THE SUPREME COURT OF FLORIDA

CASE NO.: 82,836

THE CITY OF NORTH MIAMI, FLORIDA,

Petitioner,

vs.

ARLENE KURTZ,

Respondent.

ON REVIEW OF A CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE FROM THE DISTRICT COURT OF APPEAL FOR THE THIRD DISTRICT

Case No. 92-2038

PETITIONER'S REPLY BRIEF

THOMAS M. PFLAUM
Fla. Bar # 220450
Route 2, Box 838
Micanopy, FL 32667
(904) 466-0252

PEDRO P. ECHARTE, JR.
Fla. Bar # 274135
International Place, 21st Floor
100 SE 2nd Street
Miami, FL 33131-2154
(305) 539-1226

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

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KURTZ's incessant commentary about the evidence succeeds in sidetracking the discussion away from the important issues and might actually mislead the Court about the factual basis for the City's policy. The following factual rebuttal thus becomes unavoidable:

A. <u>It is too late for KURTZ to dispute the evidence at this stage of the proceeding</u>: The City submitted to Circuit Judge Shapiro volumes of medical, economic and scientific data, affidavits by public officials and Dr. SHULTZ (a national authority on smoking and health), and a great many other evidentiary materials all of which conclusively proved that its policy was justified by the empirical facts and advanced urgent public and governmental objectives consistent with officially-announced national health policy. KURTZ submitted **no** substantive evidence or testimony to rebut or contradict that showing because, she asserted, the case should be decided in an evidentiary vacuum, purely as a matter of abstract principle. KURTZ did not even depose Dr. SHULTZ about his data or findings; nor did she depose any of the witnesses identified by Mr. FELDMAN as the City's experts on such topics as the City's employment policies and hiring practices, and its insurance and medical expenses and procedures.[1]

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[1]Mr. FELDMAN in his deposition repeatedly informed KURTZ's attorney that many of her questions pertained to the data provided by Dr. SHULTZ, or to information possessed by the officials he specifically identified to be in charge of the City's insurance program, personnel department, department of administration, and smoking-cessation programs. See, e.g., FELDMAN depo. at 12-35, 39. **KURTZ deposed none of these witnesses.** In her brief KURTZ nevertheless denigrates FELDMAN's supposed lack of knowledge on these very same topics, i.e., the efficacy of the City's smoking cessation program (actually

(continued...)

KURTZ did not depose the principal witness in the case (Dr. SHULTZ) and did not submit **any** expert testimony or, indeed, **any empirical evidence whatever** to contradict or challenge the City's medical and economic data, and when she moved for summary judgment she advised Judge SHAPIRO that all of the evidence was **undisputed** and **irrelevant**. See Jan. 7, 1992 transcript at pp. 23, 46. Judge SHAPIRO correctly decided that the evidence was hardly "irrelevant," and his ruling thus contained specific findings of fact based on **undisputed evidence**, and not one of his findings was questioned or even mentioned by the Third District.

However uncomfortable it may be for her, KURTZ made her own bed and must now lie in it. It would be terribly unfair to the City for KURTZ to be permitted, two appellate courts removed from the evidentiary stage of the proceeding, to begin remaking her bed to generate "factual disputes" which did not exist in the trial court **when such factual disputes could have been dealt with and resolved.**[2]

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[1](...continued)
operated by Mr. LAPIRA; FELDMAN depo. at 29-31), and the City's health-screening procedures (operated by Mr. ZEIEN; FELDMAN depo. at 47-50). KURTZ likewise refers to the City's supposed policies concerning obese and diabetic candidates, even though Mr. FELDMAN stated that Mr. ZEIEN had that information, and that the City was barred by federal law from refusing to hire persons with those conditions (see FELDMAN depo. at 103-104).

[2]If KURTZ had disputed the City's evidence at the proper time, before the trier of fact, then FELDMAN or SHULTZ could have submitted supplemental testimony; or the City could have argued to the trier of fact what the testimony and evidence actually proved; or LAPIRA, ZEIEN and MEARS could have rebutted the misleading "factual statements" which now appear in KURTZ's Supreme Court brief. (As a matter of fact, the City initially made arrangements to obtain additional witnesses and evidence, including direct testimony from former Surgeon General Koop, but abandoned those efforts **because** KURTZ stipulated that she did not dispute the City's medical and economic data and findings.) Not
(continued...)

B. **KURTZ's factual statements are false and/or misleading:** KURTZ's brief contains dozens of "factual" statements none of which are strictly true and most of which are highly misleading. For example, at page 7 of her brief, KURTZ writes, citing pages 17-19 of the SHULTZ affidavit (emphasis in original):

> Significantly the experts stated that **all** of an employer's lost productivity costs related to employee smoking could be eliminated by a prohibition of on-the-job smoking.

This statement is doubly false for at that point in his affidavit Dr. SHULTZ was merely referring to the findings of one other researcher among the 90 which he cited (**not** to his own findings); and moreover the KURTZ phrase "all of a employer's lost productivity costs" actually refers to only about $100 per year in costs attributable to on-the-job smoking which do not include **any** of the major costs of smoker illnesses and absenteeism.[3]

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[2](...continued)
only would it constitute the worst sort of "sand-bagging" for KURTZ to evade her stipulation that the evidence was undisputed, but it would also be **bizarre** to permit a plaintiff to argue her case at the evidentiary stage as a "pure theory" case, yet then in the Florida Supreme Court portray the case as an "evidentiary dispute" -- that would literally reverse the proper order of things.

[3]Dr. SHULTZ was thus reporting the virtual tautology that if an employer did not allow smoking employees to smoke on the job, then a small amount of money would be saved even if the employee continued to smoke off the job (i.e., because they would not burn up their offices), which is utterly different from saying (as KURTZ does in her brief) that prohibiting on-the-job smoking eliminates "all lost productivity costs" arising from the employment of smoking employees. (In fact, the City's undisputed financial projections reflect that even **that** study indicates that the City's policy will save at least $2.5 million.) The important point is that KURTZ's distortion of the term "lost productivity costs" was not inadvertent since it was carefully teased out of the tables contained in the SHULTZ affidavit.
(continued...)

Another example is KURTZ's deliberate misconstruction of the term "subsidization." KURTZ heatedly asserts that it is no subsidy for an employee to use part of his wages to purchase cigarettes, but KURTZ knows full well that the City never suggested any such thing. The City said it was a subsidy for the public to have to pay **extra dollars over and above wages** for the expensive consequences of some of its employees' "off-duty" behavior.[4]

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[3](...continued)

Another example of KURTZ's distortion of the record is her statement that SHULTZ's affidavit was based on a comparison of "never smokers" and therefore did not support the City's policy which was geared to the "one-year non-smoking" of candidates. That is a distortion of the SHULTZ affidavit, which referred to a single study involving "never smokers" but based its findings on 90 studies listed at the end of his affidavit, and in fact, **specifically** addressed the significance of the "one-year period of successful cessation." (See SHULTZ affidavit at 22). Furthermore, the City's policy cannot be unconstitutional on the theory that the evidence would warrant a policy even more restrictive than the policy actually adopted!

[4]It is no subsidy for an employee to use her wages for private pleasures, but it is a subsidy to require the public to also pick up the tab for the consequential expenses of such private pleasures. That is precisely why the United States Supreme Court rejected the argument that constitutional privacy compelled the public to subsidize the costs of abortions for welfare recipients; not because the recipients were being prevented from using their public assistance monies for abortion, but rather because the public was not obligated to pay additional money for that service. That ruling, moreover, was in the context of an established constitutional right to purchase an abortion, while here there is no constitutional right to buy or use tobacco, a point which even KURTZ finally seems to concede at page 16 of her brief. (And the Court should note that Federal law actually **does** prohibit Food Stamp subsidies to be used for tobacco!) In other words, KURTZ would lose even if she demanded that the townspeople of North Miami pay her extra for the medical costs of an abortion, which **is** a constitutionally-protected behavior, so she certainly cannot demand that the townspeople pick up the tab for other medical costs **not even related** to a constitutionally-protected behavior. **That** is why the City maintains that this case is more like the "helmetless

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Another example is the canard that the City does not give smokers the option of waiving insurance or accepting a surcharge commensurate with their higher medical expenses and lower productivity. The record is undisputed that the City **cannot** implement such measures (because of collective-bargaining restrictions), and that it is a fundamental employment policy of the City that all its employees receive full medical insurance at no cost. (See, e.g., FELDMAN depo. at 35-37, 44-46, 67-68; HARTSTEIN depo. at 179). If KURTZ doubted that testimony and believed that such alternative measures were possible, she should have introduced testimony or evidence to support her skepticism.[5]

Another example is KURTZ's statement that the policy is inequitable because the City does not exclude persons with other conditions and habits, but the record is undisputed that the City does indeed screen the health of all applicants (FELDMAN depo. at 47-50); and KURTZ knows full well that Federal law precludes the City from declining to hire persons with the physical conditions she enumerates.[6]

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[4](...continued)
motorcycling" case, *Picou*, 874 F.2d 159 (11th Cir. 1989), rather than **any** case involving a constitutionally-protected form of conduct.

[5]Likewise there is **no** evidence in the record to support KURTZ'S contention that potential job applicants are being forced to change their behavior as a result of the City's policy, rather than simply applying for other jobs.

[6]Moreover, KURTZ cannot be arguing that the City policy would be constitutional if only the City excluded skydivers or couch potatoes along with smokers, which is no privacy argument at all but rather an equal protection argument, and a specious one at that. Underinclusion has never been a basis for striking down a rational classification scheme, and if it were, then the
(continued...)

Another distortion is KURTZ'S assertion that the City's policy allows it to accept "less qualified" non-smokers over "more qualified" smokers. That begs an empirical question which is not at issue since the **undisputed** evidence is that a workforce of nonsmokers is by definition "more qualified" from the public's perspective than a workforce of smokers, since on average each smoking worker costs the City roughly an extra $70,000 over 15 years. It is too late for KURTZ to retract her stipulation that the City's data was undisputed, and there is nothing in the record to support her speculation concerning the effect of the policy on applicant quality. Moreover, since KURTZ concedes that there are numerous qualified applicants for a particular job (brief at 11), the real question is: **IF KURTZ AND HER NON-SMOKING TWIN, IN EVERY OTHER RESPECT IDENTICAL TO HER, WERE BOTH TO APPLY FOR A JOB AT THE CITY, DOES THE FLORIDA CONSTITUTION ACTUALLY FORBID THE CITY FROM PREFERRING THE NON-SMOKING TWIN NO MATTER HOW OVERWHELMING THE EVIDENCE THAT THE NON-SMOKING TWIN WILL BE A MORE PRODUCTIVE PUBLIC SERVANT AND COST $70,000 OR $100,000 LESS TO EMPLOY?** Since KURTZ apparently would answer that question "Yes, it does," it is **she** who is advocating irrationality by the government!

Some of KURTZ's "factual statements" are preposterous, for example, her statement that the City's economic analysis "was not based on actual medical or productivity costs' experience," a

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[6](...continued)
Third District opinion would itself violate the Fourteenth Amendment because it grants absolute protection to users of a single plant substance without assuring equal protection to all other similarly-situated flora users who are affected by exclusionary hiring practices based on private practices far **less** injurious to the public interest than that of tobacco-users.

comment which suggests that KURTZ is unfamiliar with even the most basic precepts of scientific and rational thought. If 30,000 studies confirmed that people who jump off high buildings do not sprout wings (as they have confirmed the medical and economic consequences of tobacco use), then both Mr. FELDMAN and Ms. KURTZ can rationally conclude they won't either, without leaping to their deaths for the "actual experience" of impacting the pavement. The evidence submitted to the circuit court, evidence which KURTZ stipulated was not disputed and which she deemed "irrelevant" at that time, proved **conclusively** the medical and economic consequences of employing smokers.[7]

Another example of distortion is KURTZ's statement, repeated more than a half-dozen times, that an "on-duty" smoking ban would be equally effective without encroaching privacy rights. The testimony and evidence actually reflect that "on-duty" smoking bans are **ineffective** because smokers, being drug addicts, must then continually go "off-duty" for a fix and thereby further reduce productivity without improving their illness rates or medical

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[7]Equally foolish is KURTZ's attack on FELDMAN's cost analysis because it assumed a four percent inflation rate (so what?), and was based on the findings of four alternative studies. KURTZ **did not introduce any evidence** contradicting any of those projections, and stipulated that **they were not disputed**, and even now she fails to explain what is wrong with offering a range of economic forecasts based on the leading empirical studies in the field. But this is a "red herring" anyway since **even Ms. KURTZ and her attorney** conceded in the trial court **and the Third District** that smokers did have significantly higher illness rates and medical expenses, a fact which no sane person could dispute.

expenses; some of that evidence was even cited in Petitioner's Initial Brief at pp. 12-13.[8]

While the City could continue to itemize all the misleading "factual" statements in KURTZ's brief, there would then be no space left to address the constitutional principles at issue here, which are much too important to be lost in the KURTZ smokescreen of non sequitur and solecism.[9]

C. KURTZ's statements about the privacy case law are incorrect: KURTZ writes that *Winfield, In re T.W.,* and *In re Browning* are relevant because the City, for ideological reasons, is seeking to mandate a healthy and wholesome lifestyle. But there is not one shred of evidence in the record to support that statement, and it is refuted by the obvious fact that the City has not implemented any smoking policy to restrict or govern the behavior of

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[8]Moreover, KURTZ has carefully avoided defining what she means by the term "on-duty smoking ban," which is no accident since it was KURTZ who argued below that the City's policy was preempted by the FCIAA, ch. 385, Fla. Stat. (1989) which barred local regulation of indoor smoking in public facilities. Alternatively, if KURTZ intends the term "on duty" to mean "during working hours" (whether an employee is inside a public facility or not, on break or not, on duty or off duty), then the ACLU is apparently advocating that public employees be literally chained to their desk, electronically monitored, or shadowed by the "smoking police" whenever they depart a government facility, which is precisely what occurred during *Grusendorf* and is a far more intrusive policy than the one actually at issue.

[9]Incidentally, KURTZ takes umbrage at the City's suggestion of tobacco-industry contributions to the ACLU, yet never actually disputes or denies that suggestion and instead erects a "straw man" argument that KURTZ's **counsel** did not personally receive tobacco industry funding (which the City never suggested). In point of fact, during KURTZ's deposition the City specifically inquired about funding for the litigation and KURTZ's attorney objected and stated that she had no obligation to disclose the funding source but that the tobacco industry may have provided funding to the ACLU.

its current employees or even future employees who take up or return to the habit. KURTZ also states that *Shaktman* and *Winfield* are relevant because, she writes, they reflect this Court's "reluctance" to allow government intrusion into personal privacy, which "reluctance" led to the requirement that the government **prove its compelling interest** in those cases. That is simply incorrect, for in those cases this Court **did not** require proof of a compelling state interest yet nevertheless sustained **harsh** intrusions into personal privacy based on no justification other than an unarticulated moral disapproval of certain private behaviors.[10]

KURTZ concludes her *pro forma* legal analysis with the assertion that the information-privacy cases are "irrelevant" because there is no informational-privacy claim in this case (KURTZ brief at 23-24), which was precisely the City's point! The problem remains that the Third District cited those cases and stated that the City's policy was an intrusive gathering of "highly personal and sensitive information." (Op. at 5-6). KURTZ naturally concedes the City's point, since KURTZ herself specifically disclaimed any information privacy claim, but that hardly bolsters the Third District's opinion

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[10]As the City noted in its initial brief, the City's policy is thus on the exact opposite end of the scale from state gambling, nudity, obscenity and controlled-substance laws (etc.), which are based on nothing more than unarticulated moral/religious values; yet impose the most draconian of criminal sanctions (incarceration); yet have consistently been enforced by the Florida courts. **Unlike** those laws the City is not **in any sense** interfering with anyone's control over her own body or lifestyle, and to equate compulsory public support of a behavior with government-compelled invasions of the human body (as KURTZ does in her brief) is preposterous. Refusing to use public money to "pick up the tab" for a nasty habit is **utterly unlike** stealing the eyes of dead children or making people have babies or blood transfusions.

which is under review. If there is no constitutional right to a City job (as the law clearly states), or to smoke tobacco (which is obvious and which KURTZ virtually concedes); and if the Third District was wrong about the underlying privacy claim (which both sides now agree on), then on what **principled basis can the Third District opinion be sustained?** In any event not **one** of the Privacy Amendment decisions offers any support whatsoever for the Third District's jeremiad in favor of rampant individualism at public expense.[11]

With respect to *Grusendorf*, KURTZ acknowledges that the Federal court held the policy did not encroach on fundamental rights even though it was far more intrusive than the policy at issue here, but KURTZ argues that the Court stated (actually it was pure *obiter dictum*) that the policy in *Grusendorf* did require a rational justification under the Fourteenth Amendment. However, KURTZ fails to acknowledge that the policy here, like the policy in *Grusendorf*, **was proved to satisfy the Fourteenth Amendment**, as specifically held by the circuit court and left unquestioned by the Third District.[12]

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[11]KURTZ's effort to "distinguish" the *Bar Examiners* decision is completely unpersuasive, for The Florida Bar **did not** demonstrate, and was not required to demonstrate, a compelling need for the information sought, while in this case the City has provided the empirical proof which was completely lacking not only in the *Bar Examiners* case but also in *Forsberg, Douglas, Winfield, Reno, In re Getty, Maisler, Stall* and *Shaktman*, in all of which cases this Court **sustained** the government intrusion.

[12]The City objects to sec. VI(B) of the KURTZ brief in its entirety for reasons already stated in footnote 41 of the City's initial brief. The Third District did not disagree with the circuit court's **findings or legal conclusions** on the Fourteenth Amendment issue. Instead it certified the Privacy Amendment to this Court. A petitioner in the City's position cannot be expected to write its initial brief on the premise that the

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D. KURTZ is wrong on the fundamental questions: Here is a simple statement of why it is not "unconstitutional" for a town to decline to hire smokers:

1. The townspeople have undertaken to pay all the medical expenses of their public servants, and it is an indisputable fact that smokers have much higher rates of illness and disease than nonsmokers, and are less productive and more often absent from work, etc.

2. It is rational for the townspeople to discriminate in favor of nonsmokers just as it would be to discriminate in favor of vendors or manufacturers whose products were demonstrably cheaper and better, and such discrimination is good policy because it is consistent with the official national policy to "rachet up" **disincentives** to smoking which is the nation's No. 1 killer and

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[12](...continued)
Supreme Court will disregard the certified question and turn instead to an uncertified issue, especially not a latent issue ignored even by the certifying court. Therefore, if this case is to be reviewed as a Fourteenth Amendment case (which it actually is, if it is anything), then the Supreme Court should direct both parties to file supplemental briefs on that issue.

Notwithstanding that objection, it is totally fallacious for KURTZ to try to distinguish *Grusendorf* on the theory that there is a connection between firemen and cigarettes but not secretaries and cigarettes. The Oklahoma policy, just like the present policy and § 633.34(b) Fla. Stat., addresses the same connection between employee smoking and employee expenses. Just as a government may reasonably be unwilling to pay **workers' compensation benefits** to employees whose smoke-related illnesses are actually the result of deliberate inhalation (i.e., firemen), a government may reasonably be unwilling to pay **medical bills** for the self-inflicted smoke-related illnesses of its employees generally. The underlying **motivation and rational "connection"** is precisely the same with respect to all three measures.

health problem.[13] Indeed, the discriminatory policy is rational because it is the town's **duty** to discriminate in favor of the best goods and services at the lowest costs.

3. Some types of discrimination are not permitted because they are irrational ("no applicants with mustaches"); or because they would impair **fundamental rights** ("no Catholics need apply") or are based on constitutionally-suspect classifications ("no Cubans need apply"); or simply because they are prohibited by laws which bar one or another form of discrimination, i.e., against the physically handicapped **or (in other states) against smokers.** But no such legal bar applies to this town's policy, at least not until its state government adopts a "Smoker's Rights" law as already twice-passed by the legislature but vetoed by two governors.

4. The Privacy Amendment was adopted to protect abortion rights in case of Federal backsliding and is properly applicable (as the case law demonstrates) to prevent the state from forcing people to have babies or transfusions, etc., but obviously does not bar government from "influencing," private behavior since all vice and morals and drug laws do **that**, and do so far more intrusively through harsh criminal law-enforcement yet are always sustained under the Privacy Amendment.

5. Whether the town's rational and legally-permissible discrimination against smokers is "fair" or "wise" (or

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[13]Tobacco is the nation's number one killer at 420,000 deaths per year and is far more lethal than **all of the following major killers put together:** alcohol (100,000 deaths), motor vehicles (25,000 deaths), infectious diseases (90,000 deaths), firearms (35,000 deaths), illegal drugs (20,000 deaths), sexually transmitted diseases including AIDS (30,000 deaths), and toxic pollutants and contaminated foods (60,000 deaths).

counterproductive) is an open political question for the townspeople and their local and state elected representatives to decide, not a "constitutional" question for the judiciary.

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KURTZ continues to identify the issue here as the compulsory "relinquishment" of "completely legal" behavior. The City anticipated that fallacy in its initial brief but notes again that the City does not care at all about KURTZ's private behavior and KURTZ remains completely free to do whatever she wants to do. The City is merely declining to assume public fiscal responsibility for her private behavior. Secondly, it can hardly be overlooked that the City predicted in its initial brief that someday tobacco might not remain a "completely legal" product (actually it already is not), and in only the intervening three months the City's prediction has been strengthened by Federal proposals, now pending, to declare tobacco **illegal**. The main point, however, is that the existence of a constitutional right cannot **ever** depend on the "relative legality" of behavior under current legislation.

The last ten pages of Petitioner's initial brief enumerated six major fallacies in the Third District's ruling, and KURTZ's arguments concerning the "legality" of tobacco reveal a seventh fallacy, even more fundamental, which has to do with the Third District's assumption of authority to resolve ordinary political controversies which arise from time to time in all democratic societies.

A few generations ago liquor was **illegal** throughout the United States; and at certain times and places cigarettes, too, have been **illegal**; and this and other states continue to impose harsh criminal

sanctions on the possession or sale of marijuana and myriad other plant substances. Alcohol prohibition was eventually repealed -- **politically not judicially** -- as ineffective and counterproductive, but government (including its courts) continues its persecution of those who prefer other plant derivatives far less harmful than tobacco or even alcohol. Our society is now in the midst of reevaluating these various policies in light of the growing medical and scientific evidence. The benefit of democratic government is not that all laws and policies will always be right but that they remain subject to correction; the policy decisions of appellate courts may be equally ill-advised (as demonstrated by the decision below), yet have the additional disadvantage of being nearly immutable.[14] As the recent massive media and governmental attention to smoking attests, this case involves nothing more nor less than an ordinary political controversy over how American society should be

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[14]As the City noted in its initial brief, the "smoking controversy," like related issues involving the environment, food labeling, and so on, should be resolved by legislation because constitutional adjudication is too blunt an instrument to devise a reasonable balance of competing interests. For example, if the courts declare an absolute constitutional privacy right to smoke at home, without suffering even the slightest of impositions or loss of benefits (which is the meaning of the decision below), then what of the rights of their children or other co-tenants who might be injured by such "private" poisoning of the nest? If government judges may take into account a parent's smoking at home in deciding a custody dispute, as they obviously should given the dangers to others of such "private" conduct, then why cannot other government officials do likewise, especially those who are actually undertaking to pay for the entire household's medical bills? (The City's insurance program also pays for the smoke-related illnesses of its workers' children.) See, for example, *Schmitt v. State*, 563 So. 2d 1095 (Fla. 1990), holding that there is no privacy right to possess "child pornography" even in one's home, a ruling apparently justified by the court's assumption that such private behavior has a detrimental effect on children. So does smoking, only worse.

organized in view of modern medical and scientific evidence about customs and behaviors, the consequences of which we remained blissfully ignorant of until recently. Such debates and controversies are ubiquitous and the *sine qua non* of democratic society; they do not suddenly become "constitutional issues" merely because they happen to tread upon the tastes, values or vices of a coterie of appellate judges.[15]

Liberal ends, such as sheltering "people of smoke" (actually, "people of **approved** smoke"!) from the social reevaluation of tobacco, do not justify a judicial *coup d'etat* against the most fundamental of all liberal ideas, that of democratic self-rule. Nor do such ends warrant sacrificing the integrity of the courts and of constitutional adjudication. The Third District opinion leads Florida courts down the sleekest of slippery slopes, for if any group of jurists can determine that a product **they** consider "acceptable" must be constitutionally protected, then the constitution becomes nothing more than an expression of conventional

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[15]If the Third District's view of privacy rights were correct, then Florida's appellate judges would long ago have ceased collaborating with the government's destruction of the lives of thousands of Floridians merely as a result of their private, autonomous decisions about which flora they prefer, whether fermented grain, sugar cane or potatoes; dried tobacco or dried hemp; or myriad other plant buds and derivatives. It is the rankest of hypocrisies for a small handful of jurists to suddenly glorify "constitutional privacy" when the habits and vices **they** deem acceptable are burdened in any way, while day in and day out they impose without hesitation draconian penalties against all those "perverts" and "deviants" having different tastes and vices. For such jurists to do so on "privacy" grounds, citing the sanctity of "personal autonomy," is to achieve a level of hypocrisy which not even Orwell or Swift could have imagined. ("All vices are private, but my vices are more private than others.") For if tobacco were being imported from Medellin instead of home-grown in North Carolina, we would call out the AWACS!

tastes and mores **exactly like** the Legislature's enactment of conventional morality into criminal law. ("Tobacco good, marijuana bad"; "four legs good, two legs bad.") Neither article V of the Florida Constitution nor article III of the United States Constitution designated jurists as the final arbiters of what is right and proper social policy.

KURTZ and the Third District have posed the question, "If the City can refuse to hire tobacco users, then what will stop it from refusing to hire Twinkie eaters or martini drinkers?" KURTZ thus asserts in her brief that the "very real danger" is that local governments will begin to regulate even the "hobbies" of citizens. No one who really believes in our system of government could advance such an argument, for the obvious answer is that the democratic process is all that ultimately protects us from stupid regulations, and for 200 years it has done this better than any alternative form of government, and should the democratic process ever fail to do so, the courts will offer no protection either.[16] The **real** danger presented by this case is that the judiciary might, under the impulse to "do good," use vague constitutional doctrines such as "privacy" to usurp every political and social question which arises. For if the scourge of **tobacco** is a "constitutional privacy"

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[16]It is a depressing feature of American constitutional history that the judiciary only rarely has stood in opposition to majoritarian sentiments, and thus persistently sustained the enslavement of Negroes, the removal of American citizens of vaguely Japanese ancestry to concentration camps, the virtual extermination of the American Indian, and enumerable other popular witch hunts and persecutions. That history hardly justifies the expectation that courts will "save us from ourselves" if democratic institutions fail, yet such a failure is actually **promoted** by the opinion below.

question, then **so indeed** are hobbies and breakfast foods, and it is precisely at that point, when every conceivable controversy and form of human behavior is a "constitutional" question for the judiciary to decide, that democratic self-rule will be hopelessly impaired. Only a lawyer distressingly ignorant of American history would fail to see that the Framers would be far more vexed (and embarrassed!) by the idea of appellate judges dictating that local communities, those ideal forms of direct self rule, are **irrevocably required to hire tobacco users,** than by the transient decision of one community not to do so. Such judicial legislation will further erode the ethos of self government, already endangered, without advancing any **real** constitutional interest whatever.

Like all important cases, this case does present a choice of hazards:

(1) the hazard perceived by the ACLU of "healthism" as a virulent new form of puritanism, which trend the judiciary should halt before we have the pantry-police rummaging through our kitchens; and

(2) the hazard perceived by the City that jurists -- especially those looking for a cheap gesture to demonstrate their civil-liberties *bona fides* -- will throw off their constitutional chains and use vague constitutional doctrine ("privacy," "substantive due process,") to enact their personal mainstream tastes and ideologies as immutable social policy.

Really this is no Hobson's Choice because if the American people cannot resolve this **ordinary political disagreement over tobacco**, then the nation is lost and the courts will not save us. But 200 years of history proves that Americans will achieve a

reasonable detente over smoking -- probably within five or ten years -- without being dictated to by jurists.

Obviously this Court possesses the raw power to rule, *ipse dixit*, that the Privacy Amendment provides complete sanctuary to smokers of tobacco without providing any protection whatever to smokers of any other plant, or to anyone else labeled "deviant" by a majority of legislators or jurists. Certainly the Court can rule that the "privacy" absolutely shelters smokers of (some) weeds and eaters of (some) vegetation (e.g., if fermented into whiskey, rum, etc.) yet permits the continued persecution of anyone whom the Legislature arbitrarily and capriciously labels a criminal because they autonomously prefer **different** vegetation in different forms. But such hypocrisy obviously erodes the integrity of the courts and the Constitution. And it does something even worse, for every time some coterie of "experts" -- whether technocrats, bureaucrats, scientists or appellate judges -- set out to solve our political and social disagreements for us, they exacerbate the public's apathy and alienation from the entire process of self-rule. Yet in the end it is **only** our public commitment to self-rule, messy and occasionally foolish as it may be, which preserves our liberty.

CONCLUSION

Undersigned counsel appeals to the Court to restrain the Third District's headlong rush into the political thicket. The wisdom of the City's policy is not a constitutional question but rather an ordinary public policy ("political") question which ought to be left to the proper authorities: the City; the Florida Legislature and Governor; and ultimately the people of the United States -- they are

perfectly capable of working out a sensible legislative solution to this controversy.

Respectfully submitted,

THOMAS M. PFLAUM
Fla. Bar # 220450
Route 2, Box 838
Micanopy, FL 32667
(904) 466-0252

PEDRO P. ECHARTE, JR.
Fla. Bar # 274135
Int'l Place, 21st Floor
100 SE 2nd Street
Miami, FL 33131-2154
(305) 539-1226

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 PETITIONER'S REPLY BRIEF was mailed this ____ day of April 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