

Docket No. 481516/08

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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 2008

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THE STATE OF FROESSEL,  
Petitioner,  
-against -  
SANDRA BLOOM,  
Respondent.

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

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BRIEF FOR RESPONDENT

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Team # 40

## **QUESTIONS PRESENTED**

I. Did the U.S. Court of Appeals for the Thirteenth Circuit correctly decide that FCO § 890 unconstitutionally abridged Respondent Sandra Bloom's First Amendment protection to commercial speech because FCO § 890 completely banned her from advertising adult material sold at her store?

II. Was the Court of Appeals for the Thirteenth Circuit correct when it held that (1) FCO § 890 infringes on an individual's constitutionally protected liberty interest to engage in private consensual sexual conduct because FCO § 890 prohibits the sale or advertisement of sexual devices; but (2) incorrect that an individual does not have an unarticulated fundamental right to privacy that includes an individual's right to use marital aids?

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**OPINIONS BELOW**

Respondent Sandra Bloom ("Bloom") brought an action before the Froessel District Court to vacate an injunction that (1) prohibited the sale of her products and (2) ordered her to remove all advertisements that promoted the products available at her store. Bloom also challenged Froessel Criminal Ordinance § 890 ("FCO § 890") on constitutional grounds pursuant to the First and Fourteenth Amendment. However, the District Court upheld the injunction and found the FCO § 890 constitutional.

Bloom appealed to the Court of Appeals for the Thirteenth Circuit, which reversed and held that FCO § 890 was unconstitutional under both the First and Fourteenth amendments. The Thirteenth Circuit's holding declared that FCO § 890 violated the Bloom's First Amendment right to commercial speech and the Fourteenth Amendment's Due Process Clause.

The State of Froessel petitioned the Supreme Court for writ of certiorari. This Court granted its petition.

**STATEMENT OF THE CASE**

Procedural History

Respondent Sandra Bloom filed this action in the District Court of Froessel to vacate the injunction that the Froessel State Court issued to: (1) stop the sale of products in Sandra's Boutique which were not permitted to be sold pursuant to FCO §

890, and (2) remove all advertisements that promote the sale of such products. Bloom contended that FCO § 890 violated her First Amendment right to commercial speech because the State Court's injunction forced Bloom to remove an advertisement outside her store that promoted her products. Bloom also contended that because FCO § 890 restricted her right to sell sexual aids FCO § 890 violated her customers' Fourteenth Amendment right to engage in consensual private sexual conduct.

The District Court of Froessel found that Bloom had standing to bring this case on her customers' behalf. However, the District Court held against Bloom on both issues and found that the Fourteenth Amendment does not protect the sale of sexual devices and that the First Amendment does not protect a store owner's choice to advertise sexual devices. Bloom appealed the Froessel District Court's decision to the Court of Appeals for the Thirteenth Circuit.

The Court of Appeals for the Thirteenth Circuit reversed the District Court's decision on both issues and found FCO § 890 unconstitutional because (1) FCO § 890 impinged on Bloom's customers constitutionally protected "liberty" interest to engage in private consensual sexual conduct; and (2) FCO § 890 unconstitutionally restricted Bloom's right to commercial speech under the First Amendment.

The State of Froessel appealed the Thirteenth Circuit's

decision to this court and this Court granted certiorari.

### Statement of the Facts

For the last decade Sandra's Boutique, and its owner Sandra Bloom, have provided Froessel's adult citizens with various aids for dealing with their most personal sexual problems. Bloom's experience as a relationship counselor for hundreds of couples gave her the experience to perform this great service for Froessel's adult citizens; Sandra's Boutique was made for Sam and Rachel Parsons.

As Sam and Rachel became deeply involved in their careers and interests their marriage became strained. In 2000, the Parson's marriage took a turn for the worse as Sam's long hours as an airplane pilot began to deprive Rachel's need for intimacy. Rachel's extra-marital affair devastated Sam but the Parsons knew that there was a way to connect the way they had over twenty years ago. The Parsons sought out Dr. Hodges, a psychologist and couples counselor, for advice. Dr. Hodges pointed the Parsons towards a University of Froessel study that demonstrated significant improvements in marital relationships after couples included some sexual experimentation into their private lives. Dr. Hodges advice could not have come at a worse time for the Parsons.

Froessl's legislature decided that it was time to take its own moral stand. In response to an unspecified number of

Froessel's curious youths entering Sandra's store and store's similar to Sandra's the Froessel legislature implemented FCO § 890 that reads:

"The sale or advertisement of any product specifically marketed and designed for sexual stimulation is prohibited within the State unless the product is sold pursuant to a legitimate medical purpose."

It was not long before Sandra Bloom and the Parsons were subjected to the Froessel legislature's moral values. On April 6, 2006, Rachel Parsons decided to take Dr. Hodges advice. Rachel Parsons walked past Bloom's advertisement for "Adult Books and Toys" and purchased "The Beetle." Upon the sale, Officer Tom Murphy arrested Sandra Bloom pursuant to FCO § 890 and confiscated "The Beetle" from Rachel Parsons.

#### **SUMMARY OF ARGUMENT**

I. This court must affirm the Thirteenth Circuit's decision and find Froessel Criminal Code § 890 ("FCO § 890") unconstitutional because it violates Respondent, Sandra Bloom's ("Bloom") First Amendment right to commercial speech.

The State of Froessel ("Froessel") failed to show that Bloom's advertisement depicted unlawful or misleading information. Froessel also failed to demonstrate it has a substantial interest in protecting children from signs advertising adult material. Most importantly, Froessel failed to show that its blanket ban is necessary to advance its alleged

interests or that Froessel adopted the narrowest action available to advance their interest.

Therefore, this court must find FCO § 890 unconstitutional because the statute unjustifiably infringes on Bloom's right constitutionally protected right to commercial speech.

II. This Court must affirm the Thirteenth Circuit's decision that FCO § 890 violated the Due Process Clause of the U.S. Constitution's Fourteenth Amendment because FCO § 890 impinged on the Parsons' constitutionally protected "liberty" interest to engage in private consensual sexual conduct. The Thirteenth Circuit correctly decided that Froessel's purely moral interests were insufficient to uphold FCO § 890 under any level of scrutiny.

Also, this Court should hold that, pursuant to the Fourteenth Amendment the Parsons' constitutionally protected unarticulated fundamental right to privacy includes their right to use marital aids in their home.

## ARGUMENT

**I. THE COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT'S DECISION THAT FCO § 890 VIOLATES BLOOM'S FIRST AMENDMENT RIGHT TO COMMERCIAL SPEECH MUST BE AFFIRMED BECAUSE FCO § 890'S BAN ON THE ADVERTISEMENT OF SEXUAL DEVICES FAILS TO DIRECTLY ADVANCE FROESSEL'S INTEREST IN PROTECTING CHILDREN FROM HARMFUL MATERIAL AND FCO § 890 IS NOT THE NARROWEST ACTION AVAILABLE TO ACHIEVE FROESSEL'S INTEREST.**

The State of Froessel violated Respondent, Sandra Bloom's ("Bloom") First Amendment right to commercial speech when it enacted Froessel Criminal Ordinance § 890 ("FCO § 890"), which denied Bloom's ability to advertise her store's products. The First Amendment states, "Congress shall make no law ... abridging the freedom of speech..." U.S. CONST. amend. I. This court has recognized, that "[t]he First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulations." Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 561 (1980). Speech is not stripped from First Amendment protection simply because it proposes a commercial transaction, such as in an advertisement. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976). Therefore, the First Amendment protects Bloom's sandwich board sign that advertises products for sale in her store as commercial speech.

This Court has consistently rejected a "highly paternalistic" view on suppressing or regulating commercial

speech because people need to be well-informed when making important decisions. Central Hudson, 447 U.S. at 562. The First Amendment protects commercial expression not only to benefit the advertiser but also to serve society's interest in attaining complete and accurate information. Edenfield v. Fane, 507 U.S. 761, 766 (1993); Bigelow v. Virginia, 421 U.S. 809, 822 (1975) (stating advertisements reaching a diverse audience are important because they inform anyone interested in or curious about an advertiser's services). This Court also acknowledges that people are entitled to be informed even if an advertisement is "tasteless" "excessive", or only conveys partially relevant information. Virginia State Board of Pharmacy, 425 U.S. at 765; Central Hudson, 447 U.S. at 562.

In Central Hudson, an electrical company challenged a New York statute which banned energy advertisements for the purposes of conserving energy and maintaining low energy rates. In its decision, this Court established the test to determine whether a statute restricting commercial speech is constitutional. A statute restricting commercial speech must be found unconstitutional unless: (1) the commercial speech in question provides misleading or unlawful information; or (2) the state has a substantial interest in creating the law; and (3) the law is proportional to the state's interest; and (4) the law is the narrowest action possible to achieve the interest. Central

Hudson, 447 U.S. at 564. Froessel v. Bloom, 1492 Misc.5d 122, 10 (2006). Although Central Hudson's test has received criticism, courts have continued to apply it because the test provides an adequate basis for review when a restriction on commercial speech is at issue. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 554-555 (2001).

Here, FCO § 890, which prohibits all advertisements for sexual devices is unconstitutional because FCO § 890 fails Central Hudson's four-pronged test.

**A. Respondent's Sandwich Board Advertisement Is Not Misleading Nor Does It Promote Unlawful Material.**

The State of Froessel failed to show that Bloom's advertisement outside her store promoted misleading information or unlawful material. In Central Hudson this Court stated that a blanket ban on commercial speech cannot be upheld unless the information conveyed is "flawed in some way, either because it [is] deceptive or related to unlawful activity" Central Hudson, 447 U.S. at 566. Outside Bloom's store is a sandwich board advertisement that reads: "Adult Books and Toys - Magazines - DVDs - Gag Gifts - And More." Bloom, 1492 Misc.5d at 4. The products listed on the sign are the exact products Bloom sells at her boutique to individuals over the age of eighteen, thus the information on her advertisement is not misleading.

Even if the advertisement is visible to the public, nothing

on Bloom's store would mislead children to believe that they are welcomed in Bloom's boutique. Bloom's warning signs state: "You must be 18 years or older to enter" and "No minors allowed." Bloom, 1492 Misc.5d at 2. Therefore, any Froessel citizen that reads the advertisement will know that Sandra's Boutique caters only to adult customers.

Additionally, Bloom's sandwich board is not misleading merely because it does not mention that her products can only be sold for "legitimate medical purposes". An advertisement does not need to mention nor give a lengthy explanation as to who can lawfully purchase the product. This That and the Other Gift and Tobacco, Inc. v. Cobb County, Georgia, 285 F.3d 1319 (11th Cir. 2002) (Holding that an advertisement for sexual devices that did not mention who could purchase the products was not unlawful under Central Hudson). Therefore, Bloom's advertisement that does not state that her merchandise can only be sold for "legitimate medical purpose[s]" is not misleading.

Moreover, Bloom's advertisement is not currently unlawful in Froessel. Even though the statute at issue, FCO § 890, restricts the sale of sexual devices both the District Court and Thirteenth Circuit have already concluded that the advertisement is currently not unlawful. Therefore, while FCO § 890's validity is pending, Bloom's advertisement is lawful.

**B. The State's Interest In Protecting Children From**

**"Inappropriate And Immoral" Material Is Not A Substantial Interest.**

Froessel's interest in protecting children from "inappropriate and immoral" material is not enough to pass intermediate scrutiny. Edenfield, 507 U.S. at 767. To fulfill Central Hudson's second prong the state must show that they had a substantial government interest for enacting the statute and not just a "supposition". Id. at 768. In Central Hudson, 447 U.S. at 566, the court held that the government's interests in energy conservation and maintaining low energy rates were considered substantial interests. However, here Froessel's interests in implementing FCO § 890 are to "protect children from an inappropriate and immoral message . . . discourage [] children from engaging in premarital sex and from being perverted by adult stores at a young age." Bloom, 1492 Misc.5d at 11; Froessel's interests are based on a mere supposition.

This Court has held that protecting children from lewd, vulgar or unlawful material in places where children expect to be protected is an important government interest. See Morse v. Frederick, 127 S.Ct 2618, 2622 (2007) (Noting that schools may take steps to safeguard children from speech that encourages illegal drug use); Bethel School District No 403 v. Fraser, 478 U.S. 675, 685 (1986) (Holding that a school is entitled to restrict sexually explicit or vulgar speech during school-

sponsored events). However, in this case the material at issue merely involves a sign advertising "adult books and toys" and other adult materials amidst a densely populated public area, Everton's commercial district, where children cannot be protected from "harmful" material at all times. Nothing in the sign's language amounts to sexually explicit or vulgar content nor does it encourage illegal conduct. Froessel v. Bloom, 369 F.5d 135, 13 (13th Cir. 2006). Also, Bloom's sign does not contain any images of the materials being sold; the sign simply lists the type of materials sold at Bloom's boutique. Therefore, because Bloom's advertisement does not actually harm children Froessel's interest is a mere supposition.

**C. Even if this Court finds Froessel's interests substantial, FCO § 890 still fails to directly advance those interests; thus a complete ban on all advertisement of sexual devices is not proportional to the government's interests.**

1. FCO § 890's Scope Is So Broad That It Infringes On The Rights Of Adults Who Are Entitled To Be Informed About Bloom's Products.

Froessel's ban against the advertisement of sexual devices is not proportional to the government's interests in protecting children because FCO § 890 also encroaches adults' rights. Courts are reluctant to uphold any suppression on speech when the restriction is more extensive than necessary to serve the state's interest. Central Hudson, 447 U.S. at 571-572. Additionally, this Court has acknowledged that an adult's First

Amendment right to free speech includes sexual expression that is indecent but not obscene. Carey v. Population Services International, 431 U.S. 678, 701 (1977) (“[W]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression”). Regardless of the State’s interest, this Court has stated that it will not reduce adult access to information to information that is appropriate only for children. Reno v. American Civil Liberties Union, 521 U.S. 844, 875 (1997) *citing* Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 74-75 (1983) (“ . . . [t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.”). Therefore, FCO § 890 is more extensive than necessary because it bans information that adults are entitled to view<sup>1</sup> to further the state’s interest in preventing child exposure to “immoral” material.

The Froessel statute also prohibits the ability for individuals with “legitimate medical purpose[s]” to acquire the products they are lawfully entitled to possess. The statute at issue states, “the sale or advertisement . . . is prohibited . . . unless the product is sold pursuant to a legitimate medical purpose.” Bloom, 1492 Misc.5d at 3. The statute’s language

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<sup>1</sup> See Bloom, 369 F.3d at 15 (“Adult Books and Toys” does not rise to the level of obscenity.”)

specifically bans *any* type of advertisement that promotes the sale of sexual devices. Although the statute also states that a person with a "legitimate medical purpose" is allowed to attain a sexual device, FCO § 890 still restricts that same person from knowing which stores sell the products they need. If the First Amendment protects commercial speech for the purposes of providing useful information to the public then FCO § 890's ban clearly impedes Bloom's ability to disseminate vital information to a person in medical need of her products.

2. The State Is Incorrect To Assume That A Complete Ban On Material They Deem As "Inappropriate And Immoral" Will Advance Its Interests To Protect Children.

FCO § 890's ban on advertisements of sexual devices will not advance the government's interest in preventing children from engaging in pre-marital sex. The government must show that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree" Edenfield, 507 U.S. at 770-771. Here, the State of Froessel alleges that a child's exposure to sexual devices will lead to promiscuity<sup>2</sup>; however, Froessel's connection is unfounded. See Kevin W. Saunders, The Cost of Errors In The Debate Over Media Harm To Children, 3 Mich. St. L. Rev. 771, 771 (2005). ("While it might be speculated that children exposed to sexual images may become

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<sup>2</sup> See Bloom, 1492 Misc. 5d at 3

prematurely sexually active, that has not been established.”) Thus, while the State of Froessel speculated that FCO § 890 will prevent children from having pre-marital sex, Froessel failed to show any proof that a blanket ban will alleviate this harm.

FCO § 890’s ban also fails to protect children because advertisements like Bloom’s do not promote illicit behavior to children. This court has declined to uphold blanket bans on commercial speech that do not directly advance the state’s interest nor pose any danger to that interest. Central Hudson, 447 U.S. at 564-565. Here, the advertisement states that Bloom’s boutique sells “Adult books and toys”. A child who sees this advertisement would not know what “adult books and toys” are or what they are used for unless the child received knowledge from another source about their functions. If a child is already aware of sexual behavior from another source then Bloom’s advertisement would not pose any danger to the State’s interest in preventing child exposure to sexual material.

Additionally, even if a child is attracted to the store because the child saw the terms “books”, “toys”, and “gag gifts”, Bloom has implemented strict policies in keeping minors outside the store to prevent child exposure to the store’s materials. Bloom, 1492 Misc. 5d at 2. The only occasions a minor managed to get into the store is when someone has failed to check an individual’s ID. Therefore, a complete ban on the

advertisement of adult material is an ineffective method to directly advance Froessel's interest in protecting children.

**D. Froessel's Complete Ban On Advertisements For Sexual Devices Is Not The Narrowest Measure Possible To Achieve Froessel's Interests.**

FCO § 890 is not the least restrictive measure the State can use to achieve its interest in protecting children. "The State cannot . . . completely suppress information when narrower restrictions on expression would serve its interest as well." Central Hudson, 447 U.S. at 565. The State said that it implemented FCO § 890's ban on all advertisement of sexual devices for the sole purpose of protecting children Bloom, 1492 Misc. 5d at 11; however, Froessel ignored narrower restrictions that would also serve its interest.

Other methods, such as the ones Bloom implemented, are more effective means for advancing the government's interest without infringing on adults' rights. Bloom effectively advertised the products in her store using a sandwich board sign placed on the sidewalk in front of her store that did not depict any obscene language or images. Bloom also took the initiative to place warning signs outside her store to advise the public that only people over the age of 18, are allowed into the store. The only time an underage person has managed to get into Bloom's store, in the ten years Bloom's store has been open, is when an employee failed to monitor the front door. Thus, the measures

Bloom implemented are far narrower means for keeping children out of stores that sell adult merchandise than FCO § 890's ban.

Even though there are reports that minors have entered Everton's adult stores, the record is unclear about the methods those stores took to deter children. Therefore, if Froessel mandated restrictions like Bloom's to Froessel's other "adult stores" then Froessel would have more success in accomplishing its interests without infringing on others' rights.

Thus, the Thirteenth Circuit must be affirmed because Froessel's interests are not proportionate to FCO § 890's blanket ban and Froessel failed to choose the narrowest means to achieve its interests.

**II. THE THIRTEENTH CIRCUIT'S DECISION MUST BE AFFIRMED BECAUSE FCO § 890 UNJUSTIFIABLY IMPINGES ON THE PARSONS' CONSTITUTIONALLY PROTECTED "LIBERTY" INTEREST AND THEIR UNARTICULATED FUNDAMENTAL RIGHT TO PRIVACY THAT INCLUDES THEIR RIGHT TO USE MARITAL AIDS IN THEIR HOME; FROESSEL'S MORALITY BASED REASONS FOR FCO § 890 ARE INSUFFICIENT TO PASS ANY LEVEL OF SCRUTINY.**

FCO § 890 must be found unconstitutional pursuant to the U.S. Constitution's Fourteenth Amendment because, FCO § 890 directly impinged the Parsons' constitutionally protected "liberty" interest and violated their unarticulated fundamental right to privacy. The Fourteenth Amendment's Due Process Clause provides that "nor shall any state deprive any person of . . . liberty. . . without due process of law." U.S. Const. amend. XIV § 1. The due process clause promises that "liberty" protects a

person from government interference in choices central to personal dignity and autonomy. Lawrence v. Texas, 539 U.S. 558, 578 (2003), and that people have fundamental rights that are not expressly articulated in the Constitution. See Griswold v. Connecticut, 381 U.S. 479, 485-486 (1965). Included in the Parsons' personal "liberty" and their unarticulated fundamental right to privacy is their right to use marital aids for private sexual conduct in their home. See Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 847 (1992) ("there is a realm of personal liberty which the government may not enter.").

Without a justified state interest, Froessel interfered with the Parsons' personal "liberty" and their right to privacy. FCO § 890 infringes on the Parsons' "liberty" interest and unarticulated fundamental right because FCO § 890 infringes their ability to purchase a marital aid.<sup>3</sup> See Carey v. Population Servs. Int'l, 431 U.S. 678, 687-688 (1977)

Therefore, FCO § 890 must be found unconstitutional pursuant to the Fourteenth Amendment's Due Process Clause.

**A. The Thirteenth Circuit Correctly Held That FCO § 890 Impinged The Parson's Constitutionally Protected "Liberty" Interest.**

The Thirteenth Circuit's decision must be affirmed because

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<sup>3</sup> See Appendix

(1) FCO § 890's ban on the sale of sexual devices impinged the Parsons' "liberty" to use sexual devices the privacy, and (2) Froessel's purely moral reasons for impinging the Parsons' constitutionally protected liberty interest cannot withstand any standard of review.

1. The Thirteenth Circuit Correctly Defined The "Liberty" Interest At Stake Broadly To Include The Parsons' Right To Engage In Private Sexual Conduct In Their Home..

The Thirteenth Circuit correctly defined the "liberty" interest at stake here as: the right for people to engage in private sexual conduct in their homes. Froessel v. Bloom, 369 F.5d 135, 13 (13<sup>th</sup> Cir. 2007). This court has held that "liberty" interests must be construed broadly. See Lawrence, 539 U.S. at 567 (Finding that person's choice to engage in homosexual sodomy not a single sexual act but a choice to engage in private conduct). Here, the Circuit Court correctly defined the "liberty" interest at stake broadly and not as the mere right for people to use martial aids.

This Court would demean the true "liberty" interest at stake if this Court defines the "liberty" interest here as merely a person's right to use marital aids. See Lawrence, 539 U.S. at 567 (Overruling Bowers v. Hardwick, 478 U.S. 186 (1986) because the Bowers Court demeaned the true "liberty" interest at stake and defined the "liberty" interest as: the right to engage in

homosexual sodomy); See also Earle, 517 F.3d at 743. To say that the Parsons, people trying to reconcile their marriage, are only interested in using marital aids for sexual experimentation would demean the true "liberty" interest here. Therefore, the "liberty" interest here is the Parsons' right to engage in private consensual sexual conduct.

2. This Court Does Not Need To Determine The Level Of Scrutiny To Apply To Find That FCO § 890 Unconstitutionally Infringes On The Parson's Protected "Liberty" Interests.

This Court must find that FCO § 890 is unconstitutional because Lawrence dictates that public morality is an insufficient reason to infringe on the Parsons' right to engage in private sexual conduct. Lawrence, 539 U.S. at 577; Earle, 517 F.3d at 745 (Relying on Lawrence and stating that morality is insufficient to prohibit sale of sexual devices). Here, Froessel enacted FCO § 890 solely because Froessel's legislature wanted to impose its morals on Froessel's citizens. Froessel's legislature's objective was clear: eliminate sexual devices to uphold morals. See Bloom, 369 F.5d at 14 ("Froessel's justification for FCO § 890 is based solely upon belief that sexual devices are immoral.") Therefore, because Froessel's legislature enacted FCO § 890 only to impose its morals Lawrence demands that FCO § 890 is unconstitutional.

3. If This Court Is Compelled To Determined The Scrutiny Level For "Liberty" Interests This Court Must

### Apply Intermediate Scrutiny.

This Court applied intermediate scrutiny<sup>4</sup> when it decided Lawrence because this Court required the State to “justify” why it intruded into a personal “liberty”. Lawrence, 539 U.S. at 578; Cook v. Gates, 528 F.3d 42, 56 (1<sup>st</sup> Cir. 2008) (Finding that Lawrence Court balanced the State’s interest against degree of intrusion into citizen’s private life to “justify” State’s intrusion into personal liberty).

Rational scrutiny should not apply to “liberty” interests merely because this Court used the term “legitimate” in Lawrence. The term “legitimate” can be found in this Court’s decisions to describe a state’s interest for rational and strict scrutiny. Roe v. Wade, 410 U.S. 113, 163 (1973) (Referring to strict scrutiny: a *legitimate* interest becomes compelling after the first trimester; Loving v. Virginia, 388 U.S. 1, 11 (1967) (Referring to rational scrutiny: Virginia does not have a *legitimate* interest to prohibit a white man from marrying someone outside his race).

Lawrence further shows that intermediate scrutiny must apply to “liberty” interests. When the Lawrence Court overruled Bowers the Court ignored rational scrutiny and based its rationale on Bower’s inability to recognize the “liberty” interest at stake;

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<sup>4</sup> See Sell v. United States, 539 U.S. 166, 179 (2003) (Intermediate scrutiny requires that state’s intrusion “significantly” further State’s interest.)

if rational scrutiny applied Lawrence would have merely followed Bowers to find its analogous anti-sodomy statute unconstitutional. Witt v. Dep't of the Air Force, 527 F.3d 806, 817 (9<sup>th</sup> Cir. 2008). Also, because the Lawrence Court relied on cases requiring strict scrutiny when this Court decided Lawrence more than rational is needed scrutiny to uphold FCO § 890. Id. at 517 (Holding that at least intermediate scrutiny applies to "liberty" interest because Lawrence relied on Roe, Casey, Eisenstadt v. Baird, 405 U.S. 438 (1972) and Griswold). Therefore, Lawrence mandates that this court must apply intermediate scrutiny to "liberty" interests.

4. Even If This Court Determines That Rational Scrutiny Applies To "Liberty" Interests This Court Must Find FCO § 890 Unconstitutional.

This Court's precedent mandates that FCO § 890 does not pass even rational scrutiny because Froessel implemented FCO § 890 solely to impose its morals on Froessel's citizens. This court has consistently held that morality interests are insufficient to uphold a statute under even rational scrutiny. Lawrence, 539 U.S. at 577; Romer v. Evans, 517 U.S. 620, 632 (1996) (Finding State's moral values did not pass rational scrutiny); *See also* Suzanne B. Goldberg, Morals-Based Justifications For Law Making: Before and After Lawrence v. Texas, 88 Minn. L. Rev. 1233, 1326 (2004) ("Since the middle of the 20<sup>th</sup> century the U.S. Supreme Court has not relied on a purely moral justification in a

majority opinion that is still good law). This Court has upheld statute's rooted in morality only when the State's morality interests were combined with another interest. See Gonzales v. Carhart, 127 S.Ct. 1610, 1634 (2007); See also Paris Adult Theatre v. Slaton, 413 U.S. 49, 58-61 (1964) (Upholding injunction against two obscene films on morality and interest to prevent crime). Thus, this court should ignore the 11<sup>th</sup> Circuit's holding in Williams v. Morgan, 478 F.3d 1316, 1323 (11<sup>th</sup> Cir. 2007), that morality alone is sufficient to pass rational scrutiny.

Froessel's alleged interest in protecting children from the dangers of pre-marital sex is a cover-up for Froessel's war against sex. See State v. Brennan, 772 So.2d 64, 72-73 (La. 2000) (Finding that anti-obscenity statute implemented to wage a war on obscenity). Froessel's legislative debates that led to FCO § 890 prove that Froessel implemented FCO § 890 not to protect children, but to wage a war against sexual material.<sup>5</sup>

Therefore, Froessel's morality based interests are insufficient to pass rational scrutiny we do not need to determine whether FCO § 890 withstands intermediate scrutiny to find FCO § 890 unconstitutional.

**B. The Thirteenth Circuit's Decision That FCO § 890 Does Not Violate An Unarticulated Fundamental Right Must Be**

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<sup>5</sup> See Bloom, 1492 Misc.5d at 3 (Everton's Mayor stated he would be thrilled if: "he never one of those *things* in the state ever again,"

**Reconsidered Because The Parsons' Unarticulated Right To Privacy Encompasses Their Right To Use Martial Aids In Their Home.**

FCO § 890 is unconstitutional because the statute infringes on conduct that is encompassed in an the fundamental right to privacy. This Court will find an unarticulated fundamental right when (1) the right in question is narrowly construed, and (2) the right in question is "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty." Glucksberg, 521 U.S. at 720-721. The right in question here satisfied Glucksberg's test because the right to use marital aids is (1) narrowly construed within the right to privacy, and (2) FCO § 890's intrusion on that right contradicts our Nation's deeply rooted history and our concept of ordered liberty. Bloom, 369 F.5d at 18-20 (Glass, J., concurring). Thus, the right to use marital aids is an unarticulated fundamental right included in the right to privacy.

1. The Unarticulated Fundamental Right To Privacy Encompasses The Parsons' Right To Use Martial Aids In Their Home.

The Parsons' right to use marital aids in their home is encompassed in their unarticulated fundamental right to privacy. This court has repeatedly held that marriage and matters that concern the intimacies of a physical relationship are areas that the government should not enter. See Eisenstadt, 405 U.S at 453 (right to privacy encompasses "right to be free from unwarranted

governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"). Here, FCO § 890 dictates that the Parsons, a couple that has been married for twenty-eight years, cannot include certain conduct in their intimate physical relationship and thus violates their right to privacy.

The 11<sup>th</sup> Circuit's statement in Williams that just because a right sounds in personal liberty does not make that right fundamental is irrelevant. Williams 378 F.3d. 1235 *citing* Glucksberg, 521 U.S. at 727. The Parsons' right to use marital aids is the same "nature in character" as those rights also included in the right to privacy because the Parsons' right relates to a private sexual matter. Casey, 505 U.S. at 854 (" . . . the abortion decision is of the same character as the decision to use contraception."). Accordingly, the Parsons' right to use marital aids is narrowly construed and must be included in their unarticulated fundamental right to privacy.

2. A Married Couple's Right To Use Marital Aids In Their Home Is Deeply Rooted In Our Nation's History And Tradition.

The right to choose to use marital aids for private intimate purposes is "deeply rooted in our Nation's history and tradition" because our Nation has contemporarily not prohibited such conduct. To decide whether a right is "deeply rooted in our Nation's history and tradition" this Court must look to how

our Nation has treated that right over the last half century. Lawrence, 539 U.S at 571-572 (“We think that our laws and traditions in the past half century of most relevance here. . . [H]istory and tradition are the starting point but not in all cases the ending point. . .”). Over the last half century, our Nation’s lawmakers have generally chosen not to prohibit marital aids despite their prominent commercial presence.<sup>6</sup> See Bloom, 369 F.5d at 20 (glass, J., concurring) (“Other than Froessel only three states criminalize the use of marital aids: Alabama, Virginia and Mississippi”). Also, the Model Penal Code, that criminalizes conduct based on morality and the state’s interest in deterring harmful conduct (Penal Code § 1.02) has chosen not to create criminal penalties for private conduct not harmful to others. Id at 20. Also, over the last half century several states that once criminalized the use of marital aids similarly to FCO § 890 found those statutes unconstitutional. Brenan, 772 So.2d at 72-76; State v. Hughes, 792 P.2d 1023, 1031-1032 (Kan. 1990); People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc., 697 P.2d 348, 369-370 (Colo. 1985).

The 11<sup>th</sup> Circuit’s contention in Williams v. Attorney General of Alabama, 378 F.3d at 1224-1245, that Glucksberg required a state to have affirmatively protected a right for the

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<sup>6</sup> See Williams, 378 F.3d at 1246-49.

right to be "deeply rooted in our Nation's history and tradition" is incorrect and unsupported. Id. at 1248 (Barkett, J., dissenting) (" . . . neither Glucksberg nor any other relevant Supreme Court precedent requires a history of affirmative protection"). Thus, the right to use marital aids as encompassed in the right to privacy is "deeply rooted in our history and tradition."

3. A Married Couple's Right To Use Marital Aids In Their Home Is Implicit In Our Nation's Concept Of Ordered Liberty.

The right to use marital aids is implicit in ordered liberty because the right is included in a married couple's right to personal privacy. When Froessel intruded on harmless and private conduct Froessel violated our ordered liberty. See Roe, 410 U.S. at 153; Bloom, 369 F.5d at 19 (Glass, J., concurring). Here, the Parsons' sought to revive their troubled marriage pursuant to a doctor's recommendation for private sexual experimentation but could not because FCO § 890 infringed their access to a marital aid. Bloom, 1492 Misc.5d at 3-4.

This Court never stated that only the right to an abortion and contraceptives are the only sexual rights required for ordered liberty. See Casey, 505 U.S. at 851 (Finding that choices central to family life are central to ordered liberty). Therefore, the Parsons' right to use marital aids as included in their right to privacy is implicit in ordered liberty.

4. FCO § 890 Does Not Pass Strict Scrutiny Because FCO § 890 Is Not Narrowly Drawn To Advance Froessel's Interests.

FCO § 890 is not narrowly drawn to advance Froessel's stated interest in protecting children's morals and therefore does not pass strict scrutiny. To withstand strict scrutiny a statute must be narrowly drawn to express only those interests for which the State enacted the statute. Carey v. Population Services International, 431 U.S. 678, 686 (1977).

Here, FCO § 890 is not narrowly drawn because FCO § 890 prohibits not only child exposure to marital aids but adult exposure as well, an interest Froessel never proclaimed. Also, because Froessel's legislature failed to define "medical purposes" FCO § 890 is essentially a blanket ban on marital devices; advice from Dr. Hodges, a psychologist, was insufficient to constitute a "medical" purpose.

Also, FCO § 890 disturbed the Parsons' ability to acquire a marital aid that may have helped reconcile their marriage; FCO § 890 contradicts this Court's adamant belief in maintaining marriages. Virginia, 388 U.S. at 12 (1967) (Stating that marriage is essential "to our very existence and survival."). Therefore, because FCO § 890 is not narrowly drawn it fails strict scrutiny and must be found unconstitutional.

**CONCLUSION**

Therefore, because FCO § 890 violated Bloom's First Amendment right to commercial speech and impinged on the Parson's Fourteenth Amendment "liberty" interests this Court must affirm the Court of Appeals for the Thirteenth Circuit and also hold that FCO § 890 violates an unarticulated fundamental right to privacy that encompasses an individual's right to engage in private sexual conduct.

Respectfully submitted,

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**APPENDIX**

**Constitutional and Statutory Provisions**

U.S. Const. amend. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV. § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FCO § 890

The sale or advertisement of any product specifically marketed and designed for sexual stimulation is prohibited within the State unless the product is sold pursuant to a legitimate medical purpose. Any violation of this ordinance is punishable, per offense, by a fine of up to five hundred dollars.