive parents open their homes and subject themselves to close scrutiny by the state. Id. at 810-11.

The Lofton court held that not only was there not a right to adopt, but there was also not a right of family integrity in adoption cases. Id. at 814. The homosexual foster parents argued for recognition because of the emotional bond that developed between
the foster parent and the child over a period of several years. However, the court found that this related to procedural due process which the foster parents had been afforded. *Id.* at 814-15. Procedural due process rights do not translate into substantive due process rights.

The statute and circumstances in *Lofton* are similar to the present case, and the district court properly found the reasoning persuasive. R.S. at 12. The cases are similar in that K.G. has developed an emotional bond with Ms. Franco and would like her to be K.G.’s adoptive parent. R. at 2. It is also true that the Department did find that it would be in K.G.’s best interest to be adopted by Ms. Franco. R. at 19. However, the best interest determination was made without taking a position on the Statute, which made Ms. Franco ineligible to become the second adoptive parent to K.G. This is similar to saying that it would be in the best interest of the child to approve the petition of a married couple where only one spouse applies, but not take a position on the fact that the couple is not filing jointly, which would disqualify the applicant. *In re Adoption of*
Baby Boy B, 487 So.2d 841 (Miss. 1986). Secondly, Ms. Franco was provided with procedural due process by going through the application process and being denied. A procedural due process right does not translate into a substantive one.

B. The Statute does not burden any of the fundamental rights asserted by Plaintiffs.

The district court properly found that the fundamental rights raised by plaintiffs were not at issue in this case because the Statute did not intrude on the Plaintiffs’ privacy or intimate affairs of their home or family. R.S. at 12. Plaintiffs assert that the Statute infringes on the Supreme Court’s prior decisions regarding care and direction of one’s children, the right to marry, and the right to engage in private sexual conduct. None of these cases is applicable to the present case.

In Troxel v. Granville, the Supreme Court recognized a fundamental right of parents to make decisions concerning “the care, custody, and control of their children.” 530 U.S. 57, 66 (2000). In that case, the Court struck down a Washington statute that allowed any person to petition for and gain visitation rights whenever such visitation would be in the child’s best
interest even if the child’s parent opposed visitation. Id. at 57. The Court reasoned that so long as the parent adequately cared for her child, it would normally not be proper for the State to intrude upon privacy and question the parent’s ability to make the best decisions about raising the child. Id. at 68-69.

The Statute does not run afoul of the right recognized in Troxel. Mississippi did not intrude into Ms. Whitney’s private life. If Ms. Whitney wants Ms. Franco to be a full partner with her in the parenting of K.G., that is Ms. Whitney’s decision, but Troxel does not stand for the proposition that Mississippi must recognize these private family decisions.

The Department did not remove K.G. from the home once it learned that Mss. Franco and Whitney were lesbians co-parenting K.G. If the unfortunate medical condition Ms. Whitney faces should prove fatal, she can direct in her will that Ms. Franco become her legal guardian. If Mississippi were to then remove K.G. because Ms. Franco is a lesbian, but otherwise qualified to adopt under the Statute, the right in
Troxel may be at issue. The Statute however confers a positive right and recognition of a person as a parent; it does not constrain the actions of Ms. Whitney. Ms. Whitney can add Ms. Franco to any relevant list as an emergency contact and can decide to co-parent equally with Ms. Franco. Plaintiffs are asking the State to confer upon them the constitutional protections of parentage that Troxel provides, which is the type of protection natural and adoptive parents receive, but Troxel does not go both ways.

Second, the Statute does not implicate the freedom to marry as discussed in Loving v. Virginia, 388 U.S. 1 (1967). In Loving, the Court found laws banning interracial marriage unconstitutional. Id. at 12. Plaintiffs may point to this case because same sex couples are prohibited from marriage in Mississippi and that promotes the same type of discrimination that racism-promoting miscegenation laws did. Wardle, supra at 365. However, the long history of marriage preference in adoption calls for legislative action, not judicial decree should a state desire same-sex

36 Miss. Const. art. XIV, § 263A
couple adoption.  Id. This statute would also not implicate the right to establish a family from Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Both adult parties here may establish whatever family they wish, but it is not incumbent upon the state to provide its imprimatur for their familial choices.

Finally, the liberty interest to engage in private sexual conduct is not burdened by the Statute. The Supreme Court in Lawrence v. Texas struck down state sodomy laws because they targeted homosexuals and interfered with a private liberty interest. 539 U.S. 558 (2003). The Court said that history and tradition are the starting point, but not the end of the substantive due process analysis. Id. at 572 (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 833, 857 (1998)). However, the sodomy laws intruded into the bedrooms of the individual and attempted to regulate sexual practices. There is no law in Mississippi barring homosexual activity, and the Statute does not regulate any private activity because of the public nature of adoption. Whether the history and tradition of unmarried couple adoption should warrant the type
of analysis as in Lawrence is a decision the Supreme Court should make.

The state may discriminate based on placing children where it decides is in their best interests. Plaintiffs had other means as their disposal to ensure the continuity of care both as co-parents and if Ms. Whitney should unfortunately succumb to her condition.

**C. Even if the Statute burdens a fundamental right, it passes strict scrutiny because it is narrowly tailored to meet a compelling state interest.**

Should this Court find that there is a fundamental right to adopt or be adopted, the Statute still passes strict scrutiny. When a fundamental right is burdened by a statute, it can still be upheld as constitutional only if it is narrowly-tailored to meet a compelling state interest. Grutter v. Bolinger. 539 U.S. 306, 326 (2003). Strict scrutiny is a high bar, but one that is met here because of the Mississippi’s compelling interest in the welfare of children. The Statute does not prohibit homosexuals from adopting, but only same-sex couples along with all other unmarried couples.

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37 This analysis presumes that the Thirteenth Circuit has the authority to recognize a fundamental right. This authority has traditionally been the province of the Supreme Court alone.
The Statute meets a compelling state interest in promoting the welfare of its children because the Supreme Court has held that there is a compelling interest in protecting the physical and psychological well-being of minors. *Sable Commc’n of Calif., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). This interest is bolstered by studies that have demonstrated childhood development is optimized by a family that includes a mother and a father. *Wardle*, *supra* at 377-79. Children are resilient and may thrive in a gay parenting environment, but that should be the exception, not the rule in a state that is unwilling to make the exception official. Further, it is narrowly tailored because it prohibits any unmarried couple, heterosexual or homosexual.

It is not clear that even a finding of a fundamental right to adopt would extend to same-sex couples. Under the “history and tradition” analysis, a fundamental right for same-sex couples to adopt is non-existent and would upset settled expectations and deeply-held social mores. *Wardle*, *supra* at 361. The decision in *Roe v. Wade*, 410 U.S. 413 (1973) was the last time the Court ignored “history and tradition” to
discover a fundamental right, which greatly upset the field of substantive due process. Wardle, supra at 361. The Court’s recent decision in Glucksberg indicates that the Court will not deviate from the “history and tradition” test. Id.

Should this Court invalidate this provision of the Statute under strict scrutiny, it would not result in Ms. Franco becoming the adoptive mother of K.G. unless the Court conferred a general fundamental right of unmarried couples to adopt. The Statute still would prohibit unmarried couples from adopting. See Miss. Code. § 93-17-3(4). This Court would then also have to invalidate the Mississippi constitutional amendment banning same-sex marriage, because otherwise Mss. Franco and Whitney would not be allowed to marry and would remain ineligible to adopt under the Statute.

The Mississippi legislature passed the Statute under its authority to confer adoption on those parents it defines as deserving. The state has a compelling interest and narrowly tailored the Statute to promote children’s physical and psychological well-being.

II. THE STATUTE DOES NOT VIOLATE EQUAL PROTECTION BECAUSE IT DOES NOT IMPACT A SUSPECT CLASS, BUT
SHOULD THIS COURT FIND OTHERWISE, THE STATUTE PASSES HEIGHTENED SCRUTINY.

The Fourteenth Amendment also provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” The Equal Protection Clause is “a direction that all persons similarly situated should be treated alike.” City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). Equal protection does not prohibit legislative classifications, but keeps legislators from treating persons differently who are in “all relevant respects alike.” Nordlinger v. Kahn, 505 U.S. 1, 10 (1992). Generally, a statute is presumed to be valid unless the statute classifies certain protected groups. See id. at 440. However, classification will not automatically invalidate a statute because all legislation classifies for one purpose or another. Romer v. Evans, 517 U.S. 620, 631 (1996). The statute will only be subject to greater scrutiny if it impacts a suspect class. Cleburne at 440. Race, alienage, and national origin are suspect classes. Id. Gender classifications based on gender call for a heightened standard of review meaning the law must be

38 U.S. CONST. amend XIV
substantially related to an important governmental interest for it to survive. *Id.* at 441.

The Supreme Court has not specifically defined the characteristics of a suspect class, but there must be a history of discrimination, the group must have an immutable characteristic, and show that the group is an insular minority or politically powerless. *High Tech Gays v. Defense Indus. Sec. Clearance Off.*, 895 F.2d 563, 573 (9th Cir. 1990); see *Anderson v. King Cnty.*, 138 P.3d 963, 974 (Wash. 2006) (describing Supreme Court defined characteristics). Because unmarried couples including same-sex couples are prohibited from adopting in Mississippi, this Court should determine if they are a suspect class, quasi-suspect class or a nonsuspect class to determine the proper level of review. If the Statute only discriminates against a nonsuspect class, rational basis is the proper standard of review.

**A. Unmarried couples are a nonsuspect class.**

The Statute discriminates equally against all unmarried couples who cohabit because it prohibits these couples from adopting. The Seventh Circuit discussed whether nonmarital cohabitation was a
suspect class. Irizarry v. Bd. of Educ. of Chicago, 251 F.3d 604, 610 (7th Cir. 2001). Even though there has been a history of disapproval of unmarried couples living together, and some states still criminalized it, the discrimination did not rise to the level of a suspect class. Id. When looking at the characteristics, unmarried couples who live together do not share any of the factors with groups recognized as suspect or even quasi-suspect. They do not have a history or invidious discrimination, do not have an immutable characteristic and are not normally considered to be an insular minority.

The Statute favors married couples because it seeks to provide a permanent and loving home for any child who needs one.39 Mississippi allows for two groups of persons to adopt, an unmarried adult and a married person whose spouse joins the petition. In re Adoption of J.D.S., 953 So.2d 1133, 1137 (Miss. Ct. App. 2007). If a married couple does not jointly adopt or one spouse withdraws later, the remaining spouse loses eligibility to adopt. Id.

Conversely sec. 5 of the Statute only prohibits “couples of the same gender” from adopting. Ms. Franco as an unmarried adult is eligible to adopt K.G. and only invoked sec. 5 because K.G. was already adopted by Ms. Whitney making them a couple of the same gender. Prior to this decision, the Mississippi state courts had not litigated this issue. The Department was going to classify Ms. Franco as an unmarried adult despite clearly knowing that she was a lesbian. R. at 20. The Mississippi Attorney General recently announced that two unmarried individuals (of the same or different gender and whether they are a couple or not) may not adopt under the Statute. 2012 WL 1071283 (Miss. A.G. Feb. 3, 2012). He stated, “we do not believe the relationship status of the individuals is relevant when they are not married to each other.” Id. This would not preclude a lesbian, even in a relationship with another woman from adopting when the two do not attempt to adopt jointly.

Because the Statute primarily discriminates against unmarried couples, which is not a suspect class, the Statute should receive rational basis analysis. However, if this Court primarily sees this as an issue
of discrimination against homosexuals, the Court should still use rational basis because homosexuals are not a suspect class.

**B. Homosexuals are not a quasi-suspect class.**

The Supreme Court has never found homosexuals to be anything other than a nonsuspect class. In *Romer v. Evans*, the Supreme Court did not even address the question of whether homosexuals were a suspect class, but proceeded directly to a rational basis analysis. 517 U.S. 620 (1996). Seven years later in *Lawrence v. Texas*, the Court struck down state sodomy laws because the statute made sodomy illegal only for homosexuals but constrained their analysis to rational basis without even a discussion that homosexuals were a suspect or even quasi-suspect class. 539 U.S. 558, 579-80 (2003).

No federal appellate court has found homosexuals to be a suspect class, but there have been a small number of courts that have granted homosexuals quasi-suspect status. See *Windsor v. United States*, Nos. 12-2335-cv(L), 12-2435(Con), 2012 WL 4937310 (1st Cir. Oct. 18, 2012) (defining homosexuals as quasi-suspect class). But see *In re Marriage Cases*, 43 Cal.4th 757
(2008) (applying strict scrutiny analysis on state law grounds). The minor debate in the courts surrounds quasi-suspect status for homosexuals, not as a suspect class on the same level as race.

Qualifying homosexuals as even a quasi-suspect class is inappropriate because homosexuals do not meet the court-defined characteristics. The Ninth Circuit reviewed each of these characteristics and found that homosexuals did not meet suspect or quasi-suspect classification. High Tech Gays, 895 F.2d at 573-74. The court concluded there had been a history of discrimination, but found homosexuality to be a behavioral trait, not an immutable characteristic. Id. at 573. Homosexuals did not lack political power as evidenced by the passage of anti-discrimination legislation pointing to an ability to “attract the attention of lawmakers.” Id. at 574 (quoting Cleburne, 473 U.S. at 445).

In Lofton, the Eleventh Circuit did not treat homosexuals as a suspect class because every other circuit that considered the issue declined to do so.
The statute at issue in that case was more restrictive than the Statute because it categorically banned all homosexuals from adopting whereas with the Statute only couples of the same gender are prohibited. As discussed above, the only reasonable interpretation is that the Statute prohibits couples of the same gender from applying jointly, but not as individuals. Because the Statute does not discriminate against a suspect or quasi-suspect class, the court should review the statute under rational basis.

C. Should this Court find that unmarried couples or homosexuals are a quasi-suspect class, the Statute passes heightened scrutiny analysis.

When a court determines that a statute is subject to heightened scrutiny, it is unconstitutional unless the state can demonstrate that the statute is substantially related to an important governmental

40 The Eleventh Circuit cited cases were: Equal, Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126 (9th Cir. 1997); Richenberg v. Perry, 97 F.3d 256 (7th Cir. 1996); Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996); Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994); High Tech Gays v. Defense Indus. Sec. Clearance Off., 895 F.2d 563 (9th Cir. 1990); Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989); Town of Ball v. Rapides Parish Police Jury, 746 F.2d 1049 (5th Cir. 1984); Rich v. Sec'y of the Army, 735 F.2d 1220 (10th Cir. 1984).
objective. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982). Although this level of classification was primarily designed for gender discrimination, the test is analyzed whether the objective itself reflects archaic or stereotypic notions. Id. at 725. Thus, if the group is excluded because its members are presumed to be innately inferior, the objective is illegitimate. Id. If the objective passes this first inquiry, the statute must then have a substantial relationship between the objective and the means. Id.

Applying the Supreme Court’s test of heightened scrutiny results in the Statute satisfying both prongs because unmarried couples, gay or straight, are not alike in all relevant aspects as married couples. First, the governmental objective must be important. In this case, the governmental objective is familial stability by giving preference to married couples and unmarried adults. The Mississippi Supreme Court has long recognized that the welfare of the child is the primary consideration in adoptions. Eggleston v. Landrum, 50 So.2d 364 (Miss. 1951). The court has
also upheld petition denials for married couples who did not file jointly. Baby Boy B, 487 So.2d at 841.

The court has not analyzed the reasoning of this policy, but it reasonably promotes a stable environment for the adopted child. Finding a proper home for an adopted child is the primary concern, and homes where the couples are unmarried are necessarily not as stable as a married couple because the incentives to remain together are stronger. A married couple must divorce and have the state approve of the dissolution to be effective whereas unmarried couples are only constrained by conscience and preference. Unmarried adults may also adopt provided the adult can provide a similar type of stable relationship. The Statute only prevented Ms. Franco from joining Ms. Whitney as a legally recognized adoptive parent, but that would be the same for any unmarried couple.

The Statute does not exclude because of archaic notions or a presumption of inferiority, but a legitimate interest in placing children in a stable environment. Although the Mississippi Supreme Court has not litigated this issue, it has considered the sexual orientation of a parent in custody battles and
concluded that Chancery Judges may only use sexual orientation as one factor to determine the fitness of the parent. *White v. Thompson*, 539 So.2d 1181, 1184 (Miss. 1990).

Having satisfied the first prong, the Statute must then bear a substantial relationship between the objective and the means. To determine this aspect, *Arkansas Department of Human Services v. Cole* is instructive. ___ S.W.3d ___ (Ark. 2011). In *Cole*, the Arkansas Supreme Court struck down an adoption law that prohibited cohabitating sexual partners (both heterosexual and homosexual) from adopting because it violated the right of privacy under the Arkansas Constitution. *Id.* at *8-9*. The court reasoned that because the statute at issue prohibited sexual partners who lived together, it was akin to the sodomy laws and needlessly intruded into the privacy of the applicants’ homes. *Id.* at *10-11*. This is entirely different than the Statute here. A same-sex couple may adopt provided only one parent adopts as an unmarried adult.41 There would not be a case here if

41 This is a recommended tactic in Mississippi by gay rights groups. See *All Children Matter: How Legal and Social Inequalities Hurt*
K.G. did not already have one adoptive parent. But this would be the case regardless of the sexual orientation of the applicant. There is no intrusiveness into Plaintiffs’ private sexual lives.

Finally, it is unclear that Ms. Franco would be allowed to adopt K.G. should the court strike the relevant provision on equal protection grounds. Ms. Franco would most likely be rejected again because she is not married to Ms. Whitney. Plaintiffs only challenge the provision of the Statute that prohibits couples of the same gender from adopting. Even with that provision removed, the Plaintiffs would not be allowed to adopt because they could not have their marriage recognized in Mississippi.

III. THE STATUTE PASSES RATIONAL BASIS ANALYSIS BECAUSE IT IS RATIONALLY RELATED TO THE LEGITIMATE STATE INTEREST OF CHILD WELFARE.

The district court properly found that rational basis is the proper level of scrutiny. R.S. at 12. When a right does not burden a fundamental right, or involve a suspect class, it does not violate the Fourteenth Amendment unless it bears no rational relationship to a legitimate state interest. ______________

517 U.S. at 631. The district court reviewed the factual determinations of the parties and properly concluded that the Statute bore a rational relationship to a legitimate government interest. R.S. at 31.

When conducting a rational basis analysis, the Supreme Court grants a large degree of deference to the legislature and will sustain a statute that meets both prongs of rational basis review even if the law seems unwise, works to the disadvantage of a particular group, or the rationale seems tenuous. Romer, 517 U.S. at 632. Under this level of review courts may not judge the “wisdom, fairness, or logic” of the statute and will uphold the statute if “there is any reasonably conceivable state of facts that could provide a rational basis for the statute.” F.C.C. v. Beach Commc’n Inc., 508 U.S. 307, 313 (1993). Defendants must demonstrate that the Statute was based on a legitimate government interest and that the Statute bears a rational relationship to that interest.

Rational basis review almost always results in the statute being upheld. See Marcy Strauss, Reevaluating
Suspect Classifications, 35 Seattle U. L. Rev. 135, 147 (2011). The basis for this type of deference is in the democratic process that will eventually resolve legislative acts the Court disagrees with, meaning “judicial intervention is generally unwarranted no matter how unwisely [the Court] may think a political branch has acted.” Vance v. Bradley, 440 U.S. 93, 97 (1979). The Court does not conduct its own fact-finding to determine a statute’s validity, and the reasoning behind the statute “may be based on rational speculation unsupported by evidence or empirical data.” Beach Commc’n, 508 U.S. at 313.

The Statute is based on the legitimate government interest of the welfare of the children of Mississippi. The district court correctly pointed out that the legislature concluded Mississippi should promote adoptions by families with both a mother and a father. R.S. at 13. The Mississippi legislature was concerned with preserving traditional family values which did not include adoption by unmarried couples. R. at 57. There were several stated concerns by Legislators at the time, but the evidence demonstrates a concern about the suitability of same-sex couples as
parents. R. at 57. The question before the Court is whether there is any conceivable set of facts that could provide the rational basis.

The Legislature primarily relied upon several studies that have questioned the effectiveness of homosexual parenting. Two of them were conducted by the Cameron group that point to a risk of a variety of harms that children raised by homosexuals may face. R. at 63-64. In the first, *Homosexual Parents*, that was published four years before the Statute was enacted, described these harms and, at least, made a plausible case against homosexual adoption. The second study, *Homosexual Custody Disputes: A Thousand Child-Years Exposure*, incriminated the character of homosexual parents by reviewing custody battles when one parent was a homosexual. R. at 64.

Plaintiffs point out that these studies have been widely discredited. R. at 69-79. They do not follow standards for conducting studies and use data that supports a view that the Camerons may have had from the start. However, discredited or not, this Court need only determine if there was a rational basis for this belief. Recently, two studies, which did not
have the same flaws as the Cameron group reached similar conclusions and provided support for the Legislature’s views. These studies use the same rigorous standards and demonstrate that there are at least some differences between gay parenting and heterosexual, married parents. Id.

The legitimate interest in the welfare of children is rationally related to the Statute. Because gay parenting is a relatively recent phenomenon, there is not reliable data on effectiveness. Wardle, supra at 367. Mississippi is unwilling to experiment with the lives of those children who need stability the most. The actions by the Legislature indicate it did not take this evidence at face value. The Statute does not prohibit all homosexual adoptions only adoptions by same sex couples. Despite the somewhat unfortunate statements at the time by some legislators, they did not categorically ban gay parenting, but instead sought to promote traditional families—those that include a couple bound by marriage. R. at 57-60.

Mississippi did not accept all the views of the study improperly demonizing. In fact, in 2011, a gay rights group ranked Mississippi ranked first among states where gay families are most likely to live. See All Children Matter, supra at 8. Also, the fact that in the ten years this law has been on the books, there has not been one case until now that litigated the issue of the same-sex couple provision demonstrating how same-sex couples have made it work in Mississippi. The state’s legitimate interest bears a rational relationship with the means, because it only prohibits couples of the same gender from adopting, not all homosexuals.

Defendants acknowledge that there was no threat of same-sex couple adoptions at the time the Statute was passed, but that this was a preventive measure against a perceived agenda. R. at 59. Even though state law prohibited gay marriage at the time, Mississippi had not yet ratified Amendment 263A that defined marriage as valid only between a man and a woman. Because the Chancery Court has wide latitude in granting adoptions, the Legislature wanted to ensure that their

43 See Miss. Const. art. XIV, § 263A. The voters did not ratify that amendment until 2004. Id.
guidance was clear. This provision of the Statute did not take away any right of same-sex couples because they could not have adopted prior to 2000. The Statute already prohibited unmarried couples from adopting, which means, prior to 2000, same-sex couples could not have adopted in Mississippi anyway. This Statute is less like the situation in Romer and more like Lofton.

In Romer, the voters of Colorado passed a constitutional amendment that prohibited any municipal or state law that recognized gays and lesbians as a protected group. 517 U.S. at 623. The amendment repealed local ordinances that had added gays and lesbians to groups protected from discrimination in a variety of contexts. Id. The Court invalidated the amendment under a rational basis review primarily because it sought to harm a politically unpopular group by removing protections and prohibiting future protection to the entire group. Id. at 634-35. The amendment did not further a proper legislative goal, but made gays and lesbians unequal to everyone else. Id. at 635.
In *Lofton*, the Eleventh Circuit upheld a more restrictive adoption statute prohibiting all homosexuals from adopting because the court found a legitimate interest in placing adoptive children in homes that have both a mother and a father. 358 F.3d at 819. Florida had a preference for marital families based on stability and that children benefit from a traditional parenting environment. *Id.* Also, Florida allowed unmarried individuals to adopt reasoning that unmarried heterosexuals may eventually provide marital stability. *Id.* at 821. Florida had never allowed homosexuals to adopt and found that it was rational for Florida to conclude that it was in the best interests of the child to be placed in homes “anchored by both a mother and a father.” *Id.* at 820.

The Statute is more akin to *Lofton* than *Romer*. First, the Statute did not target gays and lesbians by removing a right to adopt in 2000. Unmarried couples have never been allowed to adopt in Mississippi, and gay marriage has likewise also never been recognized within the state. Secondly, adoption is fundamentally different than discrimination protection. The state is charged with providing what it believes to be the
most suitable homes for children so it necessarily must conduct a full investigation to ensure the applicant is a proper parent. Finally, the Statute does not go as far as Florida’s because it allows unmarried gays and lesbians to adopt meaning it is less restrictive, more inclusive, and more practical. Mississippi provided clear guidance to the Chancery Court and did not remove any existing protections as in Romer.

The district court properly found that the Statute met rational basis review because it was rationally related to the legitimate state interest in promoting the welfare of children in Mississippi. R.S. at 32. The court did not “sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations.” R.S. at 32 (quoting New Orleans v. Dukes, 427 U.S. 297, 303 (1976)). Forcing Mississippi to allow same-sex couple adoption would involve formally recognizing homosexual relationships that the Supreme Court said a state would not have to do in Lawrence, 539 U.S. at 578. Perhaps Mississippi will join the majority of states that allow same sex
couples to adopt, but that should be a political
decision left to the state’s elected representatives.

IV. THE STATE DID NOT WAIVE ITS DEFENSE OF
SOVEREIGN IMMUNITY BECAUSE IT RAISED THE ISSUE
BEFORE THE CASE WAS LITIGATED ON THE MERITS.

The district court properly found that the State had
not waived its claim of sovereign immunity because it
had not litigated the issue on the merits when it
raised the issue. R.S. at 35. The Eleventh Amendment
of the Constitution prevents claims brought in federal
district court against state officials even if the
court could hear the case under its supplemental
early Eleventh Amendment cases held states could raise
this immunity at anytime, more recent cases have held
that states may waive this defense if not timely
raised. Wis. Dept. of Corr. v. Schacht, 524 U.S. 381
(1998). The parties stipulate that if properly
raised, Defendants would have sovereign immunity.
R.S. at 22. The issue before the Court is whether the
defense was timely raised. The Supreme Court’s
decision in Lapides v. Bd. of Regents is instructive
because the decision to grant sovereign immunity is
based on the principles of consistency and fairness. 535 U.S. 613, 622-23 (2002).

Currently, there is a circuit split in the wake of Schacht and Lapides over how soon a state must raise the defense or waive it. This split primarily arose from Justice Kennedy’s concurring opinion in Schacht that advocated for treating sovereign immunity like personal jurisdiction—states must raise the defense at the outset or lose it. Schacht, 524 U.S. at 395 (Kennedy J., concurring). This case does little to address the current split in the circuits relating to the issue of when a state may waive sovereign immunity because the division begins when states litigate the issue on the merits, lose, and then raise sovereign immunity. Compare Ku v. Tenn., 322 F.3d 431, 432-34 (6th Cir. 2003) (finding waiver effective when State lost on summary judgment) with Chittister v. Dept. of Cmty. & Econ. Dev., 226 F.3d 223, 227 (3d Cir. 2000) (finding state may raise defense for first time on appeal).

The district court properly found that Defendants had not litigated on the merits when the defense was raised. R.S. at 35. The district court had only
litigated on the motion to dismiss for lack of supplemental jurisdiction. R.S. at 35. Defendants concede that the Answer did not raise the defense, but answering a complaint is not litigation the merits. Further, four days after answering the complaint, Defendants raised the defense in the pre-trial conference. R.S. at 35. With the understanding that Justice Kennedy’s concurrence in *Schacht* was not the opinion of the Supreme Court, Defendants complied with the Court’s jurisprudence by raising the issue in a timely fashion.

More importantly, it would not be inconsistent or unfair to allow immunity in this case. Defendants had a practical consideration for not raising the defense in the motion to dismiss stage. Defendants argued that the district court did not have jurisdiction to hear the state law claim because it would substantially predominate over the entire case. R.S. at 13-14. Defendants could have argued in the alternative, but there was no need to raise the defense until the district court had decided the issue of supplemental jurisdiction.
It is not unfair to the Plaintiffs because Defendants did not litigate their claims on the merits, lose and then raise this defense. That is what happened in Ku where Tennessee never questioned the district court’s jurisdiction and engaged in substantial discovery before ultimately losing on summary judgment. 322 F.3d at 432. None of that happened here. Defendants questioned federal jurisdiction from the outset, did not engage in substantial discovery, and raised the defense prior to the district court’s summary judgment decision. No appellate court has found that answering a complaint is enough to waive the defense. Courts have found Eleventh Amendment waiver only after a determination has been made under summary judgment. See Eric Porterfield, Eleventh Amendment Immunity After Lapides v. Board of Regents of the University System of Georgia: Keeping States Out of Federal Court, 55 BAYLOR L. REV. 1243, 1270-72 (2003).

This Court should not restrict the immunity defense to the Motion to Dismiss stage because it would be unfair to Mississippi. Defendants have contested federal jurisdiction from the outset, and only raised
this defense when the district court asserted supplemental jurisdiction. It would have been inappropriate for the State to raise it sooner.

V. THE DISTRICT COURT IMPROPERLY ASSERTED SUPPLEMENTAL JURISDICTION.

The district court improperly asserted supplemental jurisdiction. 28 U.S.C. § 1367(a) authorized the district court to exercise subject matter jurisdiction over a plaintiff’s claims against non-diverse defendants provided the state claim is so related to claims within the court’s original jurisdiction that they form part of the same case or controversy. However, § 1367(c) gives the district court the power to decline an exercise of supplemental jurisdiction over a state law claim for two reasons relevant here: (1) The claim raises a novel or complex issue of State law, (2) The claim substantially predominates over the claim or claims over which the district court has original jurisdiction. 28 U.S.C § 1367(c).

These factors are not themselves determinative, so the district court should have considered the factors in relation to the specific circumstances of each case. Batiste v. Island Records, Inc., 179 F.3d 217, 227 (5th Cir. 1999). Finally, the district court
should have considered and weighed the values of judicial economy, convenience, fairness, and comity. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 (1988).

The district court improperly asserted jurisdiction because the Statute presented a novel issue of state law. In order to determine the novelty or complexity of the issue, district courts examine whether the state law in the area is unsettled or whether the issue is one of first impression. Mendoza v. United States, 481 F.Supp.2d 643, 647 (W.D.Tex. 2006). It is appropriate for a district court to dismiss under § 1367(c)(1) when no state court has decided a case on the issue. Brim v. ExxonMobil Pipeline Co., 213 Fed.Appx. 303, 305 (5th Cir. 2007).

In this case, the statute has never been litigated in a state court. The Mississippi Supreme Court—or any Mississippi court—has not issued guidance on the proper evidentiary support needed for weighing how sexual orientation factors in a best interests of the child determination for adoption.

With respect to § 1367(c)(2), the state claim “substantially predominates” because of the scope of
the issues raised or comprehensiveness of the remedy sought. The state claim may then be dismissed and left for resolution by state tribunals. **United Mine Workers of America v. Gibbs**, 383 U.S. 715, 726 (1966). When substantial time will need to be devoted to the state law claim, it is secondary, or will be subsidiary to the federal claim, the claim does not “substantially predominate.” **Jackson v. Stinchcomb**, 635 F.2d 462, 473 (5th Cir. 1981). Because Count III of the complaint related specifically to a state issue on the weight that should be placed on the petitioner’s sexual orientation, Mississippi state courts are peculiarly competent to address this issue. The weight sexual orientation plays was the primary determination of the Chancery Court making Count III an issue that the district court will have to devote substantial time to such that it cannot be subsidiary to the federal claims. The district court had to determine if Mississippi law allowed findings of fact in adoption proceedings based on judicial discretion. If this had been the determination, the state law claim would have made Counts I and II moot, and the district court would remand to the Chancery Court.
CONCLUSION

Defendants-Appellee request that the Judgment entered on November 18, YR-00 be affirmed. Further, the Defendants requests that the Judgment entered on September 23, YR-00 be reversed with respect to the assertion of supplemental jurisdiction over Count III.

Respectfully submitted,

Defendants, CHANCERY COURT OF VAN BUREN COUNTY, MISSISSIPPI; LUCAS RHODES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHANCELLOR OF THE CHANCERY COURT FOR VAN BUREN COUNTY, MISSISSIPPI; CODY ELLISON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE MISSISSIPPI DEPARTMENT OF HUMAN SERVICES; AND TOMMY FENDER, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI

by their attorney

___________________________

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To: The J. Will Pless International Graduate of the Year Selection Committee  
From: David C. Soutter  
RE: Attached Writing Sample, *Third Circuit Holds First Amendment Protects Off-Campus Internet Speech from School Discipline*  
Date: February 7, 2013

I completed the following case comment as a Staff Member of the *Suffolk University Law Review*. This comment has been selected for publication in Volume XLV of the journal which was published in November of 2012 with the citation 45 SUFFOLK U. L. REV. 1341 (2012). I have included one of the prints from the edition.

This comment is presented in final Law Review format and is in compliance with the Bluebook and the *Suffolk University Law Review* Bluebook Supplement. All of the substantive sections of the comment are included including the analysis section which begins on page eight.

The comment explores the Third Circuit’s decision in extending First Amendment protection to student expression made off-campus and on the internet. This decision resolved an apparent intra-circuit split and distinguished from other circuits that have decided on similar cases.
To: The J. Will Pless International Graduate of the Year Selection Committee
From: David C. Soutter
RE: Attached Writing Sample, Massachusetts Supreme Judicial Court Distinguishes from Thompkins’ Unambiguous Invocation Requirement of Right to Remain Silent
Date: February 7, 2013

I completed the following case comment as a Staff Member of the Suffolk University Law Review. This comment has been selected for publication in Number 1 of Volume XLVI of the journal which will be released in February or March of 2013.

This comment is presented in final Law Review format and is in compliance with the Bluebook and the Suffolk University Law Review Bluebook Supplement. All of the substantive sections of the comment are included including the analysis section which begins on page eight.

The comment explores the SJC’s recent decision of Commonwealth v. Clarke to distinguish from the United States Supreme Court’s decision in Thomkins v. Berghuis to extend unambiguous invocation to the right to remain silent on state constitutional law grounds. Specifically, the SJC declined to adopt the Thomkins’ standard because Article 12 under the Massachusetts Declaration of Rights does not require such invocation.
To: The J. Will Pless International Graduate of the Year Selection Committee  
From: David C. Soutter  
RE: Attached Writing Sample, Wilkins v. Intruder Publications Inc.  
Date: February 4, 2013

I completed the following memorandum during my first year of law school for Professor Baker’s class, *Legal Practice Skills*, which is an introductory class to legal research and writing. This is part of the final draft of the memorandum I submitted after making revisions based on comments and suggestions I received following submission of the first draft. I received an “A-“ on the assignment as well as an “Honorable Mention” award in the “Best Brief” category for this work.

For purposes of this memorandum, Professor Baker placed me as the Plaintiff’s counsel in a case involving the public disclosure of a private fact in Boston, Massachusetts. The defendant had made a motion for summary judgment. This brief is in opposition to the motion. In this case, the Plaintiff, Dan Wilkins, sued Intruder Publications for printing that he was a gay man. Mr. Wilkins considered his sexuality a private fact. Mr. Wilkins also sued Dan Chandler for an unauthorized use of name or likeness for disclosing Mr. Wilkins’s sexuality for commercial gain in the same article printed by Intruder Publications.

Mr. Wilkins’s lawsuit alleged that Intruder Publications had violated Massachusetts law by publicly disclosing a private fact (the Right of Privacy Law) and further alleged that Kyle Chandler had committed an unauthorized use of Mr. Wilkins’s name or likeness under a different section of the same statute.

As I was counsel to Mr. Wilkins, I wrote this memorandum from a persuasive standpoint rather than an objective one.
ARGUMENT

I. THE MOTION FOR SUMMARY JUDGMENT FOR PUBLIC DISCLOSURE OF PRIVATE FACTS SHOULD BE DENIED BECAUSE INTRUDER PUBLICATIONS INVADED MR. WILKINS’S PRIVACY BY UNREASONABLY DISCLOSING HIS SEXUALITY.

Intruder Publications’s public disclosure of Mr. Wilkins’s sexuality was unreasonable because this private fact was of no legitimate public interest. Under Massachusetts law, public disclosure of a private fact is unreasonable when the fact is private, and the nature and substantiality of the intrusion outweigh any public interest in the matter. Mass. Gen. Laws ch. 214, § 1B (2008); Bratt v. Int’l Bus. Mach. Corp., 392 Mass. 508, 510 (1984). Intruder Publications unreasonably disclosed Mr. Wilkins’s sexuality in the article, “Another Hero Steps Forward,” which discussed the failure of Mr. Chandler’s Jackson’s Rangers to win city funding for an AIDS Hospice. Mr. Wilkins brought public attention when he saved Josie McKenna; however, he also took consistent and reasonable steps to maintain his sexuality as a private fact.

A. Mr. Wilkins took reasonable and consistent actions to ensure that his sexuality remained a private, highly intimate, personal matter.


Private facts are those details of a highly personal, intimate nature which one chooses to keep private. In Peckham, the plaintiff, a prominent business and civic leader, entered a romantic relationship with a co-worker whom he fired after she became pregnant. 48 Mass. App. Ct. at 283. The court held a private fact could be, “some intimate details of her life, such as sexual relations which even [a famous] actress is entitled to keep to herself.” Id. at 287 (citing the Restatement (Second) of Torts § 652D, 390-91).
In certain, limited contexts, a private fact remains so even when there is a disclosure. For example, the plaintiff told only his daughter and a close friend about the affair. *Id.* at 283. The court held that even when one discusses a “sensitive personal matter” with a relative or a close friend, he may reasonably expect that the disclosure will remain confidential. *Id.* at 285-86. In contrast, in *Cefalu*, the plaintiff was in an unemployment line when a photographer for the defendant published his picture, but never mentioned him by name. 8 Mass. App. Ct. at 73. The court held that the right of privacy protects certain private conduct, but having your photo taken on a public street means you have “doffed the cloak of privacy” as to your presence on the street *Id.* at 77-78.

Turning to the present case, Mr. Wilkins’s sexuality is a highly personal, intimate detail of his life. Like in *Peckham*, where the plaintiff’s relationship was private until the paternity action was filed, here Mr. Wilkins’s sexuality was private until the *Boston Buzz* published this fact. The relationship itself was an intimate detail, much like Mr. Wilkins’s sexuality. Like in *Peckham*, where the court held that even a famous actress is entitled to keep some intimate details private, here Mr. Wilkins should have been entitled to keep his sexuality private as he has done consistently by serving in silence in the Marine Corps and only attending gay events out of state. One’s sexuality is a private matter unless the individual chooses to make it public.

Mr. Wilkins did not publicly disclose his sexuality. Like in *Peckham*, where the plaintiff only disclosed his affair with his daughter and a close personal friend, here Mr. Wilkins only ever disclosed his sexuality to his two closest friends, a handful of adult family members and the men in his support group. Given the length and breadth of Mr. Wilkins’s experiences and personal interactions throughout his life in the USMC, as a veteran teacher and active member of his church, this is an incredibly small number of people. Also, support groups like the one Mr.
Wilkins attended, and others such as Alcoholics Anonymous, help people struggling with a sensitive private issue and maintain a custom of keeping members’s identities confidential. Just like in Peckham, where the court held that discussing a “sensitive personal matter” with a close relative or trusted friend does not diminish the expectation of privacy, here Mr. Wilkins’s support group serves as trusted confidants which should not diminish the expectation of privacy because he is disclosing in the same manner which Peckham recognized. Unlike in Cefalu, where the plaintiff was photographed in a public place revealing that the plaintiff was standing in an unemployment line, here there had been no public record identifying Mr. Wilkins as a gay man. He attended events sponsored by gay organizations and even gone to a “gay” bar; however, these acts are not demonstrations of one’s sexuality as there is no requirement that only homosexuals may attend. People may make inferences based on conduct, but that is significantly different than a newspaper displaying this fact in print for 750,000 readers to see. The only public act which demonstrates sexuality was at the support group which, as a custom, maintains confidentiality. Unlike in Cefalu, where the plaintiff had relinquished his right of privacy when photographed on a public street, here Mr. Wilkins never “doffed the cloak” because there are no public actions which clearly demonstrate his sexuality.

In conclusion, Mr. Wilkins’s sexuality remained a private fact because of his reasonable efforts to maintain his privacy and the lack of any public disclosure.

B. Intruder Publications unreasonably violated Mr. Wilkins’s right of privacy because the public did not have a countervailing legitimate concern that outweighed Mr. Wilkins’s privacy interest.

Intruder Publications’s disclosure of Mr. Wilkins’s sexuality was unreasonable. Public disclosure of a private fact is unreasonable when the privacy interest outweighs any legitimate
public interest in the information and there is no nexus between the fact and the public concern. O’Connor v. Police Comm’r of Boston, 408 Mass. 324 (1990); Bratt, 392 Mass. at 510.

A person in the public eye may become a public figure if there has been voluntary involvement, but only for that particular issue. For example, in Jones v. Taibbi, 400 Mass. 786, 789 (1987), the defendant filmed the arrest of the plaintiff as a suspect in the Hillside stranglings and provided a background story which alleged the plaintiff’s guilt. The plaintiff was never formally charged due to lack of evidence. Id. The court held that the plaintiff was not a limited purpose public figure because he had not voluntarily injected himself into this particular controversy, and further stated that a private individual does not automatically become a public figure solely by involvement in a matter drawing public attention. Id. at 798-99.

Secondly, there must be a nexus between any legitimate public concern and the private fact to permit overruling the individual’s privacy. For example, in Bratt, several employees of the defendant learned of the plaintiff’s medical diagnosis as paranoid after a doctor employed by the defendant disclosed the diagnosis to the plaintiff’s supervisor, despite a policy that medical information would only be disclosed with the employee’s consent. 392 Mass. at 511-12. The court held that it would balance the defendant’s business interest against the nature of the intrusion concluding that a doctor employed by the defendant could disclose medical information if the defendant could prove a valid business interest in the information. Id. at 510. In Peckham, the plaintiff was a prominent businessman and recognized civic leader who became engaged in a scandalous paternity suit. 48 Mass. App. Ct. at 283. The court held that the paternity claim was a legitimate public concern because it was a matter of public record, and that there was a “nexus” between the two because of the plaintiff’s status as a business man and civic leader. Id. at 289. However, the court outlined that public disclosure falls short of public entitlement when it
becomes “a morbid and sensational prying into private lives for its own sake which a reasonable member of the public, with decent morals, would say he had no concern.” Id. at 288 (citing the Restatement (Second) of Torts § 652D, 390-91).

Mr. Wilkins’s actions did bring public attention; however, saving Josie McKenna’s life did not automatically transform him into a public figure. Like in Jones, where the defendant reported the plaintiff’s alleged involvement in the Hillside stranglings, here Intruder Publications first reported Mr. Wilkins’s heroic acts. As in Jones, where the court held the plaintiff was not a public figure because he did not voluntarily inject himself into the investigation, here Mr. Wilkins is not a public figure because he saved Josie’s life. Intruder Publications “dragged” him “unwillingly” into the AIDS Hospice debate. Mr. Wilkins’s heroism may be construed as voluntary; however, this act did not necessarily make him a public figure. Even if it had, it would only be for issues directly related to the particular heroic act such as commuter train safety.

Mr. Wilkins’s sexuality does not legitimately concern the public because there is no nexus between his heroic actions and his sexuality. Unlike in Bratt, where the defendant’s disclosure of the plaintiff’s mental condition may have met a legitimate public concern, here Intruder Publications disclosed Mr. Wilkins’s sexuality in a completely unrelated article. Mr. Wilkins agreed to be interviewed after saving Josie McKenna from the commuter train; however, that agreement did not provide a blanket consent for disclosure. Unlike in Bratt, where the court held that disclosure would be lawful if it served a legitimate business interest, here Intruder Publications has failed to demonstrate any legitimate interest in publicizing a hero’s sexuality. Secondly, unlike in Peckham, where the plaintiff was a prominent business man and recognized civic leader, here Mr. Wilkins has done what normal, law-abiding citizens should do by being involved in the community and Church, and maintaining one’s obligations. Unlike in Peckham,
where the court held that the plaintiff’s status as a prominent businessman had a “nexus” with the public concern about the integrity of prominent figures, here there is no “nexus” between a private gay man and the AIDS Hospice Project because Mr. Wilkins is not a leader in the gay community but simply a teacher. Finally, unlike in Peckham, where the court held that the line of public access is drawn where a reasonable, decent member of the public would say she has no concern, here a reasonable, decent Bay Stater or Bostonian would say that Mr. Wilkins’s sexuality is not newsworthy because it is “morbid and sensational prying” into one’s private life.

In conclusion, this Court should apply the same balancing test and deny the motion for summary judgment because Intruder publication’s public disclosure of Mr. Wilkins’s sexuality was private and lacked a nexus between Mr. Wilkins’s sexuality, his personal conduct and the AIDS Hospice project thereby failing the balancing test.

The United States Supreme Court famously held in Miranda v. Arizona that the Fifth Amendment privilege against self-incrimination granted a series of required safeguards, and outlined a way a suspect can invoke his rights. In 2010, the Court revisited this issue in Berghuis v. Thompkins, holding that a suspect simply remaining silent was not enough, but he must “unambiguously” announce his intention to invoke the right to remain silent. In Commonwealth v. Clarke, the Supreme Judicial Court of Massachusetts (SJC) considered Thompkins in determining whether a suspect’s head shaking constituted an unambiguous invocation of the right to remain silent. The SJC held that the defendant’s shaking of his head met the heightened Thompkins standard and also distinguished Thompkins because article XII of the Massachusetts Declaration of Rights did not require “utmost clarity” to invoke the right to remain silent.

On October 10, 2008, two detectives from the Massachusetts Bay Transportation Authority (MBTA) Transit Police Department, Christopher Ahlborg and Audrina Lyles, arrested the defendant, Brandon Clarke, for indecent assault and battery and placed him in an interrogation room at MBTA headquarters. After informing him that the interrogation would be videotaped, Detective Ahlborg gave Clarke a waiver form describing his Miranda rights.

1. See 384 U.S. 436, 444 (1966) (holding suspect must receive warning of right to remain silent prior to questioning); see also U.S. CONST. amend. V (“No person shall be . . . compelled in any criminal case to be a witness against himself . . . .”). The Court required these safeguards, “unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it.” Miranda v. Arizona, 384 U.S. 436, 444 (1966). The Court had previously extended the Fifth Amendment privilege against compulsory self-incrimination to the states through the Fourteenth Amendment. See Malloy v. Hogan, 378 U.S. 1, 6 (1964) (holding Fourteenth Amendment protects Fifth Amendment right against compulsory self-incrimination from abridgement by states).
4. See id. at 310-11 (setting issue before court).
5. See id. at 311 (holding suspect’s action met heightened federal standard, but Massachusetts Constitution only required lower standard); see also MASS. CONST. pt. I, art. XII (outlining Massachusetts privilege against self-incrimination).
6. See 960 N.E.2d at 311.
7. See id. The court noted that the form provided to the defendant complied with Miranda, informed the suspect that he could stop the questioning at any time, and asked him if he understood these rights. See id. at 311 n.2. Immediately above the signature line, the form asked: “Having these rights in mind, do you wish to speak with me now?” Id.; see Miranda v. Arizona, 384 U.S. 436, 444 (1966) (requiring law enforcement to
When Clarke immediately began to sign the waiver, Detective Ahlborg stopped him because the detective wanted to discuss Clarke’s rights with him verbally before obtaining the written waiver.8 After Detective Ahlborg completed this review, an exchange took place between Clarke and Detective Ahlborg in which Clarke asked what would happen if he did not speak, to which Detective Ahlborg replied, “Nothing.”9 Following this answer, Clarke indicated that he wanted to go home, and when asked if he wanted to speak, Clarke “shook his head back and forth in a negative fashion.”10 Detective Lyles then interjected to correct what she perceived as a misperception—that by saying nothing Clarke would be free to leave—and informed Clarke that even if he said nothing, he would still be charged and held unless bailed.11

The conversation between the three continued during which Clarke indicated his confusion and anxiety about the interrogation; however, Clarke ultimately decided he wanted to talk to the detectives, signed the “Miranda waiver form,” and admitted that he had repeatedly brushed his hand against a man on the subway.12 At trial, Clarke moved to suppress his incriminating statements

8. See 960 N.E.2d at 311.
9. Id.
10. Id. at 311-12 (citing motion judge’s finding). The entire conversation went as follows:

THE DEFENDANT: “[Inaudible] speak with you, or?”
AHLBORG: “Nope, you don’t have to speak with me at all if you don’t want to. It’s completely up to you.”
THE DEFENDANT: “What happens if I don’t speak with you?”
AHLBORG: “Nothing.”
THE DEFENDANT: “I just want to go home.”
AHLBORG: “You just want to go home? So you don’t want to speak?”

Id. at 311. At the motion to suppress hearing, Detective Ahlborg testified that he interpreted the headshake to mean the defendant did not want to speak, while Detective Lyles testified she did not recognize any meaning in the headshake. See id. at 312. The Commonwealth contended that the shaking of the head was not interpreted at the time to mean “no,” but was instead an “ambiguous action” that could just as reasonably be interpreted to have a variety of other meanings such as confusion, regret, disbelief of the situation in which the suspect finds himself, expression of a range of emotions, or having no meaning at all, but just an involuntary motion. See Brief and Appendix for the Commonwealth on Direct Entry from an Order of the Single Justice of the Supreme Judicial Court at 14-15, Commonwealth v. Clarke, 960 N.E.2d 306 (Mass. 2012) (No. SJC-10816), 2011 WL 3572301, at *14-15 [hereinafter Brief for the Commonwealth] (explaining head movement’s range of possible meanings). Detective Lyles clarified Detective Ahlborg’s answer of “nothing” because it may have been confusing and misleading, seeming to suggest that if Clarke remained silent, he would be free to go. See id. at 15 (discussing reasons why Detective Lyles interjected). Detective Lyles explained what “nothing” meant, resulting in the continued exchange and subsequent decision by Clarke to waive his rights. See id. at 15-17 (describing sequence of events following Detective Lyles’s clarification).

Id. at 312 (“But that ‘nothing’ does not exclude you still being charged and us detaining you here. . . . So it doesn’t mean you’ll get to walk up out of here and go home right now.”).
12. See id. The officers did not videotape Clarke’s incriminating statements because after signing the waiver form, Clarke did not grant permission for the remainder of the interrogation to be recorded. See id. The Commonwealth of Massachusetts charged Clarke with one count of assault and battery and two counts of indecent assault and battery on a person fourteen or over. See id.
“arguing that he had invoked his right to remain silent by shaking his head in a negative fashion...” 13 The trial judge allowed the motion to suppress because he found Clarke’s head shaking—in light of the totality of the circumstances—to be an unambiguous invocation of the right to remain silent. 14 The Commonwealth applied to the SJC for leave to appeal from the allowance of the motion to suppress; a single justice granted this application and reported the case to the full court. 15 The SJC upheld the trial judge’s decision to suppress because Clarke’s unambiguous invocation of his right to remain silent was not “scrupulously honor[ed]” when the officers continued the questioning and elicited the incriminating statements. 16 The court then determined that even if Clarke’s action could be interpreted as not meeting Thompkins, the Massachusetts Constitution did not require a suspect to invoke his right to remain silent with the “utmost clarity” as required by federal law. 17

In Miranda v. Arizona, the Supreme Court ruled that the Fifth Amendment privilege against self-incrimination required “procedural safeguards” to ensure law enforcement “scrupulously honor[ed]” a suspect’s Fifth Amendment rights. 18 The Court held that before law enforcement officials may interrogate a person in custody, they must inform him of a series of rights including the right to remain silent and the right to both consult with a lawyer and have one present during questioning. 19 A suspect may waive these rights, but if waived, the prosecution must demonstrate that the suspect waived these rights “voluntarily, knowingly and intelligently.” 20 Furthermore, if the suspect indicates “in any

13. Id.
14. See id. Clarke’s status as a first-time arrestee and his overall reluctance to answer questions weighed heavily in the trial judge’s “totality of the circumstances” analysis. See id. at 313. The Commonwealth argued in its brief to the SJC that the determination of whether Clarke invoked his right to remain silent should be fact specific and made in the totality of the circumstances, “including examining circumstances both immediately prior and subsequent to defendant’s claim to have invoked his right to remain silent.” Brief for the Commonwealth, supra note 10, at 12.
15. See 960 N.E.2d at 310-11; see also MASS. R. APP. P. 15(c) (confering authority of single justice to review motions and refer to appellate court); Pemberton v. Pemberton, 411 N.E.2d 1303, 1304-05 (Mass. App. Ct. 1980) (describing authority to decide appeal rests in appellate court not in single justice).
16. 960 N.E.2d at 316.
17. See id. at 320 (holding article XII provides greater protections even if headshake failed to meet federal standard).
19. See Miranda v. Arizona, 384 U.S. 436, 444 (1966) (“Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.”).
20. See Miranda v. Arizona, 384 U.S. 436, 444-45 (1966) (describing conditions for effective waiver);
manner” before or during the interrogation that he does not want to be interrogated, law enforcement officials may not question him even if the suspect has already answered questions or volunteered statements.21

Although Miranda created a heavy burden on the government to prove effective waiver of these rights, lower courts developed separate interpretations about what actually constituted a proper invocation of the right to counsel.22 In Davis v. United States, where the suspect had waived his rights and then made an ambiguous request for counsel, the Court held that a suspect must “unambiguously request counsel” such that “a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.”23 In Berghuis v. Thompkins, the Court applied the “unambiguous” standard to the right to remain silent, holding there was “no principled reason to adopt different standards for determining when an accused has invoked the Miranda right to remain silent . . . .”24 Not only did the Court apply this
standard in the prewaiver context, but the Court seems to have departed from *Miranda*’s “in any manner” language by requiring a suspect to actually announce in order to invoke his right to remain silent.\(^{25}\)

The SJC may distinguish itself from Supreme Court holdings with regard to certain constitutional rights because the rights guaranteed under article XII of the Massachusetts Constitution, which are similar in scope to rights guaranteed by the Fifth Amendment, are “more expansive than those [rights] guaranteed by the Federal Constitution.”\(^{26}\) With regard to the right to counsel, the SJC had consistently applied an affirmative and unambiguous standard for proper invocation and did not distinguish from the *Davis* standard on state-law grounds under article XII.\(^{27}\) In a case similar to *Thompkins*, the SJC applied the *Davis* standard to the right to remain silent but did not adopt the rule because the court only overturns a trial court’s finding of fact on a “clearly erroneous” standard and saw no reason to “disturb the judge’s findings.”\(^{28}\)

\(^{25}\) See Vander Giessen, supra note 18, at 198-99 (asserting majority in *Thompkins* ignored *Miranda*’s “in any manner” language); see also Budden, supra note 22, at 499-500 (discussing Court’s rejection of Thompkins’s argument that unambiguous standard only applies in postwaiver context). The Court reasoned that extension of this rule to the right to remain silent provided “an objective inquiry that ‘avoid[s] difficulties of proof and . . . provide[s] guidance to officers’ on how to proceed in the face of ambiguity.” (Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (2010) (quoting *Davis v. United States*, 512 U.S. 452, 458-59 (1994))). Not extending this rule to the right to remain silent would require police “to make difficult decisions about an accused’s unclear intent and face the consequence of suppression ‘if they guess wrong.’” (Id. (quoting *Davis v. United States*, 512 U.S. 452, 461 (1994))). The effect of the Court’s decision is to create the somewhat paradoxical rule of requiring a suspect to speak when told he has an express right to remain silent. See Scott C. Stansbury, Article, Berghuis v. Thompkins and *Miranda* Rights: Speaking Up to Stay Silent, 38 S.U. L. REV. 317, 339 (2011) ("[*Thompkins*] represents the first decision that deals with a suspect having to clearly invoke his right to remain silent by speaking.").


\(^{27}\) See, e.g., Commonwealth v. Dubois, 883 N.E.2d 276, 281-82 (Mass. 2008) (holding “Maybe I better get a lawyer” not sufficient to clearly invoke right to counsel); Commonwealth v. Obershaw, 762 N.E.2d 276, 284 (Mass. 2002) (”[E]quivoval statements and musings concerning the need for an attorney do not constitute such an affirmative request.”); Commonwealth v. Contos, 754 N.E.2d 647, 657 (Mass. 2001) (holding “I think I’m going to get a lawyer” met unambiguous standard). The Supreme Court’s decision in *Davis* did not change the law in Massachusetts as the SJC had previously required: “For the rule of *Miranda* regarding the termination of questioning to apply, there must be either an expressed unwillingness to continue or an affirmative request for an attorney.” See Commonwealth v. Pennellatore, 467 N.E.2d 820, 823 (Mass. 1984) (holding “I guess I’ll have to have a lawyer for this” not invocation of right).

\(^{28}\) See Commonwealth v. Sicari, 752 N.E.2d 684, 695-96 & n.13 (Mass. 2001) (holding long period of silence did not invoke right to remain silent). In *Thompkins*, the Court determined that a suspect remaining largely silent during a two-hour-and-forty-five-minute interrogation, but without saying that he wanted to remain silent or did not want to talk with police, was insufficient to invoke the right to remain silent. See Berghuis v. Thompkins, 130 S. Ct. 2256, 2259-60 (2010). In *Sicari*, the SJC recognized that, in the aftermath
Commonwealth v. Mavredakis, the SJC outlined the factors the court would consider when determining if the article XII privilege against self-incrimination grants greater protection than the Constitution by “look[ing] to the text, history, and . . . jurisprudence existing in the Commonwealth” prior to the Supreme Court decision.29

In Clarke, the SJC analyzed the Fifth Amendment in light of Thompkins and article XII to determine if Brandon Clarke’s actions were sufficient to invoke the right to remain silent.30 In the Fifth Amendment analysis, the court first discussed the Supreme Court’s ruling in Miranda and recognized that the Court had set a low bar for invoking the right to remain silent by allowing invocation “in any manner.”31 The SJC then discussed the heightened bar the Court had instituted in Thompkins by requiring suspects to “‘unambiguously’ announce their desire to be silent.”32 Applying Thompkins to the facts of the case at bar, the SJC upheld the trial judge’s determination that Clarke “engaged in affirmative conduct indicating his desire to end police questioning.”33 The SJC rejected the Commonwealth’s argument that Thompkins required verbal conduct in order to unambiguously invoke the right to remain silent because of Miranda’s “in any manner” language and because of previous recognitions that nonverbal conduct can clearly communicate.34 The SJC held that under the Thompkins standard, Clarke unambiguously invoked his right to remain silent.

of Davis, most circuit courts and state supreme courts had adopted the “clear articulation rule” for the right to remain silent, and discussed that this case would not meet that standard but declined to explicitly adopt the rule because the silence did not require police to cease questioning. Commonwealth v. Sicari, 752 N.E.2d 684, 696 & n.13 (Mass. 2001).

29. See 725 N.E.2d 169, 177 (Mass. 2000) (discussing factors used to determine if state constitution has more expansive protections than federal Constitution). Article XII is more expansive than the Fifth Amendment and the SJC has more broadly interpreted article XII than the Fifth Amendment. See id. at 178. In Mavredakis, even though there would not have been a Fifth Amendment violation under Miranda, the SJC held that the police department’s policy of preventing contact between third parties and suspects in custody violated article XII. See id. at 180 (holding policy unconstitutional as far as application to attorney’s contact with suspects). This case was in line with a number of cases over the past thirty years in which the SJC has found greater protections under the state constitution than those provided under the U.S. Constitution. See Roderick L. Ireland, How We Do It in Massachusetts: An Overview of How the Massachusetts Supreme Judicial Court Has Implemented Its State Constitution to Address Contemporary Legal Issues, 38 VAL. U. L. REV. 405, 406 (2004) (describing how Mavredakis comports with previous SJC distinctions from federal Constitution through Massachusetts Constitution).

30. See 960 N.E.2d at 311. Even though the SJC will defer to the trial judge and accept subsidiary findings of fact, where the judge determined facts based on documentary video evidence, the SJC will put itself in the position of the trial judge in viewing the videotape. See id. at 313. In such a scenario, the court will review and analyze the evidence independently to determine “its significance without deference.” Id. After reviewing the evidence, the SJC will substantially defer to the trial judge, provided his findings are warranted by the evidence. See id. (describing circumstances when SJC will review documentary evidence).

31. See id. at 314 (quoting Miranda v. Arizona, 384 U.S. 436, 473-74 (1966)).

32. Id. (quoting Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (2010)). The court then stated that this is the objective test adopted from Davis. See id.

33. Id. at 315.

34. See 960 N.E.2d at 315 (citing Commonwealth v. Gonzalez, 824 N.E.2d 843, 848 (Mass. 2005)) (holding Thompkins does not necessarily require verbal communication to unambiguously invoke).
by engaging in conduct “that a reasonable police officer in the circumstances would understand.”  

After determining that Clarke had met the Thompkins standard, the court opted to determine whether article XII also requires this standard if Clarke’s “conduct were to be construed as not meeting the heightened Federal standard, articulated in Thompkins . . . .”  

After reasoning that a state’s constitution may provide greater protections to its citizens than the U.S. Constitution, the court turned to the Mavredakis factors to determine whether article XII’s privilege against self-incrimination confers more protection than the Fifth Amendment. Recognizing that the heightened standard in Thompkins had come from Davis, the court discussed its right-to-remain-silent jurisprudence in the post-Davis (and pre-Thompkins) era and discerned a fundamental difference between the prewaiver and postwaiver contexts. The court reasoned that it would be appropriate to apply Thompkins in the postwaiver context because a suspect changed course mid-interrogation whereas, in the prewaiver context, the suspect would not have made the choice whether to answer questions, and applying Thompkins would provide insufficient protections under article XII. The SJC declined to adopt the Thompkins rule because it places “too great a burden on the exercise of a fundamental constitutional right” and held that even if Clarke’s conduct had been insufficient under Thompkins, it was sufficient under article XII.

In the Fifth Amendment analysis, the SJC determined the meaning of Clarke’s headshake (and invocation of the right to remain silent) as unambiguous under Thompkins, despite reasonable alternative explanations that could have made the meaning of the headshake at least ambiguous.

35. Id. (quoting Davis v. United States, 512 U.S. 452, 459 (1994)). The court reasoned that because of the right in question, it would be “sensible to recognize that a suspect may well communicate through conduct other than speech.” Id. The court found justification for this reasoning in Justice Sotomayor’s dissent in Thompkins. See id. (“Advising a suspect that he has a ‘right to remain silent’ is unlikely to convey that he must speak (and must do so in some particular fashion) to ensure the right will be protected.” (quoting Berghuis v. Thompkins, 130 S. Ct. 2250, 2276 (2010) (Sotomayor, J., dissenting))).  

36. Id. at 316.  

37. See id. at 317; see also Commonwealth v. Mavredakis, 725 N.E.2d 169, 177 (Mass. 2000) (“[W]e look to the text, history, and our prior interpretations of art. 12, as well as the jurisprudence existing in the Commonwealth. . . .”).  

38. See 960 N.E.2d at 318-19 (analyzing period between Davis and Thompkins with respect to prewaiver and postwaiver differences).  

39. Id. at 319. The court discussed a number of reasons why a suspect might fail to unambiguously invoke in the prewaiver context, such as unfamiliarity with the English language, intimidation by the interrogation process, or an overwhelmed feeling because of the circumstances. See id. (citing Davis v. United States, 512 U.S. 452, 469-70 (1994) (Souter, J., concurring)). The court discussed a scenario where a suspect finds his initial ambiguous invocation ignored and, as a result, forgoes a later invocation of his right to remain silent—precisely the scenario Miranda intended to address. See id. at 320.  

40. See id. at 320.  

41. See id. at 315 (holding defendant’s headshake met heightened standard under Thompkins). But see Brief for the Commonwealth, supra note 10, at 14-15 (indicating other reasonable interpretations of
examining the context of the headshake in the totality of the circumstances inside the interrogation room, the court interpreted Detective Ahlborg’s question—“So you don’t want to speak?”—as a direct question and the headshake as a direct, negative response. The court favored Miranda’s “in any manner” language to invoke the right to remain silent over the more explicit (and more recent) Thompkins requirement that a suspect “unambiguously announce” because of previous recognitions that nonverbal conduct can convey mixed messages. In finding Clarke’s headshake meets the heightened Davis test under the Fifth Amendment—that a reasonable police officer would understand it as invoking the right to remain silent—the SJC somewhat narrowly construed the Supreme Court’s invocation requirements.

By applying article XII to the invocation of the right to remain silent—even though Clarke’s headshake met the Thompkins unambiguous standard—the SJC effectively deterred further appellate review by the U.S Supreme Court. By focusing on the Mavredakis factors in its analysis of whether article XII grants broader protections, the court avoided criticisms that it “protected certain constitutional rights by fiat, rather than by well-grounded reasoning.”

42. See 960 N.E.2d at 315 (describing questioning and response). The court further justified this interpretation because Detective Ahlborg understood the headshake to mean that Clarke did not want to speak. See id. But this type of volitional action runs counter to the court’s jurisprudence with respect to invoking the right to counsel and the court’s application of Davis (in Sicari) with respect to invoking the right to remain silent. See supra notes 27-28 (describing court’s earlier jurisprudence applying Davis to right to remain silent in Massachusetts). The court upheld the trial judge’s totality-of-the-circumstances analysis based on Clarke’s youth and lack of prior arrests. 960 N.E.2d at 313. But the court had previously required the totality-of-the-circumstances analysis to include examining the circumstances in the context of the interrogation and not the defendant’s prior lack of criminal history. See Brief for the Commonwealth, supra note 10 (describing previous contextual analysis of statements by defendants to determine right-to-remain-silent invocation).

43. See 960 N.E.2d at 315 (deciding Thompkins does not require speech because of language in Miranda). This line of reasoning appears to run contrary to Thompkins because even Justice Sotomayor’s dissenting opinion, as quoted by the court, discussed the apparent confusion that may result from requiring a suspect to speak after he has been advised he has the right to remain silent. See id. (quoting Berghuis v. Thompkins, 130 S. Ct. 2250, 2276 (2010) (Sotomayor, J., dissenting)) (noting Justice Sotomayor’s observation in Thompkins of contradiction in compelling advised suspect to verbalize preference).

44. See id. (holding Thompkins does not require speech but nonverbal expression sufficiently meets standard). But see Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (2010) (“Had [Thompkins] made either of these simple, unambiguous statements, he would have invoked his ‘right to cut off questioning.’” (quoting Michigan v. Mosley, 423 U.S. 96, 103 (1975) (quoting Miranda v. Arizona, 384 U.S. 436, 474 (1966))). Although the Court did not specifically require a statement, commentators have interpreted this ruling as “requir[ing] defendants to expressly state that they are exercising their right to silence.” See Gee, supra note 20, at 424 (discussing effective meaning of Thompkins ruling); see also Dery, supra note 18, at 407 (“If you wish to ensure your Fifth Amendment right to remain silent, you had better speak up.”); Stansbury, supra note 25, at 339 (discussing why Court’s decision requires suspects to speak in order to invoke right).

45. See 960 N.E.2d at 320 (“We therefore hold that, even if the defendant’s conduct was insufficient to meet the Federal Thompkins standard, the defendant acted with sufficient clarity to invoke his art. 12 right to remain silent.”). To justify this course of action, the court began with a discussion of its practice of interpreting “‘the rights of our citizens under art. 12 to be more expansive than those guaranteed by the Federal Constitution.’” See id. at 316-17 (quoting Commonwealth v. Cryer, 689 N.E.2d 808, 812-13 (Mass. 1998)).

46. See Ireland, supra note 29, at 408-09 (describing cases where SJC determined broader protections
court maintained that invocation by unambiguous nonverbal conduct was consistent with prior jurisprudence despite advocating an utmost-clarity standard for law enforcement: When there is a question as to the invocation of the right to remain silent, the court recommended that police cut off questioning and “ask the suspect to make his choice clear.”

Even though the court rejected the *Thompkins* standard under article XII, its primary complaint rested on the problem of requiring unambiguous invocation in the prewaiver context where “the suspect has yet to exercise the choice between speech and silence.” The court continued by somewhat ironically stating that a failure to invoke unambiguously may have a number of causes despite rejecting the Commonwealth’s argument that, in context, Clarke’s head movement could reasonably have a number of other meanings. Further, the court stated that ambiguous invocations should not be treated as if the suspect had said nothing, yet it did not endorse the actions of Detective Lyles when she interpreted the headshake as an ambiguous action and clarified for Clarke what “nothing” meant in context. Clear nonverbal expression may just as sufficiently invoke the right to remain silent; however, Clarke’s actions were ambiguous enough that reasonable police officers could differ on the intent of the headshake.

The Supreme Judicial Court of Massachusetts had to determine whether nonverbal expression can invoke the right to remain silent in the post-*Thompkins* era. Even though nonverbal expression can just as clearly communicate intent, and a headshake may precisely mean a desire not to be questioned, Clarke’s actions did not express this desire as clearly as the SJC determined. The court decided that Clarke’s conduct met the Supreme Court’s heightened *Thompkins* standard, but then rejected it under article XII of the Massachusetts Constitution. The court preferred to rely on its previous decisions with respect to the right to remain silent and not adopt the more recently imposed federal standard.

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47. See 960 N.E.2d at 321 (advocating, but not mandating, that police obtain clear invocation from suspect whenever otherwise ambiguous).

48. See id. at 319 (“To require a suspect, before a waiver, to invoke his or her right to remain silent with the utmost clarity, as called for by *Thompkins*, would . . . provide insufficient protection for residents of the Commonwealth under art. 12.”).

49. Compare id. (describing range of other reasons why suspect may fail to clearly invoke right to remain silent), with Brief for the Commonwealth, supra note 10, at 15 (explaining range of possible meanings head movement could have in present case).

50. Compare 960 N.E.2d at 316 (finding insufficient actions taken by Detective Lyles to clarify because questioning continued), with id. at 320 (discussing relevance of ambiguous invocations).

51. See Brief for the Commonwealth, supra note 10, at 15 (describing other possible meanings of head movement).

Although the First Amendment protects the right of free speech, the Supreme Court of the United States has held that certain types of speech made by students on campus may be restricted in public schools. The Court has not addressed, however, student speech originating off campus on the internet, requiring the circuit courts to develop and apply methods of dealing with this type of speech, including the Second Circuit’s approach, commonly referred to as the Tinker test. In Layshock ex rel. Layshock v. Hermitage School District, the Court of Appeals for the Third Circuit considered whether the Hermitage School District could discipline a student, Justin Layshock, for creating an offensive profile on the social-networking website, MySpace, while off campus. The court held that the school district could not regulate Layshock’s speech because not one of the limited circumstances permitting regulation—as prescribed by the Supreme Court—was present.

1. See U.S. CONST. amend I (“Congress shall make no law . . . abridging the freedom of speech . . . .”); see also Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508, 513 (1969) (holding student speech protected unless material and substantial disruption or reasonable risk of substantial disruption). In so holding, the Court adopted the standard used by the Fifth Circuit in Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966). See Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969). In Tinker, school officials created a policy banning armbands after learning that a group of students planned to wear armbands to protest the Vietnam War. Id. at 504.

2. See Wisniewski ex rel Wisniewski v. Bd. of Educ., 494 F.3d 34, 38-39 (2d Cir. 2007) (establishing two-part test based on Tinker for unprotected student speech); see also Doninger v. Niehoff, 642 F.3d 334, 347 (2d Cir. 2011) (referring to decision in Wisniewski as “Tinker Test”), cert. denied, 132 S. Ct. 499 (2011). The Second Circuit based its decision on the language in Tinker and a footnote in an earlier Second Circuit student-speech case that suggested a situation under Tinker in which school officials could restrict off-campus expression. See Thomas v. Bd. of Educ., 607 F.2d 1043, 1052 n.17 (2d Cir. 1979) (“We can, of course, envision a case in which a group of students incites substantial disruption within the school from some remote locale.”); see also Lee Goldman, Student Speech and the First Amendment: A Comprehensive Approach, 63 Flaf. L. Rev. 395, 405 (2011) (describing lower courts “ad hoc” determination of whether to apply Tinker).

Although courts have generally applied Tinker to off-campus, student speech on the internet, several commentators question whether Tinker even should apply and if not, what would be appropriate in lieu of Tinker. See, e.g., Goldman, supra, at 398 (arguing off-campus student speech should receive full First Amendment protection); Allison Belnap, Comment, Tinker at a Breaking Point: Why the Specter of Cyberbullying Cannot Excuse Impermissible Public School Regulation of Off-Campus Student Speech, 2011 BYU L. Rev. 501, 524-25 (2011) (rejecting Tinker’s current application to off-campus internet speech in favor of true-threat approach); Harriet A. Hoder, Note, Supervising Cyberspace: A Simple Threshold for Public School Jurisdiction Over Students’ Online Activity, 30 B.C. L. Rev. 1563, 1595-96 (2009) (arguing for “control and supervision” test to replace material and substantial disruption standard).


4. See id. at 207 (setting issue before court).

5. See id. at 219 (holding that no authority existed to support punishment in present case). The court
In December 2005, Layshock, a Hickory High School student, created a profile that mocked his Principal, Eric Trosch, on MySpace. Layshock created this profile using his grandmother’s computer, at her house, during nonschool hours. Layshock granted access to fellow students, and, not surprisingly, news of the profile “spread like wildfire” spawning at least three copycat profiles. Layshock did access the profile he created twice at school, but school officials took action based on the belief that Layshock’s speech was entirely off campus.

On December 21, school officials learned that Layshock may have created one of the false profiles and decided to call Layshock and his mother to a meeting with the Superintendent. At that meeting, Layshock admitted to creating the profile and, without any prompting, walked to Principal Trosch’s office to apologize. School officials took no disciplinary action at the meeting; however, in January 2006, school officials held a disciplinary hearing concluding Layshock had violated the school’s discipline code and instituted various punishments, including a ten-day suspension and placement in an alternative education program.

On January 27, 2006, the Layshocks filed a three-count complaint alleging that the school district had violated Layshock’s First Amendment right to free speech. The district court granted summary judgment in favor of Layshock noted that MySpace “is a popular social-networking website that ‘allows its members to create online “profiles,” which are individual web pages on which members post photographs, videos, and information about their lives and interests.’”

6. Id. at 207.
7. 650 F.3d at 207. Layshock created the profile using a photograph of Trosch that he obtained electronically by “cut[ting] and past[ing]” from the school’s website and followed a theme of “big” because the principal was a large man. Id. at 208.
8. Id. On December 12, Trosch asked the technology director to disable access to MySpace; however, students found ways to access the profiles. Id. School officials were unable to effectively block access to MySpace because the school’s technology director was on vacation on December 16th. Id. at 209. The school limited access until the beginning of Christmas recess by cancelling computer-programming classes and restricting computer use only to the library where officials could monitor what the students were viewing. Id.
9. Id. School officials did not learn that Layshock had accessed the profile on campus until the following week. Id.
10. Id. at 209.
11. 650 F.3d at 209.
12. Id. at 209-10. The school district imposed the following punishment:

In addition to a ten-day, out-of-school suspension, Justin’s punishment consisted of (1) being placed in the Alternative Education Program (the “ACE” program) at the high school for the remainder of the 2005-2006 school year; (2) being banned from all extracurricular activities, including Academic Games and foreign-language tutoring; and (3) not being allowed to participate in his graduation ceremony.

Id. at 210. The school district also informed Layshock and his parents that they were considering expelling him. Id.
13. Id.; see also 42 U.S.C. § 1983 (2006) (outlining circumstances when suit may be brought for
because the school district failed to demonstrate a sufficient nexus between the profile Layshock made and a substantial disruption at the school.\textsuperscript{14} A three-judge panel from the Third Circuit affirmed on appeal; however, the Third Circuit vacated this decision and that of a factually similar, yet differently decided, case, \textit{J.S. ex rel Snyder v Blue Mountain School District},\textsuperscript{15} opting to rehear both en banc to resolve the apparent intracircuit split.\textsuperscript{16} After the hearings, the court reversed \textit{J.S.} and reaffirmed the earlier holding in \textit{Layshock}, that the regulation of Layshock’s speech violated the First Amendment.\textsuperscript{17}

The Supreme Court first considered the extent of student free-speech rights in \textit{Tinker v. Des Moines Independent Community School District},\textsuperscript{18} but was careful to note, “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”\textsuperscript{19} The Court determined that student speech that “materially [or] substantially interfere[s] with the requirements of appropriate discipline in the operation of the school” may be prohibited.\textsuperscript{20} The Court discussed two other
circumstances in which disciplining speech would not violate the First Amendment—first, when school officials could reasonably forecast the speech would cause a material disruption, 21 and second, when speech actually does cause this type of disruption even if the speech occurs off campus. 22

Following Tinker, the Court carved out three additional circumstances in which school officials can prohibit student speech without a substantial disruption or a foreseeable risk of one. 23 In Bethel School District No. 403 v. Fraser, 24 the Court held that school officials could discipline a student for on-campus speech that was plainly offensive, lewd, or vulgar. 25 Just two years later, the Court issued its next exception in Hazelwood School District v. Kuhlmeier, 26 allowing school officials to exercise editorial control over “the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” 27 Most recently, the Court held that school officials had a compelling interest in preventing messages that promote illegal drug use. 28


22. Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 513 (1969) (“But conduct by the student, in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.”). Tinker provides the framework for addressing a wide variety of student speech, but whether it applies to online speech is an unresolved question. See Hoder, supra note 2, at 1572 (noting Supreme Court has not yet addressed online student speech).

23. See Goldman, supra note 2, at 400-04 (describing further exceptions Court created following Tinker).


25. See Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (holding vulgar or plainly-offensive speech unprotected in public school setting). Schools may prohibit vulgar and offensive speech in public discourse because student rights are “not automatically coextensive with the rights of adults in other settings.” See id. at 682 (discussing protected speech in public settings versus unprotected student speech in school settings). The Court distinguished its earlier holding in Cohen v. California, 403 U.S. 15 (1971), explaining that just because an offensive form of expression conducted by an adult receives First Amendment protection, it does not follow that a student conducting offensive expression would receive the same protections. See id. at 682 (“[T]he First Amendment gives a high school student the classroom right to wear Tinker’s armband, but not Cohen’s jacket.”).


27. See Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (excepting school-sanctioned, expressive activities from First Amendment consideration). The Court distinguished Tinker by stating that the standard for determining when school officials may punish students for speech is not the same as determining when the school may decline to “lend its name and resources to the dissemination.” Id at 272.

28. See Morse v. Frederick, 551 U.S. 393, 408 (2007) (holding school officials may regulate physically off-campus, student speech in limited circumstances). Although the petitioner, Frederick, had unfurled a
Application of *Tinker* to off-campus speech had its beginnings in the Second Circuit, where the court held school officials could not discipline students for an off-campus, underground newspaper because the speech was beyond *Tinker*’s “schoolhouse gate.” 29  The court recognized the possibility that school officials could discipline a student for off-campus expression, provided the off-campus speech caused a material disruption on campus. 30  Nearly thirty years later, the Second Circuit dealt with this possibility and created a two-prong reasonable-foreseeability test to address off-campus student speech. 31  In *Doninger v. Niehoff*, 32  the Second Circuit applied this test and held that school officials could regulate the student’s internet speech originating off campus. 33  Finally, prior to the development of the reasonable-foreseeability test, the Supreme Court of Pennsylvania considered the off-campus internet speech as “on campus” because there was a sufficient nexus between the speech and the school. 34  Despite several cases from separate circuits addressing off-campus,
internet, student speech in 2011—applying disparate standards under *Tinker*—the Supreme Court denied certiorari to each of these, leaving the circuits to continue to explore the limits of student First Amendment protections in the internet age.35

In *Layshock*, the Third Circuit considered the Supreme Court’s jurisprudence and concluded that *Tinker*, and not *Fraser*, applied because the Supreme Court in *Morse* precluded *Fraser*’s application to off-campus speech.36 Because the school district did not challenge the district court’s finding that no material and substantial disruption had occurred, the court adopted the *Thomas* reasoning.37 The school district argued that when Layshock took a picture of the principal from the district’s website to use in the profile, the speech came on campus and created a nexus sufficient for the school to regulate the speech under *Fraser* because of the vulgar and defamatory nature of the profile.38 The court rejected this argument and relied heavily on *Thomas*’s interpretation of *Tinker* because, as in *Thomas*, Layshock did not intend for the speech to come onto campus.39

students and adversely impacted the education environment.” Id. at 869. The student frightened teachers and students by creating a website aimed at his teacher, soliciting money “to help pay for the hitman.” Id. at 851-52.


36. See 650 F.3d at 219 (recognizing *Fraser* inapplicable to off-campus speech). The court noted: “[H]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected.” Id. (quoting Morse v. Frederick, 551 U.S. 393, 404 (2007)). Even though *Fraser* discussed the school’s role to develop good citizens, it would be a stretch to say that this responsibility extended beyond school grounds. See Mattus, *supra* note 16, at 334 (describing *Fraser*’s intent, but arguing “[t]he line must be drawn somewhere.”). Although the Supreme Court had not decided *Morse* at the time of the incident at Hermitage High School, many courts had already declined to extend *Fraser*’s lewd and offensive doctrine to off-campus speech. See Joseph A. Tomain, *Cyberspace is Outside the Schoolhouse Gate: Offensive, Online Student Speech Receives First Amendment Protection*, 59 Drake L. Rev. 97, 134-38 (2010) (discussing cases that have declined to extend *Fraser* to off-campus, online speech). In the only opinion in *Layshock* other than the majority, Judge Jordan concluded that the court’s unanimous endorsement of *Tinker*’s reasoning for internet speech—as opposed to the fractious conclusion in *Snyder*—demonstrated the position of the Third Circuit. 650 F.3d at 219-20 (Jordan, J., concurring). *Tinker* is the appropriate standard because, with the internet’s omnipresence, school officials may regulate speech when it actually causes a material and substantial disruption, or when school officials can reasonably forecast that it would do so regardless of where the speech originates. See id. at 221 (Jordan, J., concurring) (discussing tools *Tinker* provides).

37. See 650 F.3d at 216 (noting *Thomas* reasoning prohibited discipline because school district had not challenged lower court finding).

38. See id. at 214 (outlining school district’s argument). The court noted that the school district equated taking a picture from a website with breaking into the principal’s office and summarily rejected this proposition. Id. at 214-15.

39. Id. at 215 (noting newspaper in *Thomas* designed to remain outside school property as Layshock
The school district offered similar cases in support, but the court distinguished Layshock because those cases involved off-campus expressive conduct that resulted in a substantial disruption. First, the court distinguished Layshock from J.S. ex rel H.S. v. Bethlehem Area School District because J.S.’s threatening, off-campus website had created a disruption of the educational environment that justified regulation of J.S.’s speech. Second, the court distinguished Layshock’s circumstances from Wisniewski v. Board of Education of Weedsport Central School District because Wisniewski’s icon depicting the killing of his teacher posed a reasonably foreseeable risk of a material and substantial disruption. Finally, the court distinguished Layshock from Doninger v. Niehoff because Doninger’s off-campus blog post had created a foreseeable risk of a material and substantial disruption. The court distinguished Layshock’s actions from these three cases, but supported the underlying reasoning that school officials could regulate off-campus speech that causes, or is reasonably foreseeable to cause, substantial disruption.

The Third Circuit resolved the internal split en banc by affirming Layshock and reversing J.S. The Layshock court confined its reasoning to the arguments of the school district and did not address whether the speech had been reasonably foreseeable to cause a material and substantial disruption. The school district simplified this case for the court by challenging the district

intended here). The school district contended that because the speech met the first prong of the Tinker test and was “vulgar and defamatory,” school officials did not violate the First Amendment by regulating the speech. See id. at 214 (explaining school district’s arguments on appeal). Online speech is immune from Fraser’s holding because it lacks the captive audience and the need for the school to disassociate itself, necessary components under Fraser. See Tomain, supra note 36, at 150-51 (noting Thomas supports holding off-campus, offensive, student speech within protection of First Amendment).

40. 650 F.3d at 217.
41. 807 A.2d 847 (Pa. 2002).
42. See 650 F.3d at 217 (distinguishing present case from Bethlehem).
43. 494 F.3d 34 (2d Cir. 2007).
44. See 650 F.3d at 217-18 (distinguishing present case from Wisniewski).
45. 527 F.3d 41 (2d Cir. 2008), rev’d on other grounds, 642 F.3d 334 (2d Cir. 2011), cert. denied, 132 S. Ct. 499 (2011).
46. See 650 F.3d at 218 (distinguishing present case from Doninger). The court noted in particular that it only had occasion to decide on the relatively minor penalty of stripping Ms. Doninger of her title as Class Secretary, whereas in the present case the student received a harsher penalty of suspension. Id.
47. See id. at 219 (finding “[n]o authority that would support punishment for creating such a profile unless it results in foreseeable and substantial disruption of school”). The court specifically declined to determine when school discipline could extend beyond the “schoolhouse gate,” reasoning that it need only find that Layshock’s use of the school district’s website did not constitute entry into the school because the school district failed to challenge the district court’s finding that no substantial disruption occurred. Id.
48. See supra note 17 and accompanying text (describing Third Circuit’s en banc resolution of Layshock and J.S.).
49. See 650 F.3d at 214 (outlining school district’s two-part argument). It was the school district’s burden to demonstrate that a material and substantial disruption had occurred or was reasonably foreseeable to occur. See Mattus, supra note 16, at 333 (noting Third Circuit put burden on schools to demonstrate actual or potential substantial disruption).
court’s holding that *Fraser* did not apply to off-campus speech and by admitting at oral argument that the school punished Layshock solely because of the offensive nature of the profile. 50 Because the court did not have to address the reasonable foreseeability of disruption, it was free to evaluate the “far more attenuated” situation of whether Layshock’s conduct made the speech on campus by “entering” the school through the district’s website. 51 The court realized a finding for the school district would set a dangerous precedent because school officials would now have the authority to control a student’s off-campus expressive conduct. 52 The court applied common-sense reasoning by noting the absurdity of the school district’s argument that Layshock had begun his speech on campus by “entering” the district’s website and properly declined to extend *Fraser* to off-campus online expression. 53

Even though the school district’s first argument failed, the court—consistent with the Second Circuit and the Pennsylvania Supreme Court—could have accepted the *Tinker*-based arguments: that school officials could regulate the speech because Layshock targeted the school community, the speech was reasonably foreseeable to come to the attention of school officials, and the speech actually came onto campus when Layshock accessed it at school. 54 Even though the school district did not dispute that punishment of Layshock would have been inappropriate under *Tinker* and argued for application of *Fraser*, it pointed to three cases that purportedly established *Tinker* as the standard for addressing off-campus student expression. 55 The court distinguished *Layshock* from these decisions—doing so based on the facts of each case—noting that the respective courts had found either a material and substantial disruption consistent with *Tinker*, or that the speech had been reasonably foreseeable to cause one. 56 With respect to *Doninger*, and careful not to explicitly agree with the Second Circuit’s holding, the court noted the harshness of the punishment that Layshock received without a campus disturbance as compared with Doninger’s milder punishment for actual

50. See Tomain, supra note 36, at 157-58 (discussing district court’s holding and admission by school district at oral argument).

51. See 650 F.3d at 215-16 (holding court could evaluate “entering” argument because no claim of substantial disruption made).

52. See id. at 216 (suggesting impact of school district not challenging district court’s finding of no disruption). The court suggested that it may have decided this case differently had the school district challenged the district court’s ruling that the speech did not cause a disruption. Id.; see also Mattus, supra note 16, at 329 (arguing key rationale for decision based on failure to challenge no disruption ruling).

53. See 650 F.3d at 214-15 (rejecting school district’s argument); see also Tomain, supra note 36 and accompanying text (describing court’s reasoning for rejecting school district’s *Fraser* applicability to off-campus, offensive speech).

54. See supra notes 46-47 and accompanying text (describing other courts’ approaches consistent with *Tinker* to regulate off-campus, disruptive, student speech).

55. See 650 F.3d at 216 (noting school district’s reliance on other off-campus, internet cases).

56. See id. at 217-18 (distinguishing facts in present case from those in *Bethlehem, Wisniewski*, and *Doninger*).
substantial disruption. In terms of off-campus internet student expression, the Layshock court was the first to extend First Amendment protection even though the speech seemingly met the criteria of Tinker, because of a concern over the dangerous precedent that would be set by allowing discipline in this case.

After addressing the school district’s primary arguments and distinguishing this case from other courts that allowed discipline of similar student expression, the court hedged by stating that the school district argued for authority based on the “unremarkable proposition that schools may punish expressive conduct that occurs outside of school, as if it occurred inside the ‘schoolhouse gate.’” The court then recognized that schools have limited authority, but missed an opportunity to set the standard in the Third Circuit behind a unanimous en banc decision by declining to define “when the arm of authority can reach beyond the schoolhouse gate.” Perhaps, this more moderate decision was the only unanimous one the en banc court could get because the case’s lone concurrence, which established Tinker as the clear standard with well-defined parameters, garnered the support of only one other circuit judge.

The Third Circuit did not split with the Second Circuit in this decision, but did raise the bar for when schools can discipline students for off-campus online speech. The Supreme Court will ultimately have to resolve the disparate rulings, but these cases will not form the basis of a decision, as the Court declined to hear any of the recent internet student speech cases. Because there was no dispute over whether the speech created a material and substantial disruption, and no mention of any reasonable forecast of one, the Layshock court discarded the weak causal arguments of the school district, instead applying the Supreme Court’s recent application of Fraser, and using the bench’s own common sense in deferring to the First Amendment. By distinguishing the facts of the present case from those of other courts that had allowed discipline in similar scenarios, the Third Circuit established a higher bar for infringement of students’ free-speech rights.

David C. Soutter

57. Id. at 218.
58. Id. at 216; see also Klupinski, supra note 20, at 613 (noting courts other than Layshock, including Snyder, found for schools in similar circumstances).
59. 650 F.3d at 219. The reasoning of the Third Circuit will remain in place as the Supreme Court denied certiorari for both the Layshock and Snyder cases. See supra note 35 and accompanying text (describing joint appeal by both schools and Supreme Court’s denial of certiorari).
60. See 650 F.3d at 219 (declining to define “precise parameters” for when schools can discipline off-campus online expression).
61. See id. at 219-20 (Jordan, J., concurring) (declaring Tinker as standard for off-campus speech).
62. See supra note 35 and accompanying text (describing denial of certiorari to recent student speech cases).
To: The J. Will Pless International Graduate of the Year Selection Committee
From: David C. Soutter
RE: Registration Flyer for 10th Annual Mary’s Firemen for a Cure™
Date: February 4, 2013

The following is the registration form and flyer for the 10th Annual Mary’s Firemen for a Cure. This is a charity ski race that I mentioned in my Form S application. My mother designed the original flyer, but I updated the current one and included more information trying to keep the spirit of her document alive.

Aimed at raising awareness for breast cancer and donations for the Maine affiliate of Susan G. Komen for the Cure, this ski event features races between fire departments from all over northern New England. During the race, teams of five firefighters race down a slalom course in full turnout gear while carrying a 50ft length of hose. The more money a team raises, the more time comes off the clock. For instance, if a team raises $1000, ten seconds will be deducted from their final race time. The team with the best time overall time wins bragging rights and a trophy.
History of the Race:

In 2004, Mary and Wayne Allen started “Firemen for a Cure” to give firefighters the opportunity to raise awareness about breast cancer. Mary was a long-time employee at Shawnee Peak and had successfully fought breast cancer for nearly 10 years. Wayne is a volunteer firefighter in North Bridgton. Mary and Wayne wanted to create a fun event for firefighters while fighting for a cause that was deeply personal for them. Unfortunately, Mary lost her battle in 2005, but Wayne and Mary’s three adult-children, Christine, David and Ryan decided to keep the race going, renaming it, “Mary’s Firemen for a Cure” in 2006.

Over the Past 9 Years, “Firemen for a Cure” and Mary’s Firemen for a Cure™ have raised nearly $100,000 helping to fight breast cancer in Maine and fund research initiatives to help find a cure.

LIMITED LODGING AVAILABLE AT THE MOUNTAIN!

1. East Slope Condos, 
   *Steps from the Main Lodge.*
   (perfect for full teams or families)
2. The Shawnee Peak House,
   *10-bedrooms, private baths*

   More Information at:
   Shawneepeak.com/dining/lodging

To Make Reservations Call:
Josh at 207-647-8444 ext. 13
or email josh@shawneepeak.com

NEARBY LODGING

Pleasant Mountain Inn
www.pleasantmountaininn.com

For Other Lodging Info. Visit:
www.mainelakeschamber.com

10th ANNUAL
MARY’S FIREMEN
FOR A CURE™

SHAWNEE PEAK
March 2, 2013
Raising Money to Fight Breast Cancer!
Benefactor:
THE MAINE AFFILIATE OF
SUSAN G. KOMEN FOR THE CURE

Please Like us on Facebook:
www.facebook.com/MarysFiremanforaCure

Donations can also be made
on the Facebook page.
EVENT SCHEDULE
MARCH 2, 2013

REGISTRATION
8:00-9:30AM

RACE BEGINS AT 10:00AM
Practice Run 8:30am-9:45am

AWARDS at 1:00PM
BLIZZARD’S PUB

Registration Information:
$125 per team ($25 per person)
Includes: Day/Night Lift Ticket, Chili Lunch, raffle, prizes and a great time!
Ski rentals for $15!
Day/Night Lift Tickets for family members: $25/person

Interested in becoming a sponsor, registering a team or need more information?
Call Wayne Allen:
207-310-0264

Or Email:
MarysFiremenforaCure@yahoo.com

Donation amount to Komen Maine Affiliate will be equal to the net proceeds of the event.

Rules & Format
All fire departments are welcome to put together teams of five people

Each team will race in full turnout gear with a 50’ length of hose*
*Please bring a hose

Each team will race through a modified giant slalom course. The team with the fastest combined time wins!

Donations collected allow you to reduce your race time! For every $100 a team raises above the registration fee, one second is deducted from the team’s race time. For example: $1000 raised equals 10 second off total team time. Final race time determined after calculating donations.

The goal is to have fun at Shawnee Peak while benefiting the Maine Affiliate of Susan G. Komen for the Cure.

Registration Form
Complete and detach this form, mail it with your $125 registration fee to:

SHAWNEE PEAK
119 Mountain Road
Bridgton, ME 04009

Team Captain’s Name:_________________________________________________________

Fire Department_____________________________________________________________

City__________________________________________________________State Zip Code

Daytime Phone Number________________________________________________________

Team Members:
__________________________________________
__________________________________________
__________________________________________

All pre-registrations must be received by March 1, 2013
Teams may register day of event.
Please make registration checks payable to:
Shawnee Peak
**MARY’S FIREMEN FOR A CURE™ PLEDGE FORM**

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**PLEDGE CHECKS SHOULD BE MADE OUT TO:**  
**MARY’S FIREMEN FOR A CURE**

Pledge forms and money may be submitted at the event. Additional Pledge Sheets may be downloaded from Facebook at:  
http://www.facebook.com/MarysFiremanforACure