THE SUPREME COURT OF FLORIDA

CASE NO.: 82,836

THE CITY OF NORTH MIAMI, FLORIDA,

Petitioner,

vs.

ARLENE KURTZ,

Respondent.
_____ /

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
FOR THE THIRD DISTRICT

Case No. 92-2038

PETITIONER'S INITIAL BRIEF ON THE MERITS

THOMAS M. PFLAUM
Fla. Bar # 220450
Route 2, Box 838
Micanopy, FL 32667
(904) 466-0252
and
PEDRO P. ECHARTE, JR.
Fla. Bar # 274135
International Place, 21st Floor
100 SE 2nd Street
Miami, FL 33131-2154
(305) 539-1226
and
DAVID M. WOLPIN
Fla. Bar # 292168
City Attorney for North Miami
776 N.E. 125th Street
North Miami, FL 33161-5654
(305) 893-6511

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES

STATUTES

OTHER

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The Third District certified the following question:

> Does Article 1, Section 23 of the Florida Constitution prohibit a municipality from requiring job applicants to refrain from using tobacco or tobacco products for one year before applying for, and as a condition for being considered for employment, even where the use of tobacco is not related to job function in the position sought by the applicant?

(Nov. 23, 1993 Certification Order).

Because the real issue in this case is whether the Privacy Amendment requires the public to use tax dollars to subsidize the cost of private conduct which **is** job-related, a better phrasing of the issue is:

> Does the Florida Privacy Amendment forbid communities from taking into consideration, in making public-employment decisions, the financial and productivity costs of smoking, and so compel them to continue using public money to subsidize the costs of smoking and thus contribute to the nation's worst public-health crisis?

NOTE ON REFERENCES IN BRIEF

Citations to the Record will be identified as "R. ___" and transcript citations by date and page ("July 8, 1991 TT. ___"). Accompanying this brief is an Appendix which will be referred to as "App. Exh. ___".

STATEMENT OF THE FACTS AND THE CASE

For purposes of deciding the issue on review, the following short version of the essential facts may suffice. (A full version of the facts is provided immediately thereafter.)

(The Short Version)

The community of North Miami has initiated a policy of not hiring any more smokers as public employees.[1] To achieve that goal the City requires all job applicants to certify that they have not smoked for the past year. The policy does not affect current employees or even new employees who might later begin to smoke after their employment. Thus the City's seeks only to gradually reduce the number of smokers in the public workforce by means of the natural attrition and nonreplacement of smokers.

The policy is grounded on overwhelming and undisputed empirical evidence that reducing the number of smokers in the public workforce will save tens of millions of public tax dollars which otherwise will be needlessly wasted on the self-inflicted illnesses of smokers and the cost of their high absenteeism and lower productivity. North Miami is self-insured and its taxpayers pay for all the medical expenses of City employees. The policy is also justified by the need for local communities to stop subsidizing and thus contributing to the most serious public health peril of our age.

---

[1]The policy applies to all forms of tobacco use, including chewing tobacco, "snuff," etc. However, the phrase "tobacco-users" is awkward and smoking is by far the most common form of tobacco use, so this brief will usually refer to the affected group as "smokers."

Ms. KURTZ is a smoker and therefore ineligible for employment by the City until she stops smoking for one year. Aside from its unwillingness to employ Ms. KURTZ until she stops smoking, the City **has no interest whatever** in Ms. KURTZ's private behavior and has done nothing to restrict, control, limit or punish her private behavior. Ms. KURTZ even admitted that the City was not interfering with her privacy and that she had no privacy interest in the fact that she was a smoker.

Ms. KURTZ, represented by the ACLU which received substantial financial backing from the tobacco industry, sued to enjoin the City's policy on various federal and state constitutional grounds. After many hearings over many months, and the careful consideration of the City's voluminous evidentiary showing (Ms. KURTZ having submitted no evidence of her own), Circuit Judge Sydney Shapiro held that the City's policy was reasonable and constitutional in all respects. Judge Shapiro held (*inter alia*) that there was no such thing as a smokers' privacy right to a government job.

While affirming Judge Shapiro's rulings on all other constitutional and statutory issues, the Third District ruled that the Florida Privacy Amendment guaranteed Ms. KURTZ equal eligibility for government employment, but it did so without actually holding that tobacco use was constitutionally-protected or that Ms. KURTZ had a constitutionally-guaranteed right to a city job. Instead, the district court camouflaged its ruling as one involving the (non)issue of "informational privacy." The district court then agreed to certify the issue for Florida Supreme Court review.

(**The Full Version**)

Plaintiff's lawsuit: ARLENE KURTZ's suit alleged that the challenged City regulation (App. Exh. "C") of not hiring any more smokers violated her constitutional rights under the Fourteenth Amendment and the Florida Privacy Amendment. (R.2-7).[2] The City by summary judgment motion and memoranda asserted that there was no State or Federal constitutional right which guaranteed a government job to tobacco users; that the relative wisdom or efficacy of its regulation was not the issue for adjudication; and that the City's regulation should be sustained because the City's policy was perfectly legitimate and rational.[3]

By introducing multiple volumes of empirical evidence which supported its regulation, the City demonstrated that the regulation promoted vital public objectives. (R. 179-2369, 2413-2419). The City's evidence conclusively demonstrated that workers who smoke are much more often ill and have much higher medical expenses and rates of absenteeism (irrespective of particular "job function"), and that the reduction of the number of smoking employees will substantially

---

[2]Ms. KURTZ did not ask for damages, back pay, or a court order directing the City to employ her or even to re-interview her. (R. 2-7). Ms. KURTZ's attorney so stipulated during Ms. KURTZ's deposition (R. 2371-2412) at pp. 4-5, and at the summary judgment hearing of Nov. 25, 1991.

[3]Ms. KURTZ's attorney acknowledged that the City's policy satisfied the "rational basis" test (July 8, 1991 TT. 7, 8, 9, 13), in that the City's objectives were legitimate and the means used were rational. July 8, 1991 TT. 6, 15; see also Kurtz Motion for Judgment on the Pleadings (R. 74). Ms. KURTZ's attorney conceded that the City's policy would promote the City's legitimate objectives because smokers as a group did have higher medical costs than nonsmokers. July 8, 1991 TT. 11.

reduce the City's medical costs and improve productivity.[4] Through its undisputed evidence the City also proved the following salient facts:

-- As former HEW director Dr. Lewis Sullivan once remarked, **"cigarettes are the only legal product that when used as intended cause death."** (New York Times, Feb. 2, 1991, at A-18). Tens of thousands of scientific studies have confirmed the cause-and-effect relationship between tobacco use and a multitude of deadly illnesses.[5] As one former Surgeon General stated, "smoking

---

[4]The City's evidence demonstrated that smoking constitutes the single greatest public health menace in the United States, and one which the Federal Government has officially urged all public institutions to combat. See 1989 Surgeon General's 689-page Report, Reducing the Consequences of Smoking; Covering transmittal letter to the President (Petitioner's Comp. Exh. IV, parts I and II). Only a few weeks ago eight past and present Surgeons General, from the Eisenhower through the Clinton Administrations, met in Washington to again appeal for public institutions to discourage smoking, stating that the nation "remains in tobacco's death grip." (New York Times, Jan. 12, 1994 at C-12). See *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.*, 335 U.S. 525 (1949); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), for the proposition that courts are to accept all reasonable justifications for government policies even when they are hypothetical (which in this case they are not). In a decision which has often been cited by this Court, the Supreme Court in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938), held that social and economic legislation is to be upheld if any state of facts, including assumed facts, would support the legislation, and that the existence of supporting facts "is to be presumed." See, e.g., *H.R.S. v. West*, 378 So. 2d 1220, 1225 (Fla. 1979); *Cilento v. Florida*, 377 So. 2d 663, 665 (Fla. 1979); *Hamilton v. Florida*, 366 So. 2d 8, 11 (Fla. 1978); *State v. Bales*, 343 So. 2d 9 (Fla. 1977).

[5]Vogt & Schweitzer, 22 Amer. J. of Epidemiology 1060, 1066 (1985) report that 30,000-to-40,000 research studies have proven the basic empirical facts which underlie the City's policy. The accompanying Appendix contains some of the affidavits and other materials submitted by the City. However, space constraints prevent the City from including or even summarizing most of the evidence contained in the six volumes of exhibits which it

(continued...)

represents the most extensively documented cause of disease ever investigated in the history of biomedical research." Thousands of scientific studies have proved beyond contradiction that smoking is the leading **and** most avoidable cause of illness and death in our society. (1990 Report of the Surgeon General, "The Health Benefits of Smoking Cessation," Centers for Disease Control (1990), at page x.)[6]

-- Smoking not only causes lung cancer, emphysema, and other obstructive illnesses of the lungs as well as cancer of the mouth, throat and larynx, but also coronary artery disease and heart disease (the **leading** causes of death in the United States); compared with non-smokers, smokers have twice the risk of stroke, by itself the third leading cause of death in the United States. The mortality rate from abdominal aortic aneurism is two to five times higher in smokers than in non-smokers; smoking is a major cause of peripheral artery occlusive disease, including gangrene and loss of limbs; cigarette smoking substantially increases the risk of respiratory infections such as influenza, pneumonia, and bronchitis,

---

[5](...continued)
submitted. (The index to the City's evidence is contained in the Appendix as Exhibit "G".)

[6]See the 1990 Surgeon General Report ("Executive Summary") at p. x (contained in Composite Exh. IV, Parts I & II, of the City's summary judgment exhibits). The City is entitled to rely on that evidence in adopting its regulations and policies. *Renton v. Playtime Theaters*, 475 U.S. 41, 106 S.Ct. 925 (1986). See also *Grusendorf v. City of Oklahoma City*, 816 F.2d 539 (10th Cir. 1987), where the Court sustained a far more draconian "no-smokers" regulation on the basis of nothing more than the warning label which by Federal law must be printed on the side of every package of cigarettes sold in the United States.

which themselves constitute the sixth leading cause of death in the United States. Smoking also causes gastric ulcers and increases the risk of cancer of the pancreas and bladder. 1990 Report of the Surgeon General "Executive Summary," at xi. Each of these myriad illnesses is a major cause of worker-absenteeism. The scientific evidence of the cause and effect relationship between smoking and these and myriad other illnesses and diseases (most recently even leukemia and cataracts have been added to the list) is overwhelming. Indeed, the evidence of the causal relationship between smoking and illness was even acknowledged by the Florida legislature 15 years ago. (See §381.3712, Fla. Stat. (1979), acknowledging smoking as a causal factor in many types of cancers).[7]

-- Although one might not realize it from reading the daily newspapers, smoking actually causes more deaths than **ALL crime, automobile accidents, fires, AIDS, cocaine, heroin, alcohol and suicides put together**. (258 J. of Amer. Med. Ass'n (JAMA) at 2080 (1987)). Smoking is now killing approximately 420,000 Americans each year, or an American death rate equal to eight, eight-year Vietnam wars every year. Thus former Surgeon General Koop rightly stated

---

[7]Benzene is a carcinogenic agent highly restricted by Federal law. A couple of years ago Perrier water was banned from distribution in the United States and actually pulled from store shelves because of Benzene readings of 16 parts per billion. According to the 1986 Surgeon General's Report, cigarettes contain between 11,000 and 43,000 parts per billion of Benzene, 2,000 times more than the "dangerously polluted" Perrier water, yet are sold daily for a private profit. In fact, cigarettes contain over **43** carcinogenic chemicals according to the 1989 Surgeon General's Report.

in his 1982 report that smoking is the **"most important public health issue of our time."**[8]

-- In narrow economic terms, the national cost of smoking-caused illness is 50 billion dollars; the State of Florida wastes approximately two billion dollars and 204,000 years of lost human life, each and every year on smoking illnesses. See Smoking & Health, A National Status Report, A Report to Congress (2d Ed. 1990), contained in Petitioner's Comp. Exh. I. In other words, if Floridians could be induced to quit smoking, the resulting savings would pay for all of the needed improvements to our schools and the entire criminal justice system, with enough left over to modernize the entire court system. Equivalent improvements to public services would accrue on the local level (police; services for youth and the elderly; housing for the homeless; treatment for the mentally ill, etc.), to the extent that local communities finally take seriously the urgent pleas of all Surgeons General since the 1960's that **government begin to implement disincentives to discourage smoking**

---

[8]In an average group of 100 young smokers, one will lose their life due to murder, two to automobile accidents, and 25 to the effects of smoking. (The Health Consequences of Smoking: Nicotine Addiction, 1988 Report of the Surgeon General, U.S. Department of Health and Human Services). See Shultz affidavit (App. Exh. "E") at pp. 15-16. While the Third District found unimpressive the City's immediate interest in saving millions of dollars in public tax revenues by reducing the number of smokers in its work force, it totally ignored the broader and more compelling reason for the policy, namely that public institutions must stop subsidizing and "coddling" tobacco use, especially by their own public employees, if the United States is **ever** to deal with the nation's most serious public health crisis and stop 420,000 needless American deaths every year.

rather than continuing to subsidize and coddle such suicidal behavior.

-- The direct economic costs of smoking are exceedingly high for the smoker's employer as well. According to the NADL Journal (January-February 1983), pp. 28-29, smoking costs American employers over **27 billion dollars** ($27,000,000,000) per year in extra absenteeism and health care costs. Men under 45 who smoke two packs of cigarettes a day face more than $56,000 of additional medical costs and most of that extra cost is borne by their insurers **which in this case are the people of North Miami.** Oster, *et al.*, The Economic Costs of Smoking and Benefits of Quitting, 4 (1984), at xvii. Each smoking employee costs the City taxpayers as much as $4,500 extra per year, year-in and year-out (a fact which is proven and undisputed in this litigation). Daynard, Smoke Gets in Your Bottom Line, 5 Boston J. 3 (1985).[9]

---

[9]Weis, Profits Up In Smoke, Indiana Bus. J. 18-19 (1981), summarizes various studies and concludes that $3,195-to-$4,500 per year was the average additional cost of employing a smoker. Weis, *supra*, Can You Afford to Hire Smokers?. The actual cost may be slightly higher: see Management World, Sept. 1981, pp. 39-40 (stating that each new smoking employee costs an employer $4,789 per year in additional expenses); 60[3] Personnel J. 162-165 Mar. 3, 1981). See also Gabel, et al., Smoking Policies, 83(1) Southern Med. J. 17 (1990). After a seven-year study of the medical requirements of smokers and nonsmokers, it was found that smokers spent, on average, 17 days more in the hospital. 22(6] Am. J. of Epidemiology 1060-1066 (1985). An even more recent study by a group of hospitals, covering 10 states, found that smokers' insurance claims were 24% higher on average than for nonsmokers. Wall St. J., Mar. 6, 1990, at B1. Health and disability insurers like Blue Cross report that claims for smokers run as high as 28% more than for nonsmokers. (1989 Surgeon General's Report, at Table 17, p. 549. To the same effect, see Milliman & Robertson, Health Risks and Behavior (1987), finding that smokers are 29% more likely to have large (over $5,000) annual insurance claims and to require

(continued...)

All of these facts were established by the City and were never contradicted by Ms. KURTZ.

Accompanying the City's Motion for summary Judgment was the detailed, 30-page affidavit of Dr. James Shultz of the Department of Epidemiology and Public Health, University of Miami School of Medicine. (App. Exh. "E"). Dr. Shultz is a nationally-recognized expert in the field of behavioral epidemiology, the study of the patterns of human disease, and his research specialty is the health effects of cigarette smoking. Basing his conclusions on nearly **100 national scientific studies**, Dr. Shultz stated that the additional cost to North Miami of each smoking employee is as high as $4,611 (1981 dollars) per year. Those costs include increased absenteeism and early mortality, increased non-health insurance costs, and job time lost. (App. Exh. "E") Dr. Shultz also confirmed the scientific basis for the City's one-year cessation requirement, based on the empirical evidence regarding the addictive qualities of smoking and relapse rates over various periods of time. (*Id.*).

---

[9](...continued)
far more days of hospitalization.

After reviewing the extensive scientific literature, the Kristein study concluded that "Smokers have 33%-to-45% excessive absenteeism." Kristein, 12 Preventative Medicine 358, 366 (1983) (contained in Petitioner's Comp. Exh. I). There are other "hidden" costs of having smoking workers: Fires are accidentally set, and City automobiles and equipment damaged by surreptitious smokers. Indeed, smokers even cost more money in terms of accidental injury and related workers' compensation costs due to accidents caused by eye inflammation and hand interference. Gabel, *et al.*, Smoking Policies, 83(1) Southern Med. J. at p. 9 (1990), reporting that smokers have more automobile accidents and moving violations; Lippiatt, 19 Preventive Med. 515 (1990), reports that cigarette-fires annually cause 8,500 deaths and injuries and half a billion dollars in property losses.

Approximately 17% of the City of North Miami workforce now smokes. The City is fully self-insured with respect to employee medical costs and pays 100% of its workers' medical expenses from taxes in the general fund. See Lee R. Feldman depo. (App. Exh. "F") at pp. 47-50; Adele Hartstein affidavit (App. Exh. "D"). Even using the **most conservative** figures cited by Dr. Shultz, the City spends hundreds of thousands of extra dollars **each year** in additional medical costs plus lost productivity due to smoking workers. Assuming normal turnover and retirement, the City will thus **unquestionably** save millions of dollars if it stops hiring smoking employees.[10] Those savings can now be used to pay for hot meals and medical transportation for the elderly, housing and care for the homeless, additional police protection, or other major programs. The City will save not only in medical costs: In an average group of 100 smoking employees, 25 will **die** from smoking: each such employee's death will be slow and agonizing, costing the City tens of thousands of dollars in direct medical, hospital and drug expenses, and each death will result in jobs remaining unperformed for months and then filled with inexperienced workers who require special training and are less efficient and productive in their labor.

---

[10]See Affidavit of Deputy City Manager Lee R. Feldman (App. Exh. "F") which contained projections of future savings to the City based on the various national studies cited in Dr. Shultz's affidavit. Mr. Feldman projected total cumulative savings to the City as high as 14 million dollars over the next 20 years. The City submitted over 50 scientific studies and reports which supported Mr. Feldman's projections.

As of 1991, 60.9% of American cities have revenues which are exceeded by expenditures, and 87.2% of those cities attributed their negative balance sheets to the rising cost of employee health benefits. (Chicago Tribune, July 9, 1991, at 11, reporting study by National League of Cities.) **The rising cost of health care is now widely considered the single most compelling economic problem in the United States, and tobacco has played a dominant role in creating that crisis.**[11]

As reflected by the data summarized above and as confirmed by the National Institutes of Health in its October 1989 Report, Guide to Public Health Practice (at p. ix), tobacco use in all its forms is thus having **"a debilitating and devastating effect on the health of the American people."** Yet in 1985 alone, the American cigarette manufacturers who are behind this litigation (and would be the sole beneficiaries of a decision in favor of the nominal Plaintiff KURTZ), enjoyed **domestic** annual retail sales of approximately 30.2 billion dollars ($30,200,000,000), selling **600 billion** cigarettes

---

[11] *"I think we are spending a ton of money in private insurance and government tax payments to deal with the health-care problems occasioned by bad health habits, and particularly smoking."*

President Bill Clinton
February 25, 1993

At the January 1994 meeting of the seven former Surgeons General, they noted that more than **two million Americans** have been killed by the tobacco industry since the first Surgeon General's report on smoking in 1964, yet "the most lethal and addictive product in our society" continues to be pushed by the tobacco industry which has a "political stranglehold" on most governmental agencies. (New York Times, Jan. 12, 1994 at c-12; Dallas Morning News, Jan. 12, 1994 at 6-A).

each year in the United States alone. Smoking Related Deaths and Financial Costs, U.S. Office of Technology Assessment (1985), at p. 6; Smoking, Tobacco & Health, a Fact Book, U.S. Public Health Service (1989) (contained in Petitioner's Comp. Exh. II). Even the merchants of tobacco death have grudgingly come to accept that public and private employers can ban "on-duty" smoking and such restrictions are commonplace. (By state law, smoking is already illegal in public facilities in Florida, except for a few designated areas.) The reason the industry accepts on-duty restrictions is that **they do not decrease tobacco consumption and sales, and so, *ipso facto*, they do not reduce illness either.** On the contrary, when "on-duty" smoking is banned, the main consequence is lower productivity, not less illness **or** higher productivity. Smokers must ingest nicotine, typically every 30-45 minutes, and their need for a "fix" is as strong as that of a heroin addict.[12] When employers

---

[12]The 1988 Surgeon General's Report equalizes nicotine and heroin in terms of their addictive properties, stating that

> The pharmacologic and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine. (1988 Surgeon General's Report, *supra*, at 9).

The U.S. Centers for Disease Control reported in Morbidity and Mortality Report, 39 MMWR 38 (Sept. 28, 1990), at pp. 673 *et seq.*, (contained in Petitioner's Comp. Exh. I), that a Colorado state hospital's ban on workplace smoking resulted in a small reduction in the number of cigarettes smoked at work, offset by increased smoking after work. Thus such bans do not significantly improve the health of workers, and so do not significantly reduce their rate of illness, absenteeism, or medical and insurance expenses.

Moreover, since 1969 it has been established that maternal smoking leads to infant low birth rate and an increased incidence

(continued...)

merely ban smoking on duty, addicted employees invariably find ways of satisfying their habit through five-to-ten minute "disappearances" typically twice-an-hour. Thus researchers have concluded that heavy smokers **"are absent from work almost twice as often as their peers."** Weis, Can You Afford to Hire Smokers?, Personnel Admin. 72 (May 1981).

The City also proved that its regulation was neither unprecedented nor draconian; that **thousands** of federal, state and local regulations, ordinances, statutes, and employment policies (including 600 state laws) restrict and regulate the sale, consumption, use, distribution, possession, and advertising of tobacco products. Indeed, in late 1987 the State of Massachusetts adopted a statute barring certain public agencies from hiring smokers, **and even dictating the newly-hired employees who later become smokers must be terminated.** (1987 Mass. Acts 697). Likewise in *Grusendorf*, *supra*, 816 F.2d 539 (the only prior case dealing with a claim of "smoking as a civil right"), the Court sustained the constitutionality of a city employment regulation banning even **off-duty** smoking by **already-employed** municipal workers. The City also

---

[12](...continued)
of prematurity, spontaneous abortion, still birth, and neonatal death. 1989 Surgeon General's Report, at 8; The Health Consequences of Smoking: 1969 Supplement to the 1967 Public Health Service Review, U.S. Public Health Service (1969). By 1975 the Surgeon General had linked parental smoking to bronchitis and pneumonia in children. 1989 Surgeon General's Report, at 9; The Health Consequences of Smoking, U.S. Dept. of Health, Education and Welfare (1975). The City's self-insurance of City employees and **their family members** means that merely barring "on duty" smoking does not protect family members from such illnesses for which the City has to pay.

noted that Florida law already barred local governments from employing any firefighter who had smoked within a year of applying. (§633.34(b) Fla. Stat. (1990)). The City also provided an historical synopsis of smoking regulations, noting that until early in this century as many as **12 states banned the import or sale of cigarettes entirely.** (See Smithsonian, July 1989, at p. 107).

The testimony and affidavits and exhibits submitted by the City in support of its regulation were **overwhelming** and **uncontradicted:** Plaintiff submitted **no** evidence whatever to demonstrate that the City was not confronting the most compelling of medical, social and fiscal problems, nor did the Plaintiff rebut the City's evidence that its policy would in fact realize significant savings and achieve greater worker productivity and reduced absenteeism by reducing through attrition the number of its employees who smoke.[13]

The summary judgment hearings and ruling: At the summary judgment hearings before Judge Shapiro, Ms. KURTZ's attorney conceded that it was her burden to establish -- apparently without evidence -- that the challenged regulation was not rationally related to a legitimate government goal. (Nov. 25, 1991 TT. 5; Jan. 7, 1992 TT. 20, 21, 24). Her only argument against the City's

---

[13]In fact, Ms. KURTZ's attorney had no interest whatever in the evidence during the entire trial court proceedings, evidence which she actually characterized as "irrelevant." See Jan. 7, 1992 TT. 23: "As to the . . . factual issue . . . the information that has been provided in support of . . . the defendant's motion for summary judgment **is really irrelevant.**" At the end of the final hearing, the court specifically inquired of Plaintiff's attorney whether there were any facts in dispute so as to prevent a summary judgment, and she stated that there were no material facts in dispute. (Jan. 7, 1992 TT. at 46).

regulation was to insist that there were more effective ways of addressing the problem. (*Id.* at 24-29).

The Third District's opinion portrays the issue as one of "informational privacy," focusing on the City's requirement that Ms. KURTZ **disclose whether she was or was not a tobacco user**, which the court described as "intimate" and "private and personal information." **But no such claim was argued by Ms. KURTZ below.** Precisely because Ms. KURTZ's complaint was rather vague about the exact nature of her legal and constitutional claim, she was deposed prior to the summary judgment hearing so the City could ascertain the exact nature of her claims, and Ms. KURTZ provided the following testimony:

By Mr. Echarte (counsel for the City):

Q: Do you smoke?

A: Yes.

. . . .

Q: Now, when I initially came out into the lobby you were having a cigarette. is that correct?

A: Yes.

Q: Miss Kurtz, would it be fair to say that you smoke in public?

A: Yes.

Q: Do you consider smoking to be secret conduct that you engage in?

A: No.

Q: Do you consider the fact that you smoke to be a personal secret?

A: No.

(Kurtz depo. at p. 9; R. 2371).

Judge Shapiro entered his final summary judgment on August 21, 1992, sustaining the City's policy in all respects. Judge Shapiro held that Ms. KURTZ did not have a constitutional right to be employed by the City, and that the right to use tobacco is not a fundamental privacy or liberty right. The court rejected Plaintiff's equal protection attack, noting that the Fourteenth Amendment did not require a government to choose between attacking every aspect of a problem or not attacking the problem at all, and so Plaintiff's argument that the City did not exclude "Twinkie eaters" (or skydivers, overweight individuals, etc.) was irrelevant, because "[a] governmental entity is not bound to deal alike with all classes or to strike at all evils at the same time or in the same manner."[14]

The Third District decision: All of Judge Shapiro's findings and legal conclusions were sustained by the Third District, except on the Florida Privacy Amendment issue. As became quite clear at oral argument, the Third District understood that the **actual** policy at issue in the case was perfectly reasonable and that it made no

---

[14]App. Exh. "B." Judge Shapiro found that the City's employment policy had been promulgated to increase productivity, to reduce absenteeism, and to reduce the City's costs (all of which were undisputed); and that the regulation was based on proper evidence that smoking employees increased the cost of the City's insurance program which was funded by the City's taxpayers. The court found that the objectives achieved by the City regulation (including raising worker productivity) were proper governmental objectives. Judge Shapiro confirmed what Ms. KURTZ's attorney had already stipulated, that Plaintiff had the burden to show that there was no rational relationship between the City's regulation and any legitimate governmental objective; Judge Shapiro found that Plaintiff had failed to carry her burden of proof, and that the evidence presented by the City demonstrated that the government was seeking to achieve proper objectives and was using a proper method of achieving its objectives.

sense to speak of smoking as a "constitutional privacy right" or of smokers as a constitutionally protected class, and that there was no such thing as a smoker's "privacy right" to a government job. What disturbed the court, however, was the prospect that **this** policy might lead to bizarre future policies aimed at beer drinkers or bacon or Twinkie eaters.[15] To reach its goal of locking shut the floodgates against any such "trend," the district court repackaged Ms. KURTZ's actual claim -- of a smoker's constitutional right to equal public employment -- into one of "informational privacy" arising from the government's inquiry into so-called "sensitive personal information." Thus the Third District analogized the case to those involving the "disclosure of private information" through the use of pen registers, the disclosure of blood donor "confidential information," and the privacy of bank records and psychological/medical records; cases involving "the power to control what we shall reveal about our intimate selves." (Op. pp. 5-6). However, in deciding the case on that basis, the court was compelled to ignore the fact **that no such "informational privacy" claim has ever been upheld by a Florida court and that Ms. KURTZ had actually disclaimed any such "information privacy" interest in this case!**

SUMMARY OF ARGUMENT

The City is not directing Ms. KURTZ not to smoke, publicly or privately, and is not doing anything to stop such behavior. If Ms. Kurtz wishes to make the private, autonomous decision to smoke

---

[15]The court's "floodgates" hypothesis is revealed in the opinion itself, where the court wrote that the City's policy might be followed by regulations aimed at practices "such as drinking, eating, exercising and engaging in certain sexual practices." (Op. at p. 3).

herself to death, that remains entirely her private decision. The Florida Privacy Amendment does not **compel the public to pick up the tab for that private decision.** The Third District has confused private rights with public coddling, and has also confused civil rights (equal protection) with civil liberties (privacy). The district court's decision is also irreconcilable with **every Privacy Amendment case which has ever been decided by a Florida court.**

I

THE THIRD DISTRICT'S RULING IS WRONG AS A MATTER OF *STARE DECISIS*: THE RULING CONSTITUTES "AD HOC JURISPRUDENCE" AT ITS MOST ARBITRARY BECAUSE IT IS IRRECONCILABLE WITH ALL OTHER PRIVACY AMENDMENT DECISIONS.

As this Court is aware, the Florida Privacy Amendment has until now been given significant positive meaning only in the context of "right-to-die" and abortion where the government is seeking to compel or forbid some medical procedure on a live human body. Thus the Third District was unable to cite a single Florida privacy case which offers precedential support for its ruling. All the Third District could cite in the way of "authority" was a 1978 law review article by then-private attorney Cope (later one of the judges who decided *Kurtz* below), who was writing as an **advocate** with respect to the then-proposed Privacy Amendment.[16]

---

[16]In a prior privacy decision, this Court felt compelled to comment that the legitimacy of the courts was jeopardized when a judge acted as advocate and thereby jeopardized the "pretense of impartiality." *In Re T.W.*, 551 So. 2d 1186, 1190 (n.3) (Fla. 1989). For an appellate court panel to cite as its only "authority" the writings of a panel member **as a private advocate** before being appointed to the court also deprives the court of the pretense of impartiality.

Mr. Cope's pre-amendment article advocated the strongest possible construction of the proposed amendment in ways which have in every instance **been repudiated** by this Court. But Mr. Cope was very astute in one respect -- predicting that privacy cases would be decided in an arbitrary, "ad hoc" manner:

> The failure to adopt an explicit standard of review would create ad hoc decision making whereby individual judges would decide individual cases on their particular facts through an unarticulated balancing process.

(Cope, Florida's Proposed Right of Privacy, 6 Fla. St. U.L. Rev. 671, 744 (1978). In view of the ruling below, Mr. Cope's comment gives the phrase "self-fulfilling prophesy" a whole new meaning, for an objective review of the Florida Privacy Amendment jurisprudence proves that *Kurtz* itself constitutes ad hoc adjudication at its most arbitrary. This can be demonstrated by grouping together the three types of privacy cases:

MAIN CATEGORIES OF PRIVACY CASES

Category 1 -- Medical procedures involving government control over one's body:[17] In all of these cases the government sought to prevent or require a medical procedure on the body of some person. With the single exception of the *Powell* decision, the Florida courts have consistently held that individuals have a privacy right to decide what happens to their own bodies and the bodies of their family members, notwithstanding even the weightiest governmental

---

[17] *In Re T.W.*, 551 So. 2d 1186 (Fla. 1989) *Dade County v. Wons*, 541 So. 2d 96 (Fla. 1989); *State v. Powell*, 497 So. 2d 1188 (Fla. 1986); *John F. Kennedy Hosp. v. Bludworth*, 452 So. 2d 921 (Fla. 1984); *Korbett v. D'Alessandro*, 487 So. 2d 368 (Fla. 2d DCA 1986); *St. Mary's Hosp. v. Ramsey*, 465 So. 2d 666 (Fla. 4th DCA 1985); and *In Re Barry*, 445 So. 2d 365 (Fla. 2d DCA 1984).

interests in preserving life, protecting children from unnecessary abandonment, safeguarding medical ethics, preventing suicide, etc. **This entire category of privacy case law has no relevance to Ms. KURTZ.**

Category 2 -- Criminal Law Enforcement:[18] In these cases the government sought to catch and punish "vice" offenders and/or to obtain private information for vice or crime control purposes. In these cases the Florida courts consistently held that the government is entitled to do whatever it wants when it is chasing criminals, without even requiring the government to prove a compelling need to find and arrest pot smokers, gamblers, and dirty book sellers, etc.[19] **This entire category of privacy case law has no relevance to Ms. KURTZ.**

Category 3 -- Informational Privacy:[20] In all these cases the state required a person to disclose information which the government wanted to evaluate an applicant for public benefits or privileges. Except for *Kurtz*, the Florida courts have always held that the

---

[18]*Stall v. State*, 570 So. 2d 257 (Fla. 1990); *Shaktman v. State*, 529 So. 2d 711 (Fla. 3d DCA 1988), *app'd* 553 So. 2d 148 (Fla. 1989); *Winfield v. Depart. Pari-Mutuel Wagering*, 477 So. 2d 544 (Fla. 1985); *Reno v. Pelullo*, 469 So. 2d 906 (Fla. 3d DCA 1985); *In Re Getty*, 427 So. 2d 380 (Fla. 4th DCA 1983); and *Maisler v. State*, 425 So. 2d 107 (Fla. 1st DCA 1982).

[19]Not once has the state been required to prove a compelling or even significant need for its criminal "vice" laws, **nor** that a significant harm was posed by such "vice" offenses, **nor** that the methods used (invasions of the home by government agents; prison sentences, etc.) are the "least intrusive means" of controlling such perceived vices (which they obviously are not).

[20]*Forsberg v. City of Miami Beach*, 445 So. 2d 373 (Fla. 1984); *Florida Board of Bar Examiners re Applicant*, 443 So. 2d 71 (Fla. 1983); *Douglas v. Michael*, 410 So. 2d 936 (5th Dist. 1982), *aff'd* 464 So. 2d 545 (Fla. 1985); and *Kurtz v. City of North Miami*, 625 So. 2d 899 (Fla. 3d DCA 1993).

government's interest in evaluating the qualifications of applicants outweighs any privacy interest in nondisclosure.

Obviously *Kurtz* is an "Category 3" case, yet is the only one where -- (i) the claimant **did not even assert an informational privacy interest**; (ii) the government has **actually proved** why it needed the information; (iii) the **least intrusive means were being used**; and (iv) **the government lost.** Except for *Kurtz*, the only time the government has ever been stopped in its policies is when it sought to invade the **physical autonomy of a live human body**, as in *In Re T.W.*, *Wons*, and the "right-to-die" cases. In all other cases, whether the government sought to invade dead bodies (*Powell*), or to search and seize live bodies (i.e., *Reno* and *Maisler*) or surreptitiously obtain highly private information (i.e., *Winfield*, *Shaktman*, etc.), the government was allowed to do so. Except for *Kurtz*, the government has **always** been allowed to require information-disclosure by applicants (*Bar Examiners*; *Forsberg*), yet this case actually involves the **least intrusive** of all "information disclosure" cases, and the only one where the applicant actually **disclaimed** an "informational privacy" interest and the government actually proved the need for its policy!

Given this background, the opinion below can only be described as a throwback to the Supreme Court's "substantive due process" decisions during the 1930's, in which Supreme Court judges decided what social legislation and policies they personally approved of and which they did not. As a leading constitutional law hornbook describes that period:

> But the rulings could not even be termed an economically consistent defense of laissez faire theories of economics. Instead, the justices

> upheld laws which they personally agreed would be necessary to protect important social goals even though the legislation involved some restraint on commerce, while they struck down as arbitrary legislation laws they considered to be unnecessary tampering with the free market system. Thus the independent review of legislation during this period resulted in an unprincipled control of social and economic legislation.

Nowak, et al., Constitutional Law, at 404 (West 1978).

In *State v. Powell*, 497 So. 2d 1188 (Fla. 1986), the plaintiff challenged the state-mandated practice of removing corneal tissue from accident victims without the consent of their next of kin. The regulation was challenged on all the grounds asserted by Ms. KURTZ in the instant case. This Court rejected the challenge, noting that the plaintiff in such a case must carry the "burden of establishing that the [regulation] bears no reasonable relation to a permissible legislative objective." *Id.* This Court did **not** apply the "compelling interest standard" applied by the Third District, even though the privacy intrusion in *Powell* was infinitely more severe than the non-intrusion *sub judice*. This Court in *Powell* reviewed the evidence concerning services for the blind and the process of corneal transplantation, and based on that empirical evidence of a public-health need the court decided that the legislation **reasonably supported a legitimate public policy**, notwithstanding plaintiff's claim that it violated fundamental privacy rights. The court remarked:

> We reject appellees' argument.... Neither federal nor state privacy provisions protect an individual from every governmental intrusion into one's private life . . . especially when the statute addresses public health interests.

Powell, *supra*, 497 So. 2d at 1193 (emphasis supplied).[21]

In *Florida Board of Bar Examiners re Applicant*, 443 So. 2d 71 (Fla. 1983), a bar applicant sought to withhold his medical and psychological records from the Florida Bar on privacy grounds, and this Court rejected a "privacy" claim with the comments that he had no right to be a lawyer anyway and that the Bar was entitled to decide what information it needed and the best means of gathering the information. Of all the Privacy Amendment cases, the two closest and most analogous cases are obviously this Court's decisions in *Bar Examiners*, *supra* and *Forsberg v. City of Miami Beach*, 445 So. 2d 373 (Fla. 1984). In both cases the government sought information about an applicant for a government benefit or privilege to which the applicant had no constitutionally-protected right, just as Ms. KURTZ has no constitutionally-protected right to be employed by North Miami. And the only "distinctions" which can be drawn between Ms. KURTZ and the applicants in the *Bar Examiners* case and *Forsberg* further undercut the ruling below: (i) in this case the government has actually proven why it need the information and is using a **far** more narrow and non-intrusive methods of achieving its objective (in both the prior cases no such proof was

---

[21]It is impossible to square this Court's decision in *Powell* with the Third District's ruling that Ms. KURTZ has a fundamental privacy right as a smoker to be employed by the City of North Miami. It is, indeed, an appalling thought that a tobacco-user would be constitutionally entitled to public money to pay the costs of her vice, while a mother is deprived of constitutional protection even to prevent the government from surgically removing, without her knowledge or consent, the eyes of her recently-deceased child. Rights deemed "fundamental" to a free society are few and limited and if they do not protect that mother they surely do not grant Ms. KURTZ as a smoker the affirmative "right" to be employed by the City of North Miami!

provided or required by the court, and in fact none existed[22]); (ii) the governmental interest in this case has been proved by empirical evidence and is **far** more compelling than the vague **unsubstantiated** interest asserted by the Florida Bar;[23] (iii) most importantly, in both *Forsberg* and the *Bar Examiners* case, the applicants **actually asserted a claim of information privacy, while in the present case Ms. KURTZ specifically disclaimed any privacy interest** in the information requested.[24]

Therefore, this Court's decisions in *Forsberg* and the *Bar Examiners* case are plainly the most analogous cases, and both rejected the privacy claims, and each distinction that can be drawn between the cases works **against** the Third District's ruling below.

---

[22]For the Florida Bar to have used the **non-intrusive** means used by the City *sub judice*, it would merely have asked the applicant to certify that he had not been institutionalized for a psychiatric condition within the twelve months preceding his application, and left the matter at that, a **far** less intrusive requirement than the highly intrusive policy sustained by this Court in the actual case.

[23]While the City has actually **proved** that tobacco use constitutes the greatest public health problem of our era, and is costing the community of North Miami millions of dollars to subsidize, the Florida Bar was not required to produce even a whiff of evidence that persons who had (for example) suffered from anxiety or insomnia in college posed a significant hazard to the citizens of Florida.

[24]This Court in *Shaktman v. State*, *supra*, held that the parameters of an individual's privacy **can only be dictated by the individual himself** (553 So. 2d at 151), and depended on "objective manifestations" of the individual's privacy expectation. (*Id.* at 153). See also *Slim-fast Foods Co. v. Brockmeyer*, ___ So. 2d ___, 18 Fla. L. Wkly. D2490 (4th DCA 1993), in which the court cited *Stall* for the proposition that there could not be a reasonable expectation of privacy when the party asserting such a privacy interest had not objectively manifested that expectation. Ms. KURTZ "objectively manifested" that she did not think there was anything private about the information that she was a smoker.

The privacy claim in this case is **far less** deserving of constitutional recognition than the claims which were **rejected** by this Court in the prior cases! In *Powell*, *Stall*, *Maisler*, *Shaktman*, *Reno*, and *In Re Getty*, the government was allowed by the courts to intrude quite severely into private affairs.[25] Privacy concerns were of so little consequence in these cases that the ready availability of less intrusive alternatives was not even noted, and in only one (*Powell*) was there even an **attempt** by government to actually prove a compelling need for the intrusion. Still the intrusions were allowed. And in cases involving **lesser** intrusions (the "applicant-disclosure" decisions in *Forsberg*, *Douglas*, and *Bar Examiners*), the intrusions were also allowed despite the availability of less-intrusive alternatives and the absence of proof of a compelling government need for the disclosures, and all those cases involved privacy intrusions **far** more pronounced than that which occurred here. All prior "applicant-disclosure" cases involved **broad** disclosure of very **confidential** information; here the government seeks extremely **limited** disclosure (a single "yes or no" question) of non-private, non-confidential information.

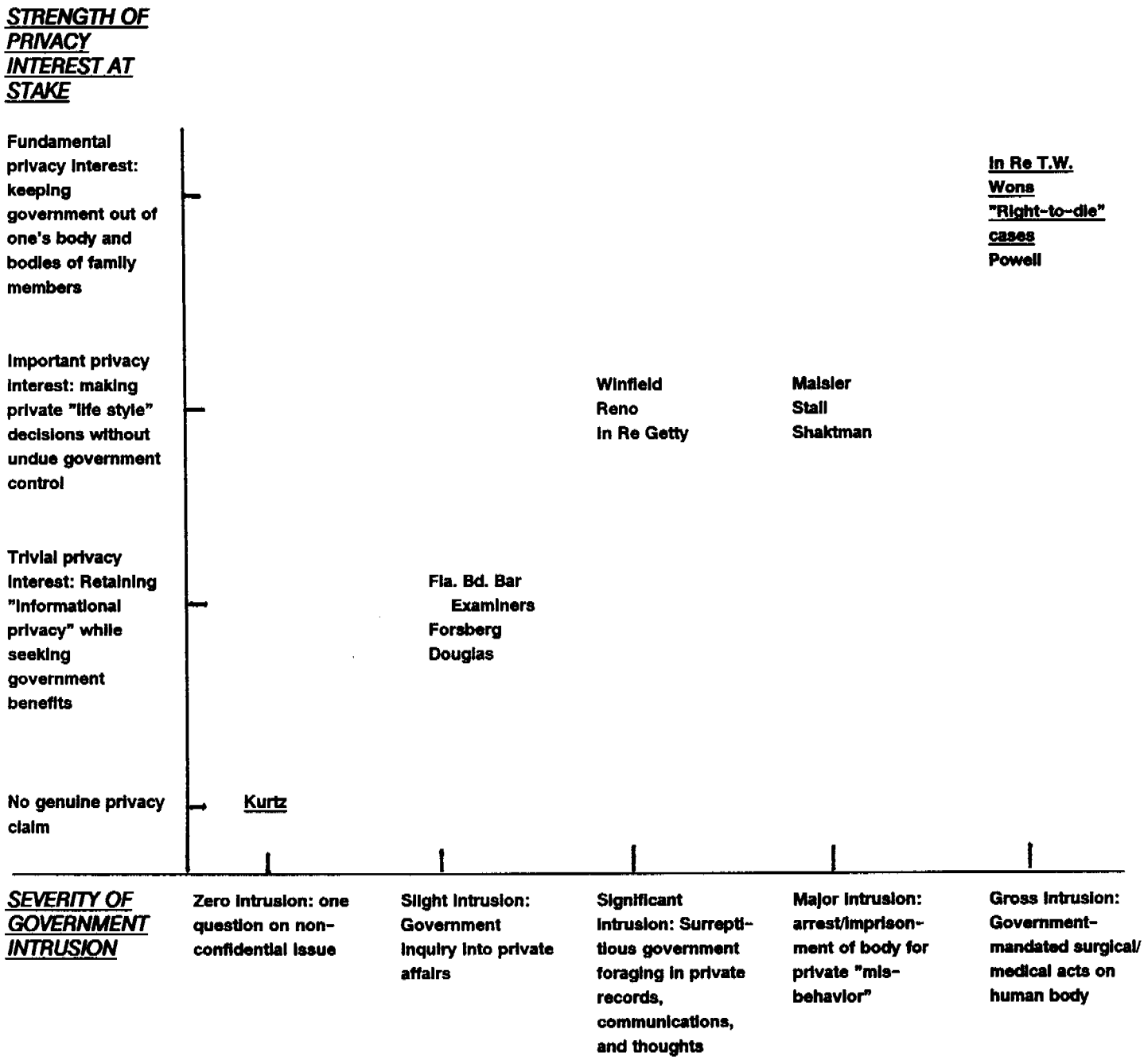
The following table shows graphically that *Kurtz* lies at the **exact opposite end** of the scale from the only other cases where Florida Courts have sustained a privacy claim:

---

[25]*Powell* authorized the government to steal human body parts without the knowledge or consent of family members, despite the deep familial and religious privacy rights thereby encroached; in the other cases the government was allowed to surreptitiously forage through private records, communications and thoughts, and to actually seize and imprison live bodies, mostly because some adult citizen had the audacity to decide to smoke a socially-unacceptable plant (one on the legislature's "disapproved" list), or to gamble outside the government-controlled gambling cabal.

TABLE A

Distribution of Privacy Rulings in Terms of (i) Severity of Governmental Intrusion, and (ii) Significance of Privacy Interest at Stake



KEY: *Cases underlined are those in which courts barred government action on Privacy Amendment grounds.*

If one considers this case in substantive "personal autonomy" terms (rather than "informational privacy" terms), the City's policy is **far** less intrusive than **any** of the criminal "vice control" cases where the government was allowed to **imprison** people for their private behavior, rather than merely withholding taxpayer subsidies. Those government policies were <u>always</u> sustained despite no proof whatever of a need for the "vice-control" policies and despite the availability of far less intrusive means (such as those applied *sub judice*!).

It is therefore quite impossible to reconcile the ruling below with any of the other Privacy Amendment cases, either in terms of actual rulings or in terms of the formally-articulated standards of judicial review. As shown immediately below, the <u>reason</u> the <u>*Kurtz*</u> ruling is irreconcilable with the Privacy Amendment case law is that it misconceived and misapplied the fundamental principles of constitutional privacy.

II

THE THIRD DISTRICT'S RULING IS WRONG IN PRINCIPLE: NO SENSIBLE DOCTRINE OF "CONSTITUTIONAL PRIVACY" REQUIRES A COMMUNITY TO HIRE SMOKERS.

1. <u>Introduction</u>

The City's statement of the facts goes to considerable length to show that the City's regulation will, by not continuing to subsidize the avoidable costs of private self-poisoning, promote the single most compelling public health objective of our age. By gradually reducing the number of tobacco addicted employees, the City will not only save millions of dollars and increase

productivity, but will also be doing its part to end government collaboration with what is, objectively speaking, our nation's greatest public health menace.[26]

The entire issue of how to deal with smoking is a major social and political issue to be addressed and ultimately resolved by the democratic political process, not "confiscated" by the courts through pseudo-constitutional adjudication. The democratic political process is perfectly capable of working out reasonable accommodations of the smoking controversy without courts inventing spurious new "civil rights." This is shown by existing and proposed state laws in Florida and other states. For example, Section 633.34(b), Fla. Stat., provides that cities and counties may not employ firefighters who have smoked tobacco within a year preceding employment. That legislation was based on economic objectives indistinguishable from those which motivated the City's policy.[27] In

---

[26]It is appalling that the Third District would imply that the City's policy does not advance a compelling public objective. Four hundred and twenty thousand dead Americans every year due to a commercially-promoted product represents a "compelling" problem if ever there was one. If a community's attempt to formulate reasonable disincentives to combat smoking does not reflect a "compelling" policy, **then no compelling policy could ever exist.** Assuming it takes each Florida Supreme Court Judge 20 hours to read the briefs and discuss and decide this case, then 6,392 Americans will have been killed by the tobacco industry in the 140 hours this Court actually spends on the case, a case in which the responsible product seeks to be classified not as an implement of mass murder (which it is), but rather a "constitutionally protected privacy right."

[27]If the City's policy is unconstitutional **then so is § 633.34(b)** because it cannot be distinguished on "job functionality" grounds. Just like the policy *sub judice*, § 633.34(b) was enacted because of the financial drain of public money to pay claims of job-related illness due to "smoke inhalation" when such illnesses

(continued...)

addition, "smokers' rights laws," which would have banned Florida governments from having special employment policies for smokers, has already twice passed the Florida legislature. House Bill 1753 (S.B. 1238) (1992) proposed to make it unlawful for employers to discriminate on the basis of an employee's off-duty use of tobacco except in certain cases. The bill was vetoed by Governor Chiles on April 10, 1992. Likewise House Bill 1799 (1990) prohibited any employer from taking any disciplinary action against employees because of their off-duty use of tobacco. That bill was vetoed by Governor Martinez on July 3, 1990. Similar "smokers' rights laws," prohibiting employers from refusing to hire smokers (e.g., Oregon Rev. Stat. §659.380 (1991); Va. Code Ann. 15.1-29.18 (1989)), have been adopted in approximately 25 states, and been defeated in approximately 25 states, including (barely) Florida. Garner, Protecting Job Opportunities of Smokers, 23 Seaton Hall L. Rev. 417, 422 (1993). The issue is clearly one of public policy for the legislature to decide, not an excuse for the invention of a spurious new "civil right." As Professor Garner states:

> If the deep suffering caused by 400,000 smoking deaths a year is ever going to be relieved, smoking must not receive the imprimatur of social approval accorded such activities as going to the church of one's choice. One of the very last things America needs is to see its hard earned public health gains derailed or compromised by dignifying smoking as a protected constitutional right. *Id.* at 431.

---

[27](...continued)
were actually self-inflicted due to smoking. The governmental budgetary interests promoted by § 633.34(b) is thus indistinguishable from North Miami's interest in reducing medical claims due to employees' self-inflicted illnesses.

Courts traditionally intervene on constitutional grounds to protect civil rights and liberties when the democratic political process is structurally incapable of achieving fairness, e.g., because of deep-seated historical and cultural prejudices or political disenfranchisement. As the United States Supreme Court remarked in *Harris v. McRae*, 448 U.S. 297, 306, 100 S. Ct. 2671, 65 L. Ed.2d 784 (1980), it is a deeply rooted doctrine that courts ought not pass on questions of constitutionality except when such adjudication is unavoidable. "Smoking and the public health" is a **political** issue of epic proportions, one in which tens of millions of Americans and major political, medical and commercial interests are actively involved. (See, i.e., Traynor, *et al.*, "New Tobacco Industry Strategy to Prevent Local Tobacco Control," 270 J. A.M.A. 479 (July 1993)). For courts to leap into **this** political thicket to end the political debate on pseudo-constitutional grounds is both anti-democratic and extremely misguided.

2. <u>The Make-Believe "Privacy" Issue</u>

Applicants for public employment who smoke have no constitutional right to require taxpayers to finance the consequences of their private conduct. There is not even an arguable "privacy" issue in this case. Putting aside philosophical and political opinions about whether the public "ought" or "should" continue using taxpayer funds to subsidizing the medical and productivity costs of smoking (an open **political** question which the democratic process should decide), the <u>Florida Constitution</u> surely does not decide the issue. Sucking carcinogenic smoke, like jumping

motorcycles over the Grand Canyon, may or may not be good American pastimes, but neither activity is a constitutionally-protected "civil right" which taxpayers are **constitutionally-forbidden from taking into account in making employment decisions.**

ARLENE KURTZ has failed the threshold requirement of showing a legitimate expectation of privacy which has been invaded or encroached by the City. Ms. KURTZ has asserted that smoking tobacco "is a matter which should be left to the individual" and that may be a valid philosophical opinion. What both Ms. KURTZ and the district court have failed to explain is why, as a matter of constitutional doctrine, individuals are entitled to foist the costs of their private behavior on the public. The City's policy does not stop Ms. KURTZ from choosing to smoke, and she surely has no constitutional privacy expectation as a smoker to be hired for a government job.[28]

In *Winfield*, *supra*, 477 So. 2d 544, 547 (Fla. 1985), this Court held that a plaintiff must make a threshold showing of an intrusion into a personal decision which is protected by the privacy amendment. *Id.* at 547. In the present case, ARLENE KURTZ has not and cannot meet that **threshold** requirement of demonstrating a legitimate expectation of privacy as a smoker in gaining employment

---

[28]Ms. KURTZ acknowledged in her deposition (at p. 23), that the City's regulation does not regulate or restrict her private conduct; the policy merely declines to accept the financial and other burdens which result from such privately self-destructive behavior. Because the very idea of a "smokers' right of privacy to a government job" is unintelligible, the Third District had to convert the issue into one of "informational privacy" even though Ms. KURTZ did not even assert an "informational privacy" interest in this case.

by the City of North Miami.[29] In *In Re T.W.*, *supra*, this Court emphasized that the Privacy Amendment shielded **"those privacy interests inherent in the concept of liberty."** It is preposterous to suggest that cigarette smoking -- which is merely a filthy habit akin to sidewalk spitting except **infinitely** more dangerous and costly -- is so fundamental to our concept of human liberty as to demand public subsidization. Even Ms. KURTZ's attorney conceded that "smoking as a private conduct is not protected as a fundamental right." (Nov. 25, 1991 TT. 7). What is even **more** preposterous is the idea that fundamental liberty concepts mean that smokers-*qua*-smokers have the right to public employment.

The government **could** constitutionally add tobacco to its list of controlled substances (as it has in the past and will someday do again). Such a prohibition, even if enforced by criminal sanctions, will not violate constitutional privacy rights. But the City has **not** proscribed possession or use of tobacco at home or even in public, it has merely declined **to assume the financial burdens** which arise from Ms. KURTZ's private decision to use "the only legal product that when used as intended causes death."

The City, in declining to continue hiring employees who smoke, is not intruding into Ms. KURTZ's private life. The City does not

---

[29]For the proposition that there is no such thing as a constitutional right to a government job, see *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 311, 96 S.Ct. 2562, 2565, 49 L.Ed. 2d 520 (1976); *McDonald v. Mims*, 577 F.2d 951 (5th Cir. 1978); *Purdy v. Cole*, 317 So. 2d 820 (Fla. 2d DCA 1975); *Smith v. Golden Beach*, 403 So. 2d 1346 (Fla. 3d DCA 1981); *Parsons v. County of Del Norte*, 728 F.2d 1234 (9th Cir. 1982); and *Orange County v. Dept. of Labor*, 636 F.2d 889 (2d Cir. 1980),

care if Ms. KURTZ smokes 10 cigarettes at a time or injects nicotine into her veins; it simply is not going to employ her so long as she engages in such conduct, because, if she becomes a public employee, sooner or later the City and its residents will have to pay the resulting medical bills. If Ms. KURTZ has the privacy right to smoke, then she must be willing to accept private responsibility for the consequences as well! So Ms. KURTZ cannot satisfy the threshold requirement of showing that the challenged regulation encroaches on her legitimate privacy interest.

Even if Ms. KURTZ as a smoker had a legitimate expectation of privacy in being employed by the City (which she does not), the affidavits and testimony and exhibits demonstrate public health interests which far outweigh her "privacy" interest in having the public "pick up the tab" of her private vice. The taxpayer interest in not continuing to **subsidize** with public money the costs of smoking by its public employees (and not being "collaborators" in a system of mass-murder for private profit), far exceeds ARLENE KURTZ's interest in being a **"smoking public employee."**[30]

An analogous line of privacy cases are those challenging state laws requiring motorcyclists to wear helmets. Those cases are analogous because the fundamental concept of human liberty no more

---

[30]The Florida courts frequently apply a "balancing approach" to determine whether the Florida Privacy Amendment has been violated. In *Rasmussen v. South Florida Blood Service, Inc.*, 500 So. 2d 533 (Fla. 1987), the plaintiff claimed he had obtained AIDS from blood supplied by the defendant, and subpoenaed the records of blood donors. This Court balanced the competing interests of Rasmussen with those of the donation system, and concluded that the interest in preserving a strong blood donation system outweighed Rasmussen's interest. *Id.* at 537.

includes a "right to ride motorcycles bareheaded on public highways" than it does a "smoker's right to a city job." In *Picou v. Gillum*, 874 F.2d 1519 (11th Cir. 1989), the court rejected a challenge by motorcyclists to helmet laws on privacy grounds. The court observed that motorcyclists suffer injuries on public roads and thoroughfares and **the costs of their injuries are borne in whole or in part by the public, and that unless society is willing to abandon accident victims to bleed to death on the highway, such self-destructive behavior "plainly imposes costs on others."** Because there is no fundamental right of privacy to ride motorcycles bareheaded, the government regulation was sustained merely because it was rational. The proper balance between personal autonomy and public welfare, the court held, was not a question to be answered by the judicial branch of government; the wisdom of such policies, the court held, was "a political, not a judicial issue."

The issues presented by this suit are many -- medical, fiscal, political, and social -- but they are not constitutional: Tobacco use no more deserves constitutional protection as a privacy right than does "bareheaded motorcycle riding," and even if it did, the City's policy does not even restrain such private conduct! As one legal commentator has remarked, "Making the world safe [or 'cost-free'] for smoking and smokers is most certainly not the goal of civil rights laws, and were tobacco use to go the way of spitting on the streets, no one who cares about civil rights would mourn its passing." Garner, Protecting Job Opportunities of Smokers, 23 Seaton Hall L. Rev. 417, 430 (1993).

If courts define smokers as a constitutionally-protected class, or smoking as a civil right (which no court except the Third District has done), then all of the convoluted issues which arise in cases involving sex, race and religious matters would inexorably follow.[31] Legislative bodies are not only empowered but are **equipped** to write statutes which carefully balance the various competing interests raised by these and myriad other such questions, but when courts mistakenly "constitutionalize" such issues they invite a deluge of needless litigation and, even worse, they **prevent reasonable legislative accommodations to reasonably balance the competing interests involved.**[32]

---

[31]Are employers to be required to ensure that no disparate impact existed through their hiring patterns? Will quotas now be required to protect "people of smoke"? Indeed, if smokers have the "civil right" to equality of public employment, then why is the ACLU willing to agree that the City could lawfully refuse to **insure** Ms. KURTZ (or impose additional assessments against her but not against nonsmoking employees) -- the Constitution certainly would not allow such class-discrimination against any **other** constitutionally-protected classes, such as homosexuals, Haitians, Mormons or Communists. For that matter, if smoking is a civil right, then how could a court sustain the "segregation" of smokers in all public facilities, in accordance with Federal and state statutes?

[32]Garner, *supra*, at 434-435, argues in favor of well-balanced, carefully-tailored legislation to secure protection to smokers while protecting the needs and interests of taxpayers and various employers. Specifically recommended are special rules for governments who should **not** use public taxes for subsidizing smokers' illnesses:

> [T]here seems to be a much more fundamental reason why a municipality may appropriately choose to hire only nonsmokers.... Public revenue, first and foremost, should be used to provide public necessities, not to compensate those who suffer from smoking-related illnesses.

(continued...)

Reasonable men and women (including judges) may certainly disagree about the **wisdom** of the City's regulation. Those of a libertarian bent will condemn it (along with helmet and seatbelt and a thousand of other public safety laws) as unnecessary government meddling; others may insist there are better ways to achieve the same objective; still others will applaud it as a responsible step which finally takes seriously all the scientific findings and official federal appeals for public institutions to recognize and combat the deadly "stranglehold" which the tobacco industry has promoted. But Judge Shapiro did not sustain the City's regulation because he personally "agreed" with it or thought it "wise." Judge Shapiro sustained the City's regulation because he recognized that judges (whether trial judges or Supreme Court judges) are not entitled to invalidate such a regulation because they disagree with it or consider it unnecessary or unwise. As the United States Supreme Court emphasized in a conceptually-identical case (involving the issue whether governments were required to provide public support for abortion), when the courts are dealing with sharply divided public-policy controversies, they are not to strike down particular governmental judgments because they are seen as "unwise,

---

[32](...continued)
Thus Garner's proposed model "Equal Employment Opportunities for Smokers Act" provides that **most** private employers may not refuse to hire smokers merely because of their off-duty smoking, but **exempts** from that prohibition all governmental employers. *Id.*

improvident, or out of harmony with a particular school of thought." *Maher v. Roe*, 432 U.S. 464, 97 S. Ct. 2376, 53 L. Ed.2d 484 (1977).[33]

The decisive failure in Ms. KURTZ's case is her inability to cite an underlying constitutional right which applies to her "smoking conduct," much less gives her a "right as a smoker" to a government job. Never before has it been accepted by **any** court that citizens have a constitutional right to smoke, nor to get a government job, much less to do both simultaneously. Given the hundreds of federal, state, and local laws restricting and burdening tobacco use and distribution, it is obvious that there is no underlying constitutional right at issue in this case.[34]

---

[33]When the issue involves the policy choice whether to continue using public money to subsidize abortion **or** smoking, in a democracy the courts are not the appropriate forum for its resolution. *Maher*, *supra*, 432 U.S. at 479. As the Supreme Court stated in *City of New Orleans v. Dukes*, 427 U.S. 297, 306 (1975), the judicial branch of government is not in business to judge the wisdom or desirability of legislative determinations, so long as fundamental rights are not involved. As the Third District itself once recognized, courts do not sit in judgment as arbiters of the "wisdom or utility" of social and economic regulation. *Jones v. Gray & Sons*, 437 So. 2d 8 (Fla. 3d DCA 1983). The wisdom of the City's policy raises political questions which the Florida Legislature has already repeatedly addressed and one day soon will undoubtedly resolve through appropriate legislation **provided it is not prevented from doing so** by the judiciary's improvident "constitutionalization" of the entire issue.

[34]See, for example, *Craig v. Buncomb County*, 343 S.E.2d 222 (N.C. App. 1986) (rejecting equal protection challenge to smoking regulations; *Rossie v. State Dept. Revenue*, 395 N.W.2d 801 (Wis. App. 1986) (rejecting an equal protection challenge to "locational" ban on smoking); *Fagan v. Axelrod*, 555 N.Y.S.2d 552 (N.Y. Sup. Ct. 1990) (ditto); *Grusendorf*, *supra*, (rejecting a privacy challenge to an off-duty smoking ban by municipal employees); *Diefenthal v. CAB*, 681 F.2d 1039 (5th Cir. 1982) (upholding the smoking ban on airplanes); *National Association Motor Bus Owners v. United States*, 370 F. Supp. 408 (D.C. Dis. 1974) (upholding ICC restrictions on smoking on interstate buses); *Tanton v. McKenny*, 197 N.W. 510 (continued...)

In *Grusendorf*, *supra*, Oklahoma City had a policy of prohibiting firefighters from smoking at all, and **Mr. Grusendorf was fired when he took three puffs from a cigarette off duty.** *Id.* at 540. The Tenth Circuit addressed Grusendorf's privacy claims and found that the government was legitimately seeking to promote health and safety interests, and upheld the firing. *Id.* at 543. *Grusendorf* cannot be "distinguished" on the grounds that Mr. Grusendorf was a fireman rather than a secretary. The policy in *Grusendorf* (just as in § 633.34 Fla. Stat.) was not based on that sort of "job performance" considerations at all, but rather on considerations relating to the public cost of self-inflicted illnesses due to smoking. The only **true** distinctions between *Grusendorf* and this case are these:

(i) Mr. Grusendorf was **employed** and **fired** by, the government, while Ms. KURTZ was a mere applicant, and it is black letter law that the rights of existing employees are far higher than those of a job applicant like Ms. KURTZ.

(ii) The North Miami policy has been implemented through **far less intrusive means** than the policy in *Grusendorf*. North Miami merely requires job applicants to affirm that they have not smoked and (**unlike** Oklahoma City) does not threaten them with termination if they do smoke after employment; and the City's policy does not subject applicants to any lie detector tests or blood or urine examination and therefore is far less intrusive than every private

---

[34](...continued)
(Mich. 1924) (upholding the suspension of a college student for smoking on a public street); *Austin v. Tennessee*, 179 U.S. 343, 45 L. Ed. 224, 21 S. Ct. 132 (1900), sustaining a state ban on cigarettes altogether.

life insurance policy issued in the United States. (See 1989 Surgeon General's Report; Petitioner's Comp. Exh. IV, part II, at pp. 546 *et seq.*).

3. The Spontaneous Generation of a New Civil Right

There is a strange sort of "constitutional mathematics" at work here: (1) It is well-established that Ms. KURTZ had no constitutional right to a government job. (2) Everyone concedes that the substance (tobacco) and the behavior (smoking) are not **themselves** constitutionally protected, the Florida Constitution does not say or imply that any particular species of plant (tobacco, marijuana, asparagus) is **itself** constitutionally sacrosanct; and sucking smoke into one's lungs is not itself constitutionally protected that way church-attendance and newspaper-publishing are.[35] (3) Everyone concedes (including the Third District) that the City of North Miami has not violated Ms. KURTZ's equal protection rights by discriminating against smokers as a class, because the City's policy is rational and serves a legitimate objective, and cigarette smokers are not a suspect class nor is tobacco-use a fundamental

---

[35]There is no reason to place tobacco above other comestibles for special status under the Florida Constitution, as distinguished from bathroom thermometers, pencil erasers or miniature marshmallows. In *Austin v. Tennessee*, *supra* 179 U.S. at 343, the Supreme Court addressed a Tennessee statute making it unlawful to have certain tobacco products within the state. Recognizing the state's power to impose restrictions upon the sale of "noxious or poisonous drugs," the Supreme Court ruled that it was within the province of government to prohibit the sale of cigarettes altogether. *Id.* at 348. The Court compared such a prohibition with those against diseased cattle. Because it was (even then!) reasonable to assert that the use of cigarettes was "pernicious altogether" and "hurtful to the community," the Court held the government competent to ban cigarettes entirely.

right. (4) The City is not even preventing Ms. KURTZ from her private conduct but merely refusing to use public funds to subsidize her private conduct, and so obviously it is not encroaching on her legitimate privacy interests.

Yet from all these negatives the Third District has produced a positive new civil right, the right of smokers-*qua*-smokers to government employment:

+ 0 (no constitutional right to City job)
+ 0 (no constitutional protection of tobacco or smoking)
+ 0 (no irrational discrimination against constitutionally-protected class)
+ 0 (no impairment of privacy)
= 1 (constitutional privacy right of smokers' to City job)

The Six Major Fallacies in the District Court's Ruling: It is because this "peculiar mathematics" **does not add up** that the Third District muddied up its opinion with extraneous and illogical remarks. The very first sentence of the opinion offers a strange phrasing of the constitutional issue: Whether the City may require prospective job applicants to refrain from "lawful" conduct as a precondition of employment. The "lawful" nature of Ms. KURTZ's vice is the most crimson of red herrings. If a majority of Florida legislators were to decide that "watching television naked" (or having an abortion!) was unlawful, and Ms. KURTZ were prosecuted for such an offense, the fact that her conduct was "unlawful" would **beg** rather than **decide** the constitutional issue. Ingesting "X" leaves (tobacco, cannabis, cocaine, lettuce) is either constitutionally-protected or it is not, and that determination is **supposed** to depend on whether the government can **prove** the substance sufficiently harmful to warrant restraint. It completely begs the constitutional

question to say that a majority of Florida legislators voted in favor or against a practice, which has no more constitutional significance than citing the Gallop Poll! People do not have a privacy right to abortion because a legislature decided that such conduct is "lawful"; slavery would not be constitutional even if still "lawful" in Alabama; using condoms and advocating Communism does not lose constitutional protection if a state or local government makes such behavior "unlawful." **Laws do not determine what things or behaviors are constitutionally protected**, otherwise the Constitution would merely parrot whatever current legislatures decided. In addition, the district court's "lawful versus unlawful" distinction would mean that the government must always use the most intrusive means (criminalization) to deal with any problem, rather than a less intrusive means such as removing public subsidies but otherwise permitting the conduct or substance to lawfully continue![36]

Tobacco is either constitutionally protected or it is not. If it is constitutionally protected, then no legislative body could

---

[36]The "lawfulness" of being a smoker is utterly irrelevant for another reason, and one which highlights the fallacy which underlies the entire district court opinion. It was perfectly "lawful" for the bar applicant in the *Bar Examiners* case to have seen a doctor or psychologist; and it was perfectly "lawful" for the housing applicant in *Forsberg* to have financial records. Nor is there anything "unlawful" in being opposed to blood transfusions on religious grounds (*Wons*); nor in wishing to be asked before the government removes body parts from one's dead child (*Powell*). Thus the district court's reference to the "lawfulness" of Ms. KURTZ's behavior reveals that the **real** reason for its decision is not "informational privacy" at all (as it claims), but rather the sort of "substantive due process" approach which was repudiated over 60 years ago: the term "lawful" is merely a code-word for "approved by this court."

ever decide that it could be "unlawful." Yet as seen by the Supreme Court decision in *Austin v. Tennessee, supra*, past legislative bodies have decided that tobacco is unlawful, and the Supreme Court of the United States sustained the legislation, and there is **not a word** in the Florida Constitution classifying tobacco with bibles or political pamphlets. If it is constitutional to make tobacco-use a crime, then *ipso facto* it cannot be unconstitutional for a government to not make it a crime but rather to impose some lesser disincentive on its use, i.e., limiting its use on instruments of interstate travel, restricting its advertising, prohibiting its use in any public facility (all of which have been done by the state, local and federal governments), or by the **less intrusive** and therefore constitutionally-**preferred** method of withdrawing public subsidies.

Two more errors in the Third District's opinion are contained in its statement that:

> The city argues it has a compelling interest in saving money for taxpayers by employing only healthy applicants. However, if the city has a compelling interest in saving money for taxpayers by employing only healthy applicants, the city could conceivably seek to regulate **other lawful private activities that affect a person's physical health such as drinking, eating, exercising, and engaging in certain sexual practices.**

(Op. at p. 3).

First (as already noted), the City does not merely assert a compelling interest in "saving money," a phrase selected for the obvious purpose of denigrating what is actually at stake here.[37]

Secondly, the Third District had no right to strike down a reasonable government policy on the basis of the court's concern over **future** policies which might follow, i.e., policies related to "drinking, eating, exercising, and engaging in certain sexual practices." A court may not decide a case before it by speculating about other cases which are not before it. The Third District's "floodgates" analysis is not only wrong in **principle**; it is also wrong in practice, for the **practical fact** is that if some government adopts a policy concerning the drinking or eating or sex habits of prospective or current employees, its policy would have to be evaluated and weighed based on actual **evidence** which, if it even exists, is simply not part of this record! **This** case should have been decided on the basis of the actual evidence, not on the basis

---

[37]No court would question a government's **compelling** interest in controlling the distribution of "Saturday Night Specials," halting drunk driving, dealing with teenage suicides, and preventing the transmission of AIDS and heroin. Yet tobacco kills far more people than all of these evils put together. Because this pernicious situation has persisted for generations, it tends to be seen as somehow "normal" (as slavery and judicially-supervised torture once were), but governments obviously must stop treating as "normal" the sale and use of a product which is killing 420,000 Americans each year. Citizens are not obligated to agree with those, such as every Surgeon General since the Eisenhower Administration, who say that governments must combat tobacco-use at least to the extent of instituting **disincentives** to smoking which are comparable in impact to the billions of dollars in promotion spent each year by the tobacco industry, and presumably three members of the Third District did **not** agree, but such disagreements are exactly why we have a democratic form of government. The Third District is not a proper party to **that** debate.

of the Third District's alarmist vision of a "Twinkie parade of horribles."[38]

Still another error in the Third District's opinion is its repeated use of the phrase "unrelated to job function." Like the "lawful conduct" phrase, this too is a red herring. The City's policy was never justified on the theory that a typist or code inspector who smoked cigarettes somehow **was a less effective typist or code inspector, just a less effective public employee**! The City's policy was always justified by overwhelming empirical evidence that smoking workers (whether police, firemen, secretaries or code inspectors) become sick and die more than non-smoking workers, and that higher rate of morbidity and mortality meant they were twice as much absent from work (both due to persistent illnesses and hospitalization, as well as to continual "off-duty" disappearances for cigarette breaks), **which made them far less productive as public workers.** So the use of tobacco is absolutely related to the employee's "job function, for the primary "job function" of **all** public employees is to **do their jobs**, and obviously their jobs are not being performed when the employee hired to perform that job is off work **45 days of the year for smoking related illness** and spending more than an extra hour a day hiding in the bathrooms.

---

[38]It is unfortunate that the district court swallowed the ACLU's "Twinkie" tautology. Smoking is truly *sui generis* in terms of its devastating impact on public health, and it is sophistry to suggest that a city policy refusing to hire people unless they stop smoking (justified by 420,000 dead Americans every year) is to be held unconstitutional because it will otherwise "spawn" into hob-nailed Twinkie-police rummaging through our pantries.

The fifth and most fundamental error in the Third District's opinion is that it confuses free choice with a free lunch. It reflects a basic misunderstanding of the underlying concept of individual liberty to convert it from a **shield against** government interference with one's autonomy, into a **sword** to obtain public support or taxpayer subsidies. Under the City's policy, Ms. KURTZ retains the complete personal freedom to smoke. Ms. KURTZ's liberty to smoke is apparently not sufficient for the Third District, however, for it holds that Ms. KURTZ is entitled to foist the cost of that private choice onto the public, no matter what **it** may feel about having to pay those costs. The Third District holds that the concept of constitutional liberty demands **public** subsidization of private conduct. But it is neither "freedom" nor "liberty" to require other citizens pick up the tab for one's private choices. That road leads to dependency, the very opposite of freedom. It is very disconcerting to see Florida appellate judges adopt as constitutional doctrine the widespread public misconception that freedom to do one's own thing means the freedom to do one's own thing at someone else's expense.[39]

---

[39]The confusion here is profound: Smoking is a form of dependency nurtured by organized pushers with the historical connivance of governments. To call a deadly dependency a "liberty" interest is a grotesque misuse of language. And if privacy meant anything it would mean autonomy and independent, not **dependence** on the charity of neighbors to pay for one's choices. It may be fine for a city to charitably decide to carry these burdens, but the point is that no community is **constitutionally required** to make that choice. The law does not inhibit adult Americans from ingesting alcohol to the point of stupefication, yet it is a crime to drive a motor vehicle while drunk, because drunk driving results in heavy **public** expenses. That "garden variety" legal distinction (continued...)

To translate Ms. KURTZ's claim into the claims asserted by other "privacy right" claimants who have appeared before this Court, Ms. KURTZ is demanding not that the government **permit** her to read dirty books, have an abortion, smoke pot or gamble, but rather that the government **help pay** for those private pleasures with public money. As it happens, the United States Supreme Court has confronted **that very claim** -- that the full enjoyment of a "privacy right" demands taxpayer support, and it has consistently rejected it. See *Webster v. Reproductive Health Services, Inc.*, 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989); *Harris v. McRae*, *supra*, 448 U.S. 297 (1980). In *Webster*, Missouri law provided that public money could not be spent for abortions and the Supreme Court held that there was no "privacy right" to public support even if such support were needed for full enjoyment of the protected liberty interest which the government could not impair. 492 U.S. at 507-508. The Constitution did not require "equal subsidizations" of abortion along with childbirth; offering differing financial incentives which might influence private decision making was not an impairment of the privacy right to an abortion, the Court held.

---

[39](...continued)
reflects the crucial judgment that individuals do not have a "right" to foist onto the public the costs of one's private choices. Unlike laws prohibiting the private consumption of marijuana and obscene books, where government actually **does** meddle in private affairs (and does so with the imprimatur of judicial approval!) the policy in this case draws a very reasonable balance between freedom and responsibility, by permitting the private conduct but refusing to "shift" the consequences of such conduct onto the public treasury.

In *Harris*, the Hyde Amendment barred the use of public funds to reimburse abortion expenses for indigent women and the Supreme Court held that the limitation did not impinge liberty or privacy rights. The constitutional concept of privacy, the Court held, protected the citizen from unduly burdensome interference by government with the personal decision to have an abortion, **but it did not prevent government from making value judgments to favor childbirth over abortion [read: "nonsmoking over smoking"] and to implement the judgment in its allocation of public benefits.** 448 U.S. at 313. The Court held that the privacy doctrine does not "translate" into a constitutional obligation to subsidize all choices equally. *Id.* at 314. The Court drew a basic distinction between using the power of government to interfere with personal choices, and the power to use public money to encourage some choices while discouraging others. Thus even though the abortion-decision lays at the core of constitutional privacy and liberty, which smoking does not,

> **[I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.**

448 U.S. at 316.

Policies like the Hyde Amendment, the Court held, merely **decline to subsidize** constitutionally-protected conduct, which could not be equated with **governmental interference** with free choice.[40]

---

[40]As the Supreme Court observed, the recognized freedom to use contraceptives and to send one's child to a private school does not create a public obligation to use taxpayer funds to subsidize, support, or encourage such choices, and nothing in the Constitution "supports such an extraordinary result." Whether freedom of choice (continued...)

Liberty, the Court held, does not confer the right to public support and "to hold otherwise would mark a drastic change in our understanding of the Constitution." *Id.* at 317-318. The district court's opinion below marks precisely that drastic change.

The sixth fallacy in the district court's opinion is this: There is something palpably wrong with the very concept of smokers having a "privacy right" to a government job, and that is because the issue in this case is really one of equal protection, not privacy at all. This case is **not even about** "government intrusion into personal privacy." In reality the City has placed smokers in a class and that class is being discriminated against. Perhaps if the City had told Ms. KURTZ that she could not smoke tobacco (the way the state **does** tell her she cannot smoke marijuana or gamble except in the state-run gambling cabal), that might present a valid "privacy" issue, but this case is actually a classic equal protection case, a civil **rights** case masquerading as a civil **liberties** claim. It makes sense for individuals to assert a "right of privacy" to protect them from laws which tell them which church to attend; whether they may have an abortion or a child; whether to drink martinis or smoke pot; whether to bet on the Dolphins or the

---

[40](...continued)
warranted public subsidization was thus a political question, "not a matter of constitutional entitlement." *Id.* at 318. See also *Maher v. Roe*, *supra*, 432 U.S. 464, 97 S. Ct. 2376, 53 L. Ed.2d 481 (1977), holding that the doctrine of constitutional privacy did not stop governments from using public funds to promote and encourage citizens to make their private decisions in ways which the government favored, and that the government was not required to prove a compelling reason for using public funds to discourse some private decisions by making the "governmentally-preferred" alternative more attractive. 432 U.S. at 476-479.

horses or the Lotto; whether to read "Playboy" or something more grossly lewd; but when the government is deciding on the distribution of benefits to individuals because of "group characteristics," then equal protection analysis applies. Here the City is discriminating between two classes (the smoking and nonsmoking classes) in offering public employment, and so this is a **classic** equal protection case. It has been mischaracterized as a "privacy" case only because the Third District realized that Ms. KURTZ could not prevail under the Fourteenth Amendment.[41]

CONCLUSION

It is not surprising that the tobacco death industry has sufficient funds to "influence" half the state legislatures to pass "smokers' rights" laws, but it is most alarming to think that **courts** might be induced to provide **constitutional** protection to tobacco, through the creation of spurious new "civil rights." Ms. KURTZ is perfectly free to smoke and the City has done nothing to interfere with her private decision to smoke. The Privacy Amendment obviously does not give Ms. KURTZ a right to work for the City, and it obviously does not forbid the City from making the reasonable and fiscally responsible judgment that taxes have more urgent uses than

---

[41]This leads to an unavoidable procedural problem: The City is convinced that this case is really an equal protection case which was initially mischaracterized by Ms. KURTZ as one of substantive privacy rights (the substantive "right" of a smoker to "get a government job"), and then **further mischaracterized** by the Third District as one of "information privacy" (the right of "smoker-applicants" not to disclose "secret" information to a government evaluating their application for employment). Yet the City does not think it ought to wander from the "privacy issue" described in the district court's certified question, unless so requested by this Court. The City will assume that this Court will invite additional briefs it if is uncertain about the Fourteenth Amendment issue.

paying for smokers' self-inflicted illnesses, high absenteeism and low productivity; indeed, that taxes **ought not** to be used to help subsidize a vicious industry product which kills 420,000 Americans each year. The City's policy satisfies the requirements of the Equal Protection Clause, and there is **no** Privacy Amendment precedent or doctrine to support the district court's ruling.

Ms. KURTZ has no reasonable privacy expectation as a smoker to a government job, and the Court should answer the certified question in the negative.

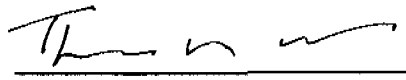
Respectfully submitted,

THOMAS M. PFLAUM
Fla. Bar # 220450
Route 2, Box 838, Micanopy, FL 32667
(904) 466-0252
and
PEDRO P. ECHARTE, JR.
Fla. Bar # 274135
Int'l Place, 21st Floor
100 SE 2nd Street, Miami, FL 33131-2154
(305) 539-1226
and
DAVID M. WOLPIN
Fla. Bar # 292168
City Attorney for North Miami
776 N.E. 125th Street, North Miami, FL 33161-5654
(305) 893-6511

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing INITIAL BRIEF OF APPELLEE was mailed this 24th day of January, 1994, to PAMELA A. CHAMBERLIN, Attorney-at-Law, Mitrani, Rynor & Gallegos, P.A., 1440 AmeriFirst Building, One Southeast Third Avenue, Miami, Florida 33131, Cooperating Attorney for the Miami Chapter of the American Civil Liberties Union of Florida, Inc.



THOMAS M. PFLAUM