IN THE SUPREME COURT
OF FLORIDA

ROBERT P. MORROW,

Petitioner,

vs. Case Number: 69,424

DUVAL COUNTY SCHOOL BOARD,

Respondent.

DEPARTMENT OF ADMINISTRATION, ETC.,

Petitioner,

vs. Case Number: 69,430

DUVAL COUNTY SCHOOL BOARD,

Respondent.

DISCRETIONARY REVIEW OF A DECISION OF THE FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF OF AMICUS CURIAE, FLORIDA TEACHING PROFESSION-NATIONAL EDUCATION ASSOCIATION (ON BEHALF OF PETITIONER, MORROW)

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APPELLEE HAS NOT GIVEN ADEQUATE SUPPORT TO SHOW THAT MORROW'S CONSTITUTIONAL RIGHTS WERE PROTECTED BELOW

Appellee, Duval County School Board, failed to address two important aspects of Appellant Morrow's constitutional claims. First, Appellee does not explain the Legislature's choice to prohibit forced retirement for private school teachers while, according to Appellee, permitting this practice in the public schools. Second, Appellee suggests no conceivable set of facts which would supply a rational basis for a legislative selection of 70 as an age at which public school teachers should no longer be considered entitled to continued employment.

A.

EQUAL PROTECTION PRINCIPLES PROHIBIT GIVING PUBLIC AND PRIVATE SCHOOL TEACHERS DIFFERENT EQUAL EMPLOYMENT RIGHTS

The Florida Human Rights Act broadly prohibits age discrimination in employment including a clear prohibition against mandatory retirement. §§760.10(1)(a) and (8)(b), Fla. Stat. (1983). No exceptions are made for teachers in either public or private schools. Appellee claims that Section 231.031, Florida Statutes (1983), creates a blanket exception to the prohibition against mandatory retirement by permitting the forced retirement of public school teachers over the age of 70 without requiring any reason other than age for the teacher's termination.

Private schools in Florida lawfully provide required education for children using teachers who perform virtually identical educational services to those public school teachers provide. However, if a private school employer stipulated that it discharged a teacher solely because he or she was over 70, that employer's actions would be clearly illegal and indefensible under the Human Rights Act. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution is violated by such irrational line drawing.

> . . . the Equal Protection Clause of the amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that

> statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike?

Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

Public and private school teachers are "similarly circumstanced." Therefore, equal protection is violated by a law which allows private school teachers over 70 protection against age discrimination but strips that protection away from public school teachers. To make such a distinction is "arbitrary" and has no "ground of difference" to rest upon.

B.

NO RATIONAL BASIS HAS BEEN SUGGESTED TO SUPPORT THE REASONABLENESS OF MANDATORY RETIREMENT OF PUBLIC SCHOOL TEACHERS OVER 70

Both substantive due process and equal protection rights are violated by any statute which does not have a rational basis.

> The test to be applied to determine if a particular statute is in violation of the due process clause is whether it bears a reasonable relation to a permissable legislative objective and is not discriminatory, arbitrary, or oppressive.

Johns v. May, 402 So.2d 1166, 1169 (Fla. 1981). (Emphasis added.) And, in explaining the equal protection requirements an age distinction must meet to be valid under Florida's constitutional standards, this Court said:

> Whenever an age restriction is attacked on due process or equal protection grounds, we find the test is: (1) whether the restriction under the particular circumstances of the case is reasonable, and (2) whether it is discriminatory, arbitrary or oppressive in its application.

White Egret Condominium, Inc. v. Franklin, 379 So.2d 346, 351 (Fla. 1980) (Emphasis added.)

For a statute to have a "reasonable relation to a permissable legislative objective" or for a legislative restriction to be "reasonable" it must have some conceivable set of facts to support it. Those facts need not be unanimously agreed upon or even accepted by a majority of the public at large

or of experts in the area. However, there must be some support for the lines a legislature draws. For example, the Legislature could not validly require that all people with blond hair be quarantined to prevent the spread of leprosy. Such a statute would be based on the belief that blond people have or are more likely than others to have contagious leprosy. While some people with leprosy may be blond, there is absolutely no basis for a belief that blonds create a greater risk for the spread of leprosy than people with any other hair color. This is due to the fact that no link has been shown between hair color and the disease of leprosy. Thus, such a distinction would have no rational basis. It would not be reasonably related to a permissable legislative objective.

Appellee has not made even the barest allegation of what the Legislature could have based its decision on to select teachers over 70 who have not voluntarily retired as a class subject to different employment treatment than others. Without some set of valid facts to support distinctions drawn by a statute, that legislation cannot stand.

> . . . we are also aware of the settled principle of constitutional law that a statute which depends upon the existence of a certain set of facts for its validity may cease to be constitutionally valid when that certain set of facts ceases to exist. Chastleton Corp. v. Sinclair, 264 U.S. 543, 44 S.Ct. 405, 68 L.Ed. 841 (1924).

Conner v. Cone, 235 So.2d 492, 498 (Fla. 1970). (See also, Pinellas County Veterinarian Medical Society, Inc. v. Chapman, 224 So.2d 307 (Fla. 1969).)

As discussed more fully in Amicus FTP-NEA's Initial Brief at pages 18-20, some showing must be made, some rational basis must be articulated, by the party relying on the validity of the legislation that there is some conceivable set of facts currently existing to support it. In Gault v. Garrison, 569 F.2d 993 (7th Cir. 1977) cert. denied 440 U.S. 945 (1979), the Seventh Circuit found that there was no conceivable facts to support a statute mandating teacher retirement at age 65. Appellant has yet to suggest what might have supported the instant legislatively drawn distinction.

Appellant's attempts, in its Answer Brief at pages 19-21, to show that its application of this law was not arbitrary, discriminatory, or oppressive are irrelevant for two reasons. First, the most careful and precise application or enforcement of a law that is flawed ab initio will not validate that law. Second, it was stipulated that Appellant's sole reason for terminating Morrow was his age. Appellant's efforts to show that other considerations, those concerning school staffing needs or student benefits, may have influenced their decision to terminate Morrow are to no avail. At best, they are surplusage.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing has been furnished by U.S. Mail on this 23rd day of December, 1986, to: Gerald A. Schneider, General Counsel, 1300 City Hall, Jacksonville, Florida 32202; William Lee Allen, Gary E. Eckstine, Neill W. McArthur, Jr., Assistant Counsel, 1300 City Hall, Jacksonville, Florida 32202; Dana Baird, Esquire, General Counsel, Florida Commission on Human Relations, 325 John Knox Road, Suite 240, Building F, Tallahassee, Florida 32301; Leslie Holland, Esquire, 208 West Pensacola Street, Tallahassee, Florida 32301; and, Robert J. Winicki, Esquire, Mahoney, Adams, Milam, Surface and Grimsley, Post Office Box 4099, Jacksonville, Florida 32201.

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