City of North Miami v. Kurtz - Is It Curtains for Privacy in Florida

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I. INTRODUCTION

The City of North Miami ("City") has a new policy, Regulation 1-46.1 This regulation informs anyone who smoked within the past year not to waste her time applying for a job with the City because regardless of her existing abilities, she will not be considered a qualified applicant.2 This policy contains inconsistencies because it does not prohibit the applicant, once hired, from smoking on the job. It also does not prohibit current employees from smoking. In City of North Miami v. Kurtz,3 the Supreme Court of Florida addressed the issue of whether the City may have a regulation that prohibits smoking prior to, and as a prerequisite for employment.4 This comment focuses on the court's decision in that case and resulting ramifications in the State of Florida.

The City claims this regulation was established to reduce costs to taxpayers and to increase the productivity of its workers.5 The goal of this regulation was to "gradually reduce the number of smokers in the City's work force by means of natural attrition."6 The City attempted to demonstrate how costs to taxpayers will be reduced. It submitted evidence indicating that employees who smoke cost the City more than those who do not.7 Accordingly, the City claims these interests justify the intrusion into Kurtz's privacy.8

In contrast, Arlene Kurtz claims the City is invading her right to privacy by enforcing this regulation; therefore, this regulation is unconstitutional under the federal and state constitutions.9 She believes that since she has a legitimate expectation of privacy in her own home and her private life, the City's interests are insufficient to outweigh those expectations.10 She claims that whether she smokes off-duty is irrelevant to the kind of job

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1. Regulation 1-46 provides: "All applicants must be a non-user [sic] of tobacco or tobacco products for at least one year immediately preceding application, as evidence [sic] by the sworn affidavit of the application [sic]." Answer Brief of Respondent at 4, City of N. Miami v. Kurtz, 653 So. 2d 1025 (Fla. 1995) (No. 92-2038).
2. Id.
4. Id. at 1026.
5. Id.
6. Id.
7. Id. at 1027.
8. Kurtz, 653 So. 2d at 1027.
10. Id.
sought. She further claims that this regulation is intrusive because it permits City employers to enter her private life to determine if she is a suitable employee based upon their own subjective standards.

In an examination of the court’s opinion, this comment first discusses the specific facts of this case and the trial history which eventually brought the case to the Supreme Court of Florida. Second, it discusses an individual’s right to privacy, which grants freedom from governmental intrusions arising from both the federal and state constitutions. Third, the comment reviews the stringent test that must be proven by the state to allow an intrusion into a person’s privacy. This section examines how the elements of the test were applied by the court. Fourth, this comment takes a brief look at how two other states deal with the privacy issue and why Florida ought to follow their lead in practice.

II. FACTS AND PROCEDURAL POSTURE

A. The Facts of City of North Miami v. Kurtz

In 1989, the City was accepting applications for a clerk-typist position. Arlene Kurtz desired a clerical job with the City, so she submitted an application. In December, 1989, she passed the examination for all prospective applicants and was deemed a qualified applicant. Three months later, the City passed Regulation 1-46, which requires each applicant to sign an affidavit verifying that she has not smoked for at least one year prior to being hired by the City.

Two months after this regulation was passed, the City notified Kurtz of an opening for a clerk-typist. However, she was told at her interview that the City no longer considered hiring applicants who had used tobacco or tobacco products within the past year. Kurtz informed the interviewer

12. Id. at 22.
13. Kurtz, 625 So. 2d at 900.
14. Id.
15. Id.
16. Answer Brief of Respondent at 5. The fact that Kurtz was qualified for the position of clerk-typist was not disputed by the City. Id.
17. See supra note 1 and accompanying text.
18. See supra note 1 and accompanying text.
19. Kurtz, 625 So. 2d at 900.
20. The reason that the City would not hire applicants who have used tobacco or tobacco products within the past year was that the regulation passed just two months earlier
that "she was a smoker and could not truthfully sign an affidavit to comply with the regulation." The interviewer proceeded to tell Kurtz that she, as well as all other applicants, would not be considered for a city job unless she remained "smoke free" for one year.

B. Procedural Posture

Kurtz sought a judgment declaring the regulation unconstitutional and injunctive relief enjoining the City's enforcement of the regulation. After cross-motions for summary judgment, the trial court found for the City and held that the regulation did not violate the United States or the Florida Constitution. The Third District Court of Appeal reversed the trial court's judgment and determined that an individual's privacy rights are invaded when the City requires a person to refrain from smoking for one year as a prerequisite to being considered for employment. The court found that the City's claimed interests were insufficient to outweigh Kurtz's right to privacy. The court stated, "Regulation 1-46 violates article I, section 23, of the Florida Constitution as the regulation constitutes an impermissible intrusion into Kurtz' private conduct and has no relevance to the performance of the duties involved with a clerk-typist."

After the district court issued its decision, it certified the following question to the Supreme Court of Florida as one of great public importance:

DOES ARTICLE I, 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?

prohibited such hiring.

22. Id.
23. Id.
24. Id.
25. Id. at 902-03.
26. Kurtz, 625 So. 2d at 901.
27. Id.
The court answered the preceding question in the negative and found that Kurtz was not afforded protection by the United States Constitution nor by Florida’s explicit constitutional privacy provision.  

III. FUNDAMENTAL RIGHT OF PRIVACY

A. Right of Privacy Implicit in the United States Constitution

There is no explicit right to privacy in the United States Constitution. Rather, "the First Amendment has a penumbra where privacy is protected from governmental intrusion." Since the right to privacy is not explicit, the Supreme Court struggled with the idea of how far privacy should be extended, as illustrated through a line of cases dealing with the issue.

The first case to recognize this fundamental right to privacy was Griswold v. Connecticut. In Griswold, the Supreme Court established a right of privacy for married couples to be free from governmental intrusion in deciding whether to use contraceptives. The Court cleverly framed the issue as follows: "[W]ould we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?" The obvious answer of "no" allowed the Court to establish a right of privacy in the marriage relationship and demonstrate the absurdity of an absence of such a right.

The Court expanded the right of privacy in Eisenstadt v. Baird. It stated that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." This case is significant because it

29. Id.
31. Id. In Griswold, the Court held a Connecticut statute that forbade the use of contraceptives violates the right of marital privacy. Id. at 485-86. Griswold was the first case to recognize a fundamental right of privacy; however, this particular case limited that right to marital relationships. Id. at 486.
32. 381 U.S. 479 (1965).
33. Id. at 486.
34. Id. at 485.
35. Id. at 486.
36. 405 U.S. 438 (1972) (overturning conviction for distributing contraceptives to unmarried persons and allowing individual right to privacy).
37. Id. at 453 (alteration in original).
extended the right of privacy to individuals and no longer limited it to married couples.

Shortly after the *Eisenstadt* decision, the Court further broadened the right of privacy in *Roe v. Wade*. In *Roe*, the Court first reaffirmed the implicit right of privacy in the United States Constitution. The Court then found that the right of privacy includes a woman's right, although not absolute, to determine whether or not she will terminate her pregnancy.

Finally and most importantly, in 1969, the Court decided *Stanley v. Georgia*. In *Stanley*, a man was arrested for possessing obscene materials in his own home. The Court found that a statute which punished mere private possession of obscene material was unconstitutional. Although *Stanley* deals with obscenity, the case stands for the proposition that a man's home is his castle. To illustrate, the court stated that "a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch." A person's right to privacy—to be let alone from governmental intrusion—is "the most comprehensive of rights and the right most valued by civilized man." While not explicit in the United States Constitution, other cases decided by the Court following *Stanley* also recognized the basic right to be free from governmental intrusion in the privacy of one's own home.

While the right to be free from governmental intrusion in one's home is merely implicit in the United States Constitution, several states have attempted to provide that right greater strength by adding explicit privacy provisions in their own state constitutions. Florida is one of the states providing such a right.

38. 410 U.S. 113, 153 (1973) (including woman's qualified right to terminate her pregnancy in realm of right to privacy).
39. *Id.* at 152.
40. *Id.* at 153.
41. 394 U.S. 557, 559 (1969) (holding statute criminalizing possession of obscene material in privacy of one's home is unconstitutional).
42. *Id.* at 558. The Georgia statute under which he was charged was "knowingly hav[ing] possession of . . . obscene matter." *Id.*
43. *Id.* at 559.
44. *Id.* at 565.
45. *Stanley*, 394 U.S. at 564 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).
46. *See* United States v. Orito, 413 U.S. 139, 142 (1973) (recognizing that zone of privacy protected by *Stanley* does not extend beyond the home).
B. Florida’s Explicit “Right to Privacy” Provision

Florida has an explicit privacy provision in its constitution. Florida’s privacy provision, Article I, section 23, however, has not been given the power that was intended when it was adopted in 1980. It has been observed that “all too often privacy plays second banana to competing interests,” even though the purpose of this provision was to provide more protection. The drafters’ intent is illustrated by their rejection of “the use of the words ‘unreasonable’ or ‘unwarranted’ before the phrase ‘governmental intrusion’ in order to make the privacy right as strong as possible.” By deleting those words, the drafters avoided the application of the weaker levels of judicial scrutiny and provided for a strict scrutiny analysis when determining violations of an individual’s privacy rights. When drafting the amendment, the Florida legislators’ intended to maintain the ideal that “an individual has a fundamental right to be left alone so that he is free to lead his private life according to his own beliefs free from unreasonable

48. FLA. CONST. art. I, § 23. Florida’s explicit privacy provision, article I, section 23, provides the following: “Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public’s right of access to public records and meetings as provided by law.” Id. For a listing of other states that also have explicit privacy provisions, see Sanchez, supra note 47, at 799.

49. FLA. CONST. art. I, § 23. See supra note 48 and accompanying text.

50. See Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985) (holding that subpoena of bank records without notice to account holders did not violate their privacy interests); Florida Freedom Newspapers, Inc. v. Sirmons, 508 So. 2d 462, 463 (Fla. 1st Dist. Ct. App. 1987) (finding that section 23 does not foreclose press from obtaining and releasing court records concerning state senator’s divorce); Goldberg v. Johnson, 485 So. 2d 1386, 1388 (Fla. 4th Dist. Ct. App. 1986) (holding that terms of settlement agreement and guardianship documents detailing estate of Shepard Broad Law Center benefactor, Leo Goodwin, Sr., were available to public, overriding his right of privacy).

51. Sanchez, supra note 47, at 800.

52. Winfield, 477 So. 2d at 548. See also Shaktman v. State, 553 So. 2d 148, 153 (Fla. 1989) (Ehrlick, C.J., concurring) (holding that even though privacy interests were indicated when State gathered telephone numbers through use of pen register, State proved compelling interests and accomplished its goal through least intrusive means available); In re T.W., 551 So. 2d 1186, 1191 (Fla. 1989) (holding that woman’s constitutional right to terminate her pregnancy extends to minors).

53. In re T.W., 551 So. 2d at 1191.
governmental interference."\(^{54}\) The State of Florida, therefore, must satisfy a hefty burden in order to override an individual's right of privacy.

**IV. TEST FOR STATE INTRUSION INTO PRIVACY**

**A. What Triggers a Violation of Privacy? A Threshold Question**

The proper standard of review for a claim of an unconstitutional intrusion into one's zone of privacy under the *Florida Constitution* was first enunciated in *Winfield v. Division of Pari-Mutuel Wagering.*\(^{55}\) That standard is now a well-established test used in each privacy claim arising in Florida.\(^{56}\) First, since the right of privacy is fundamental, the state must have a compelling interest.\(^{57}\) This shifts the burden of proof to the government to justify its intrusion upon a person's privacy interest.\(^{58}\) This burden is only met by first "demonstrating that the challenged regulation serves a compelling state interest and [second, that it] accomplishes its goal through the least intrusive means."\(^{59}\) For a justified invasion, no governmental alternatives must have been available.

**B. The Intrusion**

The *Florida Constitution*’s privacy provision provides that citizens will be free from governmental intrusion.\(^{60}\) By this provision, Floridians supposedly have their privacy interests protected. The people could reasonably believe that the government cannot intrude upon their personal lives.

In *City of North Miami v. Kurtz,* however, Regulation 1-46 prevents applicants from smoking on their own time, even in their own homes, for a minimum of one year before they may be considered for a governmental

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55. 477 So. 2d 544 (Fla. 1985).

56. *See Stall,* 570 So. 2d at 260; *Shaktman,* 553 So. 2d at 157; *In re T.W.,* 551 So. 2d at 1191; Florida Bd. of Bar Examiners Re: Applicant, 443 So. 2d 71, 76 (Fla. 1983) (holding that Florida Bar requirement that applicants must disclose medical treatment records does not violate their right of privacy).

57. *Winfield,* 477 So. 2d at 547.

58. Id.

59. Id.

60. FLA. CONST. art. I, § 23.
job.61 This regulation allows governmental employers to take a peek inside the home and life of Kurtz, as well as other possible candidates for governmental employment. Since the regulation permits governmental intrusion, whereas Article I, section 23 of the Florida Constitution forbids such intrusion, they directly conflict. However, the Supreme Court of Florida held that this regulation is perfectly valid and does not violate the privacy provision.62 The court’s message to Floridians is that it is permissible for the City to demand to know if its applicants participated in legal, off-duty conduct on their own time.

On the other hand, some believe, and courts have held in prior cases, that the government should be limited to only that information it genuinely needs to know.63 To illustrate, in Grusendorf v. Oklahoma City,64 the court allowed a regulation prohibiting smoking before and during the particular employment.65 There is a significant difference between the facts in Kurtz and the facts in Grusendorf. Kurtz merely applied for a job as a clerk-typist. Contrarily, in Grusendorf, the plaintiff was a firefighter.66 For a job with duties of a firefighter, where people’s lives depend upon a person’s ability to perform, it is necessary for the employee to be in top health. Therefore, a requirement that the individual not engage in unhealthy behavior like smoking is a justified intrusion.67 In contrast, Kurtz’s applied-for position of clerk-typist lacks those stringent health and conditioning requirements, and people’s lives do not depend on it. Thus, the regulation appears to be an unjustified intrusion into Kurtz’s private life.

If the government is permitted to intrude into an applicant’s private life to determine if she smokes where the prohibition is not related to the job sought, one cannot help but wonder where the line will be drawn. There are no set limits or guidelines for what an employer may demand to know by claiming that it is in the City’s interest. There is, however, an extraordinary

61. See supra note 1. Regulation 1-46 does not directly state, “no smoking in your home or on your own time.” However, those are the obvious implications since it prohibits all smoking for one year at any location in order to be eligible for a city job.
64. 816 F.2d 539 (10th Cir. 1987) (holding that no-smoking off-the-job rule did not violate rights of employee).
65. Id. at 543.
66. Id.
67. Id.
amount of activities which are hazardous to one’s health and may be the
target of employer regulation. For instance, because drinking beer could lead to alcoholism and liver
problems, and eating eggs could lead to high cholesterol and heart disease, these activities could be banned by employers concerned about health
insurance costs. However, although these interests could legitimately
relate to insurance claims, these types of bans by employers would probably
fail because these activities are socially acceptable. In many cases,
people drink beer and eat eggs as a part of their daily regimen. In addition,

under the City’s analysis, it could regulate when its employees or
prospective employees go to bed at night, what they eat for breakfast,
what kind of cars they drive, where they take their vacations and what
hobbies they engage in, all in the interest of making sure that those
employees meet some ideal of health and fitness and thus cost the City
less money to insure.

Other prohibitions that employers might claim would help reduce
insurance costs for the taxpayers are activities that pose great health risks
but lack significant utility, such as consuming foods containing caffeine or
alcohol, participating in activities such as skiing, scuba diving, and

68. Some of the many acts that are hazardous to our health that could be possible targets
of employer regulation include the following activities:
Skiing, football, boxing, skydiving, and swimming are activities where a person puts
safety at risk. Medical experts agree there is no dietary reason for adding salt to
foods. Yet many people do and subsequently increase their risk of hypertension and
other circulatory diseases. Sunbathing often leads to skin cancer. A higher risk of
coronary disease is associated with high cholesterol consumption. Automobile driving,
mining, and bridge construction often result in injuries and fatalities.
Walter E. Williams, Cigarettes and Property Rights, in CLEARING THE AIR 39, 40 (Robert

69. Elizabeth B. Thompson, The Constitutionality of an Off-Duty Smoking Ban for

70. Compare possible interests claimed by the City due to harm from drinking beer and
eating eggs with the harm from smoking. Smoking is looked down upon more and more in
society. While few people give much concern to those who drink beer and eat eggs, there
are employers who do not allow smoking on the job, and there are restaurants that either ban
smoking or maintain a separate section for smokers. This results in a stigmatization of
smokers, and it illustrates the discriminatory focus of Regulation 1-46.

71. Drinking beer and eating eggs are just as much a part of many people’s daily
lifestyles as smoking. However, the City chose to focus its prohibition only on smoking.

72. Answer Brief of Respondent at 21.
motorcycle riding, or engaging in sexual activity with numerous partners.\textsuperscript{73} The idea of governmental control over its employees’ off-duty lives\textsuperscript{74} belittles the fact that an employer purchases only an employee’s labor, not the employee (or in this case, a prospective employee).\textsuperscript{75} Allowing this intrusion puts Florida’s constitutional privacy provision to shame because that which is expressly prohibited is actually being permitted.

Practical problems may arise from enforcing this regulation and allowing the intrusion. One possible problem is verification of compliance with the regulation. Verification of an off-duty ban may result in a deeper intrusion into one’s privacy.\textsuperscript{76} For instance, one possible verification procedure that would result in more intrusion is a demand that an individual take a polygraph test to determine if she lied about not smoking.\textsuperscript{77} Another intrusive way to verify compliance is by looking into the employee’s medical records to determine if she has any symptoms associated with that type of prohibited conduct.\textsuperscript{78} These two examples demonstrate the fact that verification is one problem which may result from allowing this intrusion.

Another possible problem resulting from this intrusion is concern over whether the government will be able to compel conduct of its employees and prospective employees in addition to banning it.\textsuperscript{79} For instance, it is a frightening concept to imagine that the government could compel a person to exercise, to eat certain foods, or to go to bed at specific times, all in the name of reducing insurance costs and increasing productivity. While the idea may seem a bit of a stretch to some, at one time the idea of the Supreme Court of Florida granting the government permission to enter into a person’s home to determine if she is engaging in lawful, off-duty conduct was also considered a stretch.

These potential problems illustrate that the \textit{Kurtz} decision could easily lead to an increase in governmental power and a corresponding decrease in


\textsuperscript{74} The idea of governmental control over its employees’ lives includes sole intrusion into a person’s private life to determine if she is smoking, as well as any of the other possible prohibitions mentioned.

\textsuperscript{75} Dushman & Maltby, \textit{supra} note 73, at 658.


\textsuperscript{77} \textit{Id.} at 962.

\textsuperscript{78} \textit{Id.}

\textsuperscript{79} Thompson, \textit{supra} note 69, at 520-21.
citizens’ rights.\textsuperscript{80} This intrusion is simply too much to bear, especially when the prohibited conduct fails to relate to the job sought. Citizens of North Miami who desire city jobs lost their right to participate in a specific form of lawful, off-duty conduct. The Supreme Court of Florida held this intrusion was justified because the state had compelling interests.

C. The City’s Lack of a Compelling State Interest

1. Introduction

In \textit{City of North Miami v. Kurtz},\textsuperscript{81} the Supreme Court of Florida found the City’s stated interests compelling, thereby justifying its intrusive behavior.\textsuperscript{82} A state’s interest only becomes compelling when “definite harm to specific individuals that either has occurred,” or will occur, is recognizable.\textsuperscript{83} The City claims two compelling interests in this case: a reduction of costs and an increase in productivity.\textsuperscript{84} The City has the burden of justifying its intrusion into the private lives of its applicants.\textsuperscript{85}

2. Reduction of Costs

The City claims it has a “compelling interest in saving money for taxpayers by employing only healthy applicants.”\textsuperscript{86} In \textit{Kurtz}, the City cites to evidence which states that “a high percentage of smokers who have adhered to the one year cessation requirement are unlikely to resume smoking.”\textsuperscript{87} Thus, the City concludes that the interest is compelling because employees will be healthier, thereby costing the taxpayers less money.\textsuperscript{88}

\begin{itemize}
\item \textsuperscript{80} This gives employers more economic power to control more than what is rightfully theirs to control. Dushman \& Maltby, \textit{supra} note 73, at 658.
\item \textsuperscript{81} 653 So. 2d 1025 (Fla. 1995), \textit{cert. denied}, 1995 WL 588370 (U.S. 1996).
\item \textsuperscript{82} \textit{Id.} at 1028.
\item \textsuperscript{84} \textit{Kurtz}, 653 So. 2d at 1026.
\item \textsuperscript{85} \textit{Id.} at 1027. This intrusion has been thrust upon Kurtz even though it does not relate to the job, and she (and all other applicants who are being intruded upon) has no guarantee of ever getting the job, even after she is forced to quit smoking for a year. \textit{Id.}
\item \textsuperscript{87} \textit{Kurtz}, 653 So. 2d at 1027.
\item \textsuperscript{88} \textit{Id.}
\end{itemize}
Usually, one would probably consider reductions of costs to the taxpayers from health insurance a compelling interest. In fact, the Supreme Court of Florida did just that in this case when it allowed a privacy intrusion due to the City’s claimed compelling interest in saving the taxpayers’ money.\(^8\) However, under the circumstances in this case, this interest cannot be deemed compelling because it does not relate to Kurtz’s ability to perform her job. The interests will not be deemed compelling “unless an employee’s off-work activity has a direct bearing on his or her ability to perform job-related tasks or significantly interferes with business operation.”\(^9\)

The City claims that a compelling interest will be served by monitoring the health of its prospective employees.\(^9\) However, this argument is flawed because the City is not concerned with the actual health of its employees. Since the compelling interest here is saving the taxpayers’ money by hiring healthy employees, the subject of Kurtz’s health must be examined.\(^9\) The City admits, however, that it did not even bother to inquire into Kurtz’s health.\(^9\) In fact, once Kurtz stated that she could not truthfully sign the affidavit,\(^9\) the City immediately turned her down without even questioning her health.\(^9\) In truth, the City does not even begin to examine any prospective applicants (even if they are the most qualified) if they have used tobacco in the past year.\(^9\) The process of waiting until after hiring to determine the health of employees, thereby supposedly satisfying this interest, divests the City of qualified applicants and forbids all applicants who smoke from demonstrating just exactly how healthy they are.

Even though the City claims to be concerned with reducing health insurance costs by refusing to hire smokers, current employees and prospective employees who have not smoked for a year are permitted to “light up” on the job.\(^9\) If the regulation’s goal is to reduce costs by hiring only non-smokers because they are healthier, the City’s compelling interest is defeated by the fact that once employees begin to work, they may smoke

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89. \textit{Id.} at 1028.
90. Rothstein, \textit{supra} note 76, at 963.
91. \textit{Kurtz}, 653 So. 2d at 1027.
92. Her health should be examined to determine if she would be a healthy employee. It was already determined that she was qualified. \textit{See supra} note 16 and accompanying text.
93. Answer Brief of Respondent at 5.
94. \textit{Id.} at 3.
95. \textit{Id.}
96. \textit{Id.} at 5.
97. \textit{Kurtz}, 653 So. 2d at 1027.
on the job as often as they please. Ironically, the place where workers may smoke, in the workplace, is precisely where the regulation should be enforced. The workplace is the one arena where employers may control conduct, because that is where the regulation will have an effect on other employees. The workplace is the one place with which employers must be concerned. The current regulation deprives smokers of the opportunity to demonstrate whether they are afflicted with any preexisting conditions that may cost the City more money for health insurance. Therefore, the City's interest in saving money for taxpayers cannot be deemed compelling.

3. Increase Productivity

The City's second claimed compelling interest is that the regulation will increase productivity. Before this case reached the Supreme Court of Florida, the Third District Court of Appeal held such an interest insufficient to outweigh Kurtz's privacy interests. The court reasoned that "the regulation constitutes an impermissible intrusion into Kurtz's private conduct and has no relevance to the performance of the duties involved with a clerk-typist." In other words, her lawful, off-duty conduct has no relevance to her performance on the job, nor her productivity once she begins to work.

When considering this particular interest, it is important to examine how the City claims productivity will be increased. The City suggests that since they employ healthier employees, productivity will increase due to lack of illness and absenteeism. On its face, this appears to be valid reasoning. However, when this regulation as applied is closely examined, it clearly does not support the City's stated interest because it permits on-the-job smoking. There is no rational correlation between a regulation designed to increase productivity by refusing to hire smokers, and then subsequently allowing them to smoke on the job. These two concepts clash and surely do not support the City's interest.

Another important aspect of this second interest is the type of employees the City will hire so that it may "increase productivity." As already established, the City's regulation forbids hiring smokers. However, "[t]he effect of the regulation is . . . that a less-qualified-non-smoker may be hired by the

98. Answer Brief of Respondent at 5.
99. Kurtz, 653 So. 2d at 1027.
101. Id. at 901.
102. Answer Brief for Respondent at 11.
103. Kurtz, 653 So. 2d at 1027.
City, while a more-qualified smoker would not even be allowed to apply. It is extremely unlikely that the City can increase productivity when there is a great possibility that it will hire less-qualified workers. There is no clear correlation between increasing productivity and refusing to hire qualified smokers. Furthermore, excluding all qualified smokers forces the City to choose from a limited number of applicants—only those who do not smoke. Once the non-smokers are hired, however, they may at any time decide to become a smoker and smoke on the job. This anomaly illustrates the City's claimed interest of increasing productivity through this regulation is not supported by the evidence, and is therefore not compelling.

D. Other Less Intrusive Means Available

1. Introduction

The only time a state interest can override personal privacy interests is when it is impossible to fulfill it by any less intrusive means. If the state actor does not use the least intrusive means, the privacy interests are not overcome and will, therefore, prevail over the state interest. In Kurtz, the Supreme Court of Florida found that the City used the least intrusive means. It held that the regulation was the least intrusive for three reasons. First, it does not prohibit smoking on the job. Second, it does not affect current health care benefits of employees. Third, it gradually reduces the number of employee smokers through attrition. Each of these reasons, however, fail as the least intrusive means available.

104. Answer Brief of Respondent at 6.
105. The City does not refute that Kurtz is qualified. Id. at 5.
106. See, e.g., Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 547 (Fla. 1985); see also Byron, Harless, Schaffer, Reid, & Assoc., Inc. v. State, 360 So. 2d 83, 96 (Fla. 1st Dist. Ct. App. 1978), quashed sub. nom by Shevin v. Byron, 379 So. 2d 633 (Fla. 1980).
108. Kurtz, 653 So. 2d at 1029.
109. Id.
2. Allowing Smoking on the Job

First, the court claims that one reason Regulation 1-46 is the least intrusive to privacy interests is because it allows smoking on the job. In fact, "the regulation only applies to job applicants and does not affect current employees. Once an applicant has been hired, the applicant is free to start or resume smoking at any time." This, however, lacks the status as the least intrusive means.

In contrast, the regulation actually seems very intrusive because instead of regulating conduct at work, it only intrudes into the applicants' conduct at home and in private. While in some cases this type of regulation may be reasonable, and even least intrusive, in Kurtz's situation, it fails to be both reasonable and least intrusive.

For instance, when the off-duty regulation in Grusendorf v. Oklahoma is compared with the regulation in Kurtz, the meaning of the term "least intrusive" manifests. In Grusendorf, a regulation was held to be the least intrusive because the regulated job was a firefighter, an occupation which has mandatory health requirements upon which citizens' lives depend. However, in Kurtz, the job was merely secretarial and had no mandatory health requirements. Since the job for which Kurtz applied does not have an obvious mandatory health requirement upon which lives depend, the respective regulation does not appear to be the least intrusive. In addition, it is understandable to the reasonable person that

[b]etween the hours of nine and five, the average person's life is not her own. Her employer can tell her what to do, and when and how to do it. . . . [However, f]ew would want to live in a society in which they were subjected to employer control twenty-four hours a day.

It is logical, and even practical, for one to assume that the employer may prohibit on-the-job smoking as part of the rules. That way the City could choose from the most qualified applicants and then enforce the no-smoking policy during working hours. The City, however, chose to travel a different route in this case, and in doing so, gave itself permission to control any prospective employee's life twenty-four hours a day. Certainly, allowing

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110. Id.
111. Id. at 1026-27.
112. 816 F.2d 539 (10th Cir. 1987).
113. Id. at 542.
114. Kurtz, 653 So. 2d at 1026.
115. Dushman & Maltby, supra note 73, at 646.
smoking while on-the-job and prohibiting it while off-the-job is an under-inclusive policy that does not employ the least intrusive means.

3. Health Care Benefits

The second reason the court accepted for the regulation being the least intrusive means was that it does not affect current health care benefits of employees.\textsuperscript{116} Even though the City claims to be concerned with health care benefits, Regulation 1-46 limits itself to the prohibition of smoking, which is just one aspect of life that may cause a person harm. The City fails to address why hiring bans on people with other health conditions that will affect the health care costs\textsuperscript{117} is any different than smoking, or more importantly, why they too are not prohibited. Hiring others that may either have a serious health condition, or may participate in dangerous activities\textsuperscript{118} which could result in high costs to the taxpayers, is not prohibited by this regulation. The City claims to be concerned about health care benefits of employees, yet it only focuses on a single possible cause of harm while failing to address numerous other risk factors. This appears to be discrimination directed at smokers, and it certainly does not appear to be the least intrusive means available.

Also, this reasoning fails as the least intrusive means when dealing with health care benefits because other alternatives are available for health care which the City did not consider. For instance, the employer could allow insurance options.\textsuperscript{119} The City could give all applicants, smokers and non-smokers alike, the option of waiving insurance coverage.\textsuperscript{120} In the present case, Kurtz already had her own health insurance; therefore, she would not have been a burden on the taxpayers because they would not be providing her with health care.\textsuperscript{121}

Next, the City could implement a premium increase for insurance of employees who smoke.\textsuperscript{122} This type of alternative would also eliminate any excess cost to the taxpayers. Any insurance cost increase would be paid for by the smoker herself, which results in a less burdensome alternative.

\begin{itemize}
\item \textsuperscript{116} \textit{Kurtz}, 653 So. 2d at 1029.
\item \textsuperscript{117} Other conditions that may affect health care costs include, but are not limited to: obesity, diabetes, hypertension, and cancer. \textit{See} Answer Brief of Respondent at 5.
\item \textsuperscript{118} These dangerous activities include, but are not limited to: unsafe sex, alligator wrestling, skydiving, and excessive television watching. \textit{Id.} at 6.
\item \textsuperscript{119} \textit{Id.} at 5.
\item \textsuperscript{120} \textit{Id.}
\item \textsuperscript{121} \textit{Id.}
\item \textsuperscript{122} Answer Brief of Respondent at 5.
\end{itemize}
Another alternative, one which the City already initiated, is a smoking cessation program.\textsuperscript{123} The City’s own expert witness testified that these programs, “[i]f properly implemented, can have up to a 40 percent effectiveness rate.”\textsuperscript{124} However, the City failed to discover if this program was a success before implementing Regulation 1-46.\textsuperscript{125} Had the City given the program some time to demonstrate its efficiency, or even attempted to establish if it was at all successful, it may not have had to resort to this regulation. The City had no idea whether this program was cost-effective nor whether the program could save money.\textsuperscript{126} Clearly, this would have been another less intrusive alternative available.

Finally, the City’s own evidence demonstrates that “most of the costs associated with employee smoking (lost productivity, secondhand smoke, ventilation and maintenance costs for segregation of smokers) can only be eliminated by a prohibition on on-the-job smoking.”\textsuperscript{127} The simplest and least intrusive means to deal with this issue would have been to ban on-the-job smoking. A ban of on-the-job smoking would help reduce smoking-associated costs and provide equal opportunities between the smokers and the non-smokers alike. In contrast, the effect of this regulation is the prevention of smokers from having a chance of obtaining any city job.

4. Reduction of Smokers Through Attrition

The final reasoning the court found to support its finding that the regulation is the least intrusive means is that it reduces the number of smokers through attrition.\textsuperscript{128} The number of smokers in society today is staggering. According to the National Center for Health Statistics, thirty-three percent of men and twenty-eight percent of women in the United States are smokers.\textsuperscript{129} The City hopes for a gradual reduction in the number of smokers by imposing a flat ban on hiring them for governmental jobs.

\textsuperscript{123} Id. at 9.
\textsuperscript{124} Id. at 10.
\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Answer Brief of Respondent at 10.
\textsuperscript{129} BUREAU OF NAT’L AFF., INC., WHERE THERE’S SMOKE: PROBLEMS AND POLICIES CONCERNING SMOKING IN THE WORKPLACE 8 (1986).
There is, however, a serious flaw with the reasoning that this regulation will reduce the number of smokers through attrition. This defect is illustrated by the following situation. Suppose an applicant, Avis, desperately needs the job so she struggles and succeeds in quitting smoking for one year. The City then hires Avis. Since the City permits on-the-job smoking, and because smoking is known to be a highly addictive behavior, the chances are very likely that the same person who quit for one year will resume the habit once in the presence of other smokers during the average work day. Thus, Avis starts smoking again, thereby not reducing the number of smokers on the work-force, but rather, increasing it. This probable scenario fails to support the City’s claim of least intrusive means.

These alternatives prove that the City did not use the least intrusive means available when it implemented this regulation. In contrast, it invaded Kurtz’s right of privacy under the Florida Constitution by allowing the government to prohibit legal, off-duty conduct to determine if an applicant will be considered for a city job.130 Florida should begin to look at the purpose of its own privacy amendment131 and also examine how other states deal with similar amendments for suggestions on how to handle these types of regulations.

V. SUGGESTIONS FROM OTHER STATES FOR DEALING WITH PRIVACY

A. Introduction

As illustrated by Kurtz, Florida courts are reluctant to take Article I, section 23 at face value.132 For an idea as to how privacy issues should be handled, two other states’ privacy amendments shall be reviewed. This review will demonstrate how courts in those respective states deal with privacy issues arising from state regulations.

B. Alaska’s Explicit Privacy Provision

Alaska, like Florida, has an explicit privacy provision in its constitution.133 The Alaska Constitution, Article I, section 22, provides that “[t]he

130. The applicant only receives consideration for the job. Remember, there is no guarantee that she will even be hired. This illustrates the severity of the intrusion into an applicant’s privacy.

131. FLA. CONST. art. I, § 23.

132. See Sanchez, supra note 47.

133. See Sanchez, supra note 47, at 799.
right of the people to privacy is recognized and shall not be infringed.\textsuperscript{134} This amendment is very similar to Florida's privacy amendment because they both recognize the same basic ideal.\textsuperscript{135} However, privacy amendments, solely on their face, do not demonstrate what effect they have on society. It is their interpretation and power given by the courts that allow these amendments to have an effect on society at large.

A significant case allowing an examination of what the Alaska constitution's privacy amendment means to Alaskans is Ravin v. State.\textsuperscript{136} In this case, a man was initially convicted for possessing marijuana in his own home.\textsuperscript{137} In Ravin, the Supreme Court of Alaska held that no adequate justification exists for the State's intrusion into a citizen's right of privacy by its prohibition of possession of marijuana by an adult for personal consumption in home; thus, possession of marijuana by adults at home for personal use is constitutionally protected.\textsuperscript{138} The court relied on Alaska's privacy amendment and previous United States Supreme Court cases\textsuperscript{139} to determine that an individual has a right of privacy to do as he pleases in his own home.\textsuperscript{140}

This case is similar to Kurtz because they both involve the prohibition of smoking. However, the substance smoked in Ravin was illegal.\textsuperscript{141} Even though it was unlawful, the Supreme Court of Alaska still found that as long as it was done in the privacy of one's own home, the State lacked the ability to intrude.\textsuperscript{142}

The State of Florida should expand its constitutional horizons and look upon Alaska as an ideal example to follow. Alaska drew the line of state intrusion into the home at the threshold of the front door. In Kurtz, however, the Supreme Court of Florida has allowed government employers to open that door and barge in, thereby giving them permission to forbid all applicants for a city job from lawfully smoking in their own homes.\textsuperscript{143}

\begin{footnotesize}
\begin{enumerate}
\item[134.] ALASKA CONST. art. I, § 22.
\item[135.] The ideal recognized in both the Florida and Alaska constitutions is being free from governmental intrusion.
\item[136.] 537 P.2d 494 (Alaska 1975).
\item[137.] Id. at 496.
\item[138.] Id.
\item[139.] Id. at 498-99 (citing Griswold v. Connecticut, 381 U.S. 479 (1965) and Stanley v. Georgia, 394 U.S. 557 (1969)).
\item[140.] Ravin, 537 P.2d at 504.
\item[141.] The illegal substance smoked in Ravin was marijuana. Id. at 496.
\item[142.] Id. at 504.
\item[143.] City of N. Miami v. Kurtz, 653 So. 2d 1025, 1029 (Fla. 1995), cert. denied, 1995 WL 588370 (U.S. 1996).
\end{enumerate}
\end{footnotesize}
The Supreme Court of Florida should follow Alaska's precedence and enforce Florida's privacy amendment to protect lawful, off-duty conduct that takes place at home, outside of the working arena. Florida must not permit the government to intrude upon a person's private life, as did the Kurtz court. Instead, Florida should follow the court's rationale in Ravin and protect lawful, off-duty conduct that is irrelevant to the performance of one's job and takes place in one's own home. To further exemplify Florida's lack of protection of privacy, Rhode Island's privacy provision will be considered.

C. Rhode Island's Explicit Privacy Provision

The State of Rhode Island also has an explicit privacy provision. This provision, however, is more direct in its protection. It "prohibits employers from refusing to hire or otherwise discriminate against employees for the lawful off-duty use of tobacco products." Thus, Regulation 1-46 would not have been upheld in Rhode Island. In addition, Louisiana, Oklahoma, and Virginia also bar employers from discriminating against employees based on lawful, off-duty behavior such as smoking.

Florida should follow these states and provide stronger protection for its citizens. For instance, Rhode Island's amendment clearly provides protection to smokers from discrimination. In contrast, Florida's privacy amendment has not received much support or enforcement, as illustrated by the decision in Kurtz. Floridians need more privacy protection before the State may intrude into more serious and personal aspects of private lives. For instance, more protection is necessary before intrusions into lawful sexual behavior, a woman's plans for procreation to eliminate family leave, as well as what religions are practiced by applicants are permitted. Kurtz may have opened the door for such intrusions. Thus, Florida ought to protect its citizens by following the lead of other states. It should implement a stricter privacy provision, or at least as a bare minimum, apply the

144. Id. at 1029.
146. Id.
148. See Crumbley & Hearing, supra note 145 and accompanying text.
149. Kurtz, 653 So. 2d at 1029 (Kogan, J., dissenting).
strict scrutiny standard the way it was intended. This will give the Florida Constitution's privacy provision its maximum potential of protection of privacy for Floridians.

VI. CONCLUSION

Kurtz was denied an employment opportunity because of what she lawfully did in the privacy of her own home. Even though she smokes at home, she is willing to abide by any on-the-job smoking prohibition. Nevertheless, the City only forbids off-duty smoking, leaving the right to smoke on-the-job intact. This regulation is extreme and should fail to satisfy the strict scrutiny test that would justify such an intrusion, as it is merely a pretext for the main "problem" that the City wants to address. The City's main flaw in designing this regulation is that it fails to address this real problem: the City does not want smokers on its payroll. Instead of limiting the conduct of every possible applicant, the City's regulation should have taken the form of an on-the-job smoking ban. This type of prohibition is more acceptable because it would not control what the citizens of Florida may do on their own time, in their own home, as well as any other time they are not on the clock.

This is an apparent case of the government attempting to control private lives of citizens. In Kurtz, the Supreme Court of Florida invites such intrusions. Such precedent by the court opens the door to greater intrusions than just allowing the City to implement this regulation. Florida's privacy provision must receive the protection that was originally intended before the right to privacy is just a memory of what could have been.

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150. Answer Brief of Respondent at 4.