RECORD NO. 16-6452

In The

United States Court Of Appeals

For The Fourth Circuit

ADAM DARRICK TOGHILL,

Petitioner – Appellant,

v.

HAROLD W. CLARKE, Director, Dept. of Corrections,

Respondent – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT ROANOKE

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Adam Derrick Toghill, ("Mr. Toghill" or "Petitioner") was convicted of violating Virginia statute which prohibited the use of "electronic means, for the purposes of soliciting, with lascivious intent, any person he knows or has reason to believe is a child less than 15 years of age to knowingly and intentionally" commit acts "constituting *an offense* under § 18.2–361." Va. Code § 18.2–374.3(C)(3)(2012)(emphasis added). At trial, the prosecution proved only that Mr. Toghill attempted to solicit oral sex, which at the time of Mr. Toghill's conviction, was classified as an "offense" under § 18.2–361(A) of the Virginia Code.

However, while Mr. Toghill's appeals were pending in state courts, this Court declared that § 18.2–361(A), also known as the "anti–sodomy provision," is unconstitutional on its face in light of *Lawrence v. Texas*, 539 U.S. 558 (2003). *See MacDonald v. Moose*, 710 F.3d 154 (4th Cir. 2013).[1] This Court held that Virginia courts' attempts to save the provision by construing it to apply to oral sex with minors only, was "an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States." *Id.* at 162.

[1] The Respondent, throughout its brief, refers to this case as *Moose* rather than *MacDonald*. However, as Tim Moose was the Director of the North Carolina Division of Community Corrections, this brief, in keeping with Bluebook Rule 10.9(a)(i), which counsels avoidance of using the name of a "government official" as a short form citation for cases, will continue to refer to the case as *MacDonald*.

Although this case presents an issue identical to that resolved in *MacDonald*, respondent Harold W. Clarke, the Director of the Virginia Department of Corrections ("the Commonwealth" or "Respondent"), attempts to distinguish the two cases by arguing that "*MacDonald* is no longer good law" because "[t]he Supreme Court of Virginia properly adopted a narrowing construction of a Virginia statute to save it from being facially unconstitutional." Resp. Br. at 20–28.[2] According to the Commonwealth, because the state of the law today is different than the state of the law at the time *MacDonald* was decided, the Virginia courts' decisions denying relief in *Toghill v. Commonwealth*, 2014 WL 545728 (Va. App. Feb. 11, 2014) ("*Toghill I*"), J.A. 206–33; and *Toghill v. Commonwealth*, 768 S.E.2d 674 (2015) ("*Toghill II*"), J.A. 275–86, are entitled to deference under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See* 28 U.S.C. § 2254.

This argument is incorrect both as a matter of fact and as a matter of law, and should be rejected by this Court.

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[2] The Commonwealth appears to have abandoned other arguments and does not defend the District Court's conclusion that the statutes in *MacDonald* and the present case were sufficiently different to justify different outcomes. *See Toghill v. Clarke*, No. 7:15–CV–00119, 2016 WL 742123, *6–*7 (W.D. Va. 2016) ("*Toghill III*"), J.A. 95–97. The Commonwealth also no longer advances the argument it pressed in the District Court that *MacDonald* was essentially *ultra vires* and was wrongly decided. *See* D.E. 11, pp. 7–14, 18–23. Though in footnote 97, Resp. Br. at 27–28, the Respondent suggests that *MacDonald* was wrongly decided, an issue raised only in a footnote and addressed with only declarative sentences is waived. *See Wahi v. Charleston Area Med. Ctr., Inc.*, 562 F.3d 599, 607 (4th Cir. 2009) (citing Fed. R. App. P. 28).

II. ARGUMENT

The Commonwealth recognizes that in *MacDonald* "this Court held that—because Code § 18.2–361(A) 'prohibit[s] sodomy between two persons without any qualification'—the statute was 'facially unconstitutional.'" Resp. Br. at 20–21 (quoting *MacDonald*, 710 F.3d at 166). The Respondent seeks to avoid this finding of facial unconstitutionality by arguing that Virginia's "highest court has narrowed a State statute to avoid any constitutional infirmity." Resp. Br. at 21. According to the Commonwealth, this narrowing construction was applied in response to *MacDonald* and that as a result, the breadth and meaning of § 18.2–361(A) have changed. Resp. Br. at 21 ("In Toghill's direct appeal, which arose after [*MacDonald*], the Supreme Court of Virginia was presented with an independent opportunity to address a constitutional challenge to Code § 18.2–361(A)"). This supposedly "new" version of the statute, the argument goes, is not facially unconstitutional because following *Toghill II* the anti–sodomy provision supposedly applies only to minors. Resp. Br. at 21–23. Consequently, the Commonwealth contends that *MacDonald* no longer governs the analysis of § 18.2–361(A).

For the reasons stated below, this argument misunderstands the crux of both *MacDonald* and *Lawrence* and, for good measure, mischaracterizes the state of the law at the time *MacDonald* was decided. It is wholly without merit and should be rejected by this Court.

A. Virginia's Anti–Sodomy Provision was and Remains Facially Unconstitutional

The Commonwealth's argument simply misunderstands the import of *MacDonald* and the effect of *Lawrence* on Virginia's criminal code. The Commonwealth spends the entirety of its brief arguing that, whatever the faults of Virginia's anti–sodomy provision, they are overcome by the Supreme Court of Virginia's narrowing construction in *Toghill II*. Thus, according to the Commonwealth, despite the divergent outcomes, there is no real conflict between this Court's decision in *MacDonald* and the Supreme Court of Virginia's decision in *Toghill II*.

In reality, the legal issue is much simpler than the Commonwealth would have it. "In a facial challenge … the claimed constitutional violation inheres in the terms of the statute, not its application.... [A] successful facial attack means the statute is wholly invalid and cannot be applied to anyone. [The] law, if unconstitutional, is unconstitutional *without regard* to its application—or *in all* its applications …." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1127 (10th Cir. 2012) (quoting *Ezell v. City of Chi.*, 651 F.3d 684, 698–99 (7th Cir. 2011)) (emphasis and alterations in original). *See also Amelkin v. McClure*, 205 F.3d 293, 296 (6th Cir. 2000) ("If a facial challenge is upheld, then the state cannot enforce the statute *against anyone*.") (emphasis added); *Wis. Right To Life, Inc. v. Barland*, 751 F.3d 804, 832 (7th Cir. 2014) (same).

This Court has previously concluded that the Virginia anti–sodomy provision is unconstitutional on its face. *MacDonald*, 710 F.3d at 166. ("We are confident, however, that we adhere to the Supreme Court's holding in *Lawrence* by concluding that the anti-sodomy provision, prohibiting sodomy between two persons without any qualification, is facially unconstitutional."). Necessarily this holding means that § 18.2–361(A) can be applied to neither MacDonald nor Mr. Toghill. The Virginia courts' attempts to salvage the statute through a limiting construction simply do not address the statute's fundamental problem: *Lawrence* mandated complete invalidation of blanket anti–sodomy provisions of which Virginia's statute is a prime example. *MacDonald*, 710 F.3d at 163–64.

The Commonwealth spends the entirety of its brief either attacking *MacDonald* or arguing that it is inapplicable to the present case. The problem, however, is that it is ultimately not *MacDonald*, but *Lawrence* that governs; and it is *Lawrence* that renders Virginia's statute unconstitutional. *MacDonald* merely recognized that "the state court's standing determination [and ultimate conclusion on the facial challenge to the anti–sodomy provision] was contrary to and involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States" in *Lawrence*. *Id.* at 162. *Lawrence*, of course, remains good law, *see, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and its meaning hasn't changed since it was decided nor since this Court's decision

in *MacDonald*. If upholding a conviction based on Virginia's anti–sodomy provision "was contrary to and involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States" in 2013, it remains so in 2017. And therefore, Mr. Toghill's conviction is no more valid than MacDonald's.

B. Virginia's Law Did Not Change in the Period Between this Court's Decision in MacDonald and the Petitioner's Conviction

Even aside from the problems with the Commonwealth's argument identified in Part II.A, *ante*, the Respondent, in its attempt to distinguish *MacDonald*, simply mischaracterizes the state of Virginia's law in 2013 as compared to 2017.

The Commonwealth argues that the present case differs from *MacDonald* because in this case (unlike in *MacDonald*), Virginia's "highest court has narrowed a State statute to avoid any constitutional infirmity." Resp. Br. at 31. This argument would be more credible had the Commonwealth not already made (and lost on) the same argument in *MacDonald*.

In its response brief in the *MacDonald* appeal, the Commonwealth argued that "the state appellate courts' construction of § 18.2–361(A) to exclude the circumstances identified in *Lawrence* from its application" saved the statute from facial invalidation. *See MacDonald v. Moose*, No. 11–7427, D.E. 40, pp. 42–43 (filed June 29, 2012). This argument was not surprising in light of the Virginia

courts' decisions in the *MacDonald* litigation. Addressing MacDonald's claim that § 18.2–361(A) is unconstitutional because it applies to consenting adults, the Supreme Court of Virginia wrote

> The sodomy statute has no express age of consent; however, it must be applied in a constitutional manner in conformity with *Lawrence* and *Martin* [*v. Ziherl*, 607 S.E.2d 367 (2005)].
>
> ***
>
> As we have previously held, we construe the plain language of a statute to have limited application if such a construction will tailor the statute to a constitutional fit. Therefore, when there is an as-applied challenge to a statute, we must interpret the statute in such a manner as to remove constitutional infirmities.
>
> ***
>
> The victims in this case were minors, defined by the Code of Virginia as persons under the age of eighteen. Nothing in *Lawrence* or *Martin* prohibits the application of the sodomy statute to conduct between adults and minors.

McDonald v. Commonwealth, 645 S.E.2d 918, 924 (2007) (internal citations and quotations omitted), *aff'g* 630 S.E.2d 754, 758 (2006); *see also MacDonald v. Commonwealth*, No. 1939-05-2, 2007 WL 43635, at *1 (Va. Ct. App. Jan. 9, 2007).[3] When the present case was before the Supreme Court of Virginia, that Court did not hesitate to acknowledge that it had previously "ruled [in *McDonald*, 645 S.E.2d 918] that Code § 18.2–361(A) was not unconstitutional as applied to sodomy cases involving an adult with a minor." *Toghill II*, 768 S.E.2d at 676.

[3] The Virginia courts were inconsistent in the spelling of MacDonald's name, on some occasions spelling it MacDonald, and on others, McDonald. The cases, however, involved the same individual. *See MacDonald v. Moose*, 710 F.3d at 158.

Thus, by the time this Court heard *MacDonald*, the Virginia courts had recognized that § 18.2–361(A) cannot be applied as broadly as it was written. In order to deal with this problem, the Virginia courts attempted to "construe away" the problematic aspects of the statute. The argument that the case at bar is somehow distinguishable from *MacDonald* because of the Supreme Court of Virginia's supposedly new and more limited statutory construction is simply contrary to the record in both this case and *MacDonald*. Both cases come to this Court in exactly the same procedural posture and following the exact same resolution of the exact same issue by Virginia courts. The Equal Protection Clause of the Fourteenth Amendment demands that these cases be treated alike. *See Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008) ("The [Equal Protection] Clause requires that similarly-situated individuals be treated alike.") (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985)).

This Court has already concluded that Virginia courts' attempts to salvage the anti–sodomy provision by giving it a construction called for nowhere in the text or the history of the statute are nothing more than "a rather plain example of state action that is flatly contrary to controlling Supreme Court precedent, and therefore cannot stand." *MacDonald*, 710 F.3d at 166 n.17. Nothing in the present case or in the decisions of the Virginia courts in *Toghill I* and *Toghill II* should cause the

Court to retreat from its reasoned judgment in *MacDonald*, and the Court should not do so now.

Because the "narrowing construction" adopted by Virginia courts was already before this Court in *MacDonald*, and because "a panel of this court cannot overrule, explicitly or implicitly, the precedent set by a prior panel of this court," *United States v. Chong*, 285 F.3d 343, 346 (4th Cir. 2002) (Widener, J.) (quoting *Mentavlos v. Anderson*, 249 F.3d 301, 312 n.4 (4th Cir. 2001)), *MacDonald* does control the outcome of this case, Respondent's protestations notwithstanding. *See* Resp. Br. at 26–27.

C. Supreme Court of Virginia's Construction Cannot Save the Anti–Sodomy Provision

It is true that "[a] State's highest court is unquestionably the ultimate exposito[r] of state law," Resp. Br. at 20 (quoting *Riley v. Kennedy*, 553 U.S. 406, 425 (2008)) (alterations in original), and that such decisions are binding on the federal courts. *Id.* (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)). However, it does not follow that federal courts must defer to the state court's interpretation of the federal Constitution when such interpretations are "flatly contrary to controlling Supreme Court precedent." *MacDonald*, 710 F.3d at 166 n.17.

As this Court explained, *Lawrence* invalidated all statutes that were "in no way dissimilar to the Texas and Georgia [anti–sodomy] statutes deemed unconstitutional by the Supreme Court." *Id.* at 164. It therefore follows that as of

June 23, 2003, the Commonwealth of Virginia had no valid anti–sodomy provision in its criminal code, whether with respect to adults or children. Consequently, Mr. Toghill used "electronic means for the purposes of soliciting" something that was not an offense at the time he made his solicitation. And because under the then–extant Virginia law a violation of § 18.2–374.3(C)(3)(2012) required proof that the defendant solicited an act "constituting *an offense* under § 18.2–361," Mr. Toghill's conviction cannot stand.

The Supreme Court of Virginia's attempts at revival of the anti–sodomy provisions cannot save them because such attempts essentially criminalize conduct that was not a crime at the time it was committed. If there is a bedrock principle of the rule of law, it is that conduct that was not a crime at the moment of its commission cannot be made criminal retroactively. *See Bouie v. Columbia*, 378 U.S. 347, 354 (1964) ("The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,' must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures.") (quoting Jerome Hall, General Principles of Criminal Law 58–59 (2d ed. 1960)).

The Petitioner has no quarrel, as a general matter, with the Commonwealth's observation "that a state court's interpretation of state law, *including one announced on direct appeal of the challenged conviction*, binds a federal court

sitting in habeas." Resp. Br. at 18–19 (quoting *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005)) (emphasis in original). And had the state law in question been capable of merely being interpreted in a variety of ways, the interpretation settled upon by state courts would be controlling. This, however, is not the case here. Instead, as this Court explained in *MacDonald*, *Lawrence* operated to invalidate the Virginia anti–sodomy statute immediately and *in toto*.[4] *MacDonald*, 710 F.3d at 166–67.

"Generally, in both civil and criminal cases, unconstitutional laws and rules are void *ab initio*, or void from inception, as if they never existed." *Ranolls v. Dewling*, ___ F. Supp. 3d ___, ___, 2016 WL 7726597, at *4 (E.D. Tex. Sept. 22, 2016); *see also Gary v. Spires*, 473 F. Supp. 878, 883 (D.S.C. 1979) ("The general rule as to the statute is that an unconstitutional statute provides no basis for the assertion of rights, but is to be treated as if it never existed."); *Advantage Media, L.L.C. v. City of Hopkins*, 408 F. Supp. 2d 780, 791 (D. Minn. 2006) (same) (citing *Norton v. Shelby Cnty.*, 118 U.S. 425 (1886)). The second edition of the American Jurisprudence Encyclopedia of United States law explains this fundamental precept in categorical terms.

> The general rule is that an unconstitutional statute, whether federal or state, though having the form and name of law, is in reality no law but is wholly void and ineffective for any purpose. Since unconstitutionality dates from the time of its enactment and not merely

[4] This Court explicitly rejected the Commonwealth's contrary argument "that *Lawrence* governs only a particular set of circumstances and does not invalidate state sodomy laws *in toto* …." *MacDonald*, No. 11–7427, D.E. 40, pp. 35–36.

> from the date of the decision so branding it, an unconstitutional law, in legal contemplation, is as inoperative as if it had never been passed and never existed; that is, it is void *ab initio*. ... No repeal of such an enactment is necessary. Since an unconstitutional law is void, it follows that generally the statute imposes no duties …. Once a statute is determined to be unconstitutional, no … division of the state may take any further action pursuant to its provisions.

16 Am. Jur. 2d, Constitutional Law, § 256 (1968). As the Supreme Court held in *Montgomery v. Louisiana*, "a valid [conviction] does not exist where a substantive rule has eliminated a State's power to proscribe the defendant's conduct or impose a given punishment." 136 S. Ct. 718, 724 (2016). Because the Virginia anti–sodomy provision was "in no way dissimilar to the Texas and Georgia statutes deemed unconstitutional by the Supreme Court," *MacDonald*, 710 F.3d at 164, it suffered the same fate, becoming a legal nullity with "no … division of the state [being able to] take any further action pursuant to its provisions." 16 Am. Jur. 2d, Constitutional Law, § 256.[5]

The cases cited by the Respondent are simply inapposite. In those cases, the state courts did not attempt to conjure up a new criminal statute *ex nihilo*, but rather resolved fairly mild ambiguities in valid statutes. Thus, in *Bradshaw*, an Ohio statute prohibited convicting anyone "of aggravated murder unless he is

[5] Indeed, one of the cases cited by the Respondent supports this very proposition. In *Riley v. Kennedy* (cited in Resp. Br. at 20), the Supreme Court held that an "invalidated [statute] is properly regarded as null and void *ab initio*, incapable of effecting any change in [the] law …." 553 U.S. 406, 425 (2008). It is hard to see why the Virginia statute ought to be viewed any differently.

specifically found to have intended to cause the death of another." 546 U.S. at 77 (quoting Ohio Rev. Code Ann. § 2903.01(D)). The question was whether the word "another" included solely the intended victim or whether the intent could be transferred to third parties. There was (and is) no question as to the constitutionality of either of those interpretations. It is therefore not surprising that the Supreme Court reversed the Sixth Circuit's grant of *habeas* relief because the circuit court ignored the construction given to the statute by the Ohio Supreme Court. *Id.* at 78.

Similarly, in *Hebert v. Louisiana*, the convicted individuals challenged the calculation of their sentences for trafficking in intoxicating liquors arguing that the state law did not permit "a more burdensome sentence than was named in the statute which the accused thought controlling." 272 U.S. 312, 316 (1926). According to the Supreme Court the only question "that would be open ... under the due process clause is whether the state had power to impose the penalty fixed by the statutes as thus construed." *Id.* at 317. However, no party questioned "[t]hat the state had such power," instead focusing the argument on whether "the statutes rightly construed show that the power has been exercised." *Id.* Under these circumstances, the Supreme Court refused to second–guess the Louisiana courts on the meaning of Louisiana law, but only because either construction of the statute was entirely plausible and consistent with the due process of law. *Id.*

The present case is entirely unlike either *Hebert* or *Bradshaw*. The Virginia anti–sodomy statute was *never* a valid enactment and, as a legal matter, the prohibitions within it simply did not exist. *See Ranolls*, ___ F. Supp. 3d at ___, 2016 WL 7726597, at *4; *see also Gary*, 473 F. Supp. at 883; *Advantage Media*, 408 F. Supp. 2d at 791; 16 Am. Jur. 2d, Constitutional Law, § 256; *see also Norton*, 118 U.S. 425. It therefore follows that Mr. Toghill could not have been convicted under a legally non–existent statute.[6] *See Bousley v. United States*, 523 U.S. 614, 620 (1998); *Reyes-Requena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001). What the Supreme Court of Virginia attempted to do in *Toghill II* was not to resolve ambiguities in a statute, but to create a crime where (due to the incautious work of Virginia's Legislature) one did not previously exist. The Virginia courts are not empowered to do create *ex post facto* laws, and this Court owes no deference to such actions.

[6] It may well be that a valid conviction could be obtained for conduct that occurred *after* Virginia courts gave the anti–sodomy provision a narrowing construction. Thus, in *Posadas de P.R. Assocs. v. Tourism Co.*, 478 U.S. 328 (1986), the Supreme Court only addressed the legality of the *future* conduct in light of the narrowing construction the otherwise constitutionally problematic statute was given by the Puerto Rico's local courts. The conduct that occurred *prior* to the Puerto Rico courts' decision was not subject to sanction. *Id.* at 336. Though the Commonwealth relies on this case, *see* Resp. Br. at 25–26, a careful reading makes plain that *Posadas de Puerto Rico* actually supports the Petitioner, for Mr. Toghill's conduct occurred long before the Virginia courts re–wrote the statute. Whether *Posadas de Puerto Rico* or other cases would counsel a different outcome had Mr. Toghill's conduct occurred after the Virginia courts had narrowed the anti–sodomy provision to its constitutionally legitimate bounds is a difficult question which, given the facts of this case, the Court need not confront.

D. The Respondent Ignores Subsequent Legislative Amendments to the Statute

The Commonwealth's argument also fails to give any import to the amendments that the Virginia Legislature adopted in 2014. *See* Va. Acts 2014, c. 794. Under the Commonwealth's view of the case, the anti–sodomy provision always has been capable of constitutional application and, therefore, Virginia law prohibited the use of electronic devices to solicit oral sex from children since at least 1999. *See* Va. Acts 1999, c. 659. According to the Commonwealth, *Lawrence* had no effect on this prohibition because *Lawrence* did not affect the anti–sodomy provision except insofar as it attempted to regulate private, consensual, adult conduct. *See* Resp. Br. at 16, 19, 21–22, 29, 32–33. But this view is hard to square with the 2014 actions of Virginia legislators.

As recounted in greater detail in the Petitioner's Opening Brief, *see* Pet. Op. Br. at 26–32, the Virginia Legislature amended § 18.2–374.3 at the earliest possible opportunity after this Court decided *MacDonald*. Further, the Legislature, by invoking the emergency powers under Va. Const. art. IV, § 13, made the Act effective immediately rather than several months after the passage. *See* Va. Acts 2014, c. 794, § 2. No such rush would have been necessary in a world where the law already properly proscribed the targeted behavior.

Since its creation in 1992, *see* Va. Acts 1992, c. 699, Section 18.2–374.3 has been amended twelve times. *See* Va. Acts 1999, c. 659; Va. Acts 2003, c. 935; Va.

Acts 2003, c. 938; Va. Acts 2004, c. 414; Va. Acts 2004, c. 444; Va. Acts 2004, c. 459; Va. Acts 2004, c. 864; Va. Acts 2007, c. 759; Va. Acts 2007, c. 823; Va. Acts 2013, c. 423; Va. Acts 2013, c. 470; Va. Acts 2014, c. 794. None of these amendments, save for the one adopted in 2014, was made effective immediately. Doubtless, some peculiar concern animated Virginia legislators in 2014 that was simply not present during the consideration of the eleven prior amendments to § 18.2–374.3. The urgency in 2014 was prompted by this Court's decision in *MacDonald*, which held that no reasonable jurist could conclude that *Lawrence* had not invalidated Virginia's anti–sodomy provision *in toto*. Faced with the legal landscape where oral sex (along with other types of sex acts) with minors were not criminal, Virginia legislators acted to amend the Code with all due haste.[7]

Yet, under the Commonwealth's view of the law, Virginia legislators were merely engaged in substantively meaningless, but somehow emergent, shuffling

[7] It bears repeating that the Petitioner does not dispute that the Commonwealth of Virginia can lawfully proscribe any type of sexual relations with minors, as well as solicitation of such relations. Nor does the Petitioner dispute that as of April 23, 2014 (the date the 2014 amendments were approved by the Governor and became law), Virginia did proscribe such behavior. *See* Va. Code § 18.2–374.3(C)(3)(2014). Where the Petitioner and the Respondent differ is in their views on the state of the law prior to April 23, 2014. The Respondent simply fails to appreciate that the anti–sodomy provision became a legal nullity following *Lawrence*, and therefore did not criminalize sodomy with respect to *anyone*, no matter how worthy of state's protection one party was, and how loathsome the conduct of another party happened to be. *See MacDonald*, 710 F.3d at 165 ("[A]lthough the Virginia General Assembly might be entitled to enact a statute specifically outlawing sodomy between an adult and an older minor, it has not seen fit to do so.").

of words and phrases from one part of the criminal code to another. To put it mildly, this view is implausible.[8] Conversely, treating the effect of *Lawrence* on the Virginia's anti–sodomy provision in a manner consistent with the admonitions of the U.S. Supreme Court, the lower courts, and learned treatises like the American Jurisprudence Encyclopedia, *see* Part II.C, *ante*, makes perfect sense of the Virginia legislators' behavior. When choosing between the two explanations for the legal changes in Virginia law, this Court should choose the one that's plausible and consistent with the basic principles of American jurisprudence. Doing so necessarily results in the rejection of the Commonwealth's arguments.

[8] While the Legislature's power to invoke the emergency clause is plenary and not judicially reviewable, *see City of Roanoke v. Elliott*, 96 S.E. 819, 822 (Va. 1918), it is used sparingly. For example, during the 2014 session, Virginia enacted 825 new laws. http://lis.virginia.gov/cgi-bin/legp604.exe?141+oth+STA (last visited May 28, 2017). However, only thirty–eight laws, or less than 5% of the total number, were enacted as "emergency legislation." http://lis.virginia.gov/cgi-bin/legp604.exe?000+sbj+136 (last visited May 28, 2017). In light of the rare exercise of this power, the fact that it was exercised when amending § 18.2–374.3 should be taken as evidence that the Legislature attempted to rectify a truly pressing problem, rather than taking an opportunity to merely improve an existing valid and working statute. *Cf. City of Leadville v. Bishop*, 61 P. 58, 60 (Colo. App. 1900) (suggesting that "a rare occurrence in legislative enactments" should "require or attract special attention and comment.").

III. CONCLUSION

For the foregoing reasons, as well as those in the Petitioner's opening brief, the judgment below should be reversed and a *writ of habeas corpus* should issue against the Respondent.

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