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In the

Supreme Court of the United States

THOMAS E. ZABLOCKI, MILWAUKEE COUNTY CLERK, ETC.,

APPELLANT,

V.

ROGER G. REDHAIL, ETC.

APPELLEE.

No. 76-879

Washington, D. C.
October 4, 1977

Pages 1 thru 48

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IN THE SUPREME COURT OF THE UNITED STATES

THOMAS E. ZABLOCKI, Milwaukee County Clerk, etc., Appellant, v. ROGER G. REDHAIL, etc., Appellee.	No. 76-879

Washington, D. C.,

Tuesday, October 4, 1977.

The above-entitled matter came on for argument at 1:08 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

WARD L. JOHNSON, JR., ESQ., Assistant Attorney General of Wisconsin, 114 East, State Capitol, Madison, Wisconsin 53702; on behalf of the Appellant.

ROBERT H. BLONDIS, ESQ., Legal Action of Wisconsin, Inc., 211 West Kilbourn Avenue, Milwaukee, Wisconsin 53203; on behalf of the Appellee.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-879, Zablocki against Redhail.

Mr. Johnson, I think you may proceed when you're ready.

ORAL ARGUMENT OF WARD L. JOHNSON, JR., ESQ.,

ON BEHALF OF THE APPELLANT

MR. JOHNSON: Thank you.

Mr. Chief Justice, and if it please the Court:

This is a direct appeal from the District Court for the Eastern District of Wisconsin, which declared a Wisconsin State statute, imposing a certain marriage requirement, unconstitutional.

The facts in this case are not in dispute.

The named plaintiff, Redhail, six years ago, approximately, fathered a baby girl out of wedlock. At that time he was in high school. Two years later he applied for

permission to marry to the County Clerk of Milwaukee County in the State of Wisconsin; because of a marriage requirement the Clerk denied him a license.

The requirement that was a basis for the denial by the County Clerk was that a person who has minor children not in his custody, to whom he has an obligation to support, must get permission from a court to marry.

In Mr. Redhail's case, he had never been married. We suspect the bulk of the cases arising, where there is a requirement to get a court's permission, are those cases involving people who have been divorced, who have been married before.

At this point, Mr. Redhail filed a complaint with the District Court for the Eastern District of Wisconsin, petitioning the court to declare the statute unconstitutional because it infringed or impinged upon his constitutional right to marry.

QUESTION: Mr. Attorney General, is the statute still operative?

MR. JOHNSON: Yes, it is, Your Honor.

QUESTION: What about this new legislation?

MR. JOHNSON: Assembly Bill 100 was passed by both houses last Friday. It is now on the Governor's desk for signature.

QUESTION: Well, if he signs it, it becomes law?

MR. JOHNSON: Yes.

QUESTION: Then what happens in this case?

MR. JOHNSON: Nothing. The Legislature has preserved the statute in question here, 245.10, intact. Of course its operation has been suspended by the injunction of the three-judge court.

QUESTION: You mean the new legislation doesn't affect the statute before us?

MR. JOHNSON: That is correct. In our belief it does not.

QUESTION: Well, I don't --

MR. JOHNSON: Let me explain further, Justice Brennan.

QUESTION: Yes. Please.

QUESTION: Does Mr. Redhail still want to marry the girl?

MR. JOHNSON: We do not know whether his ardor has cooled or not.

QUESTION: She hasn't married in the meantime?

MR. JOHNSON: He has not applied for a license -- he did not apply for a license up to the time of the appeal to this Court.

QUESTION: Is there something in the record that indicates he has had a second child?

MR. JOHNSON: No, there is not.

QUESTION: You were going to tell me, Mr. Attorney General?

MR. JOHNSON: Yes. Assembly Bill 100, which is now before the Governor for signature, retains the present statute intact. Its operation is suspended when there's any injunction enjoining the enforcement procedures under 245.10, which --

QUESTION: As there is in this case.

MR. JOHNSON: It was tailor-made legislation to accommodate this appeal. If this Court --

QUESTION: But, as I understand it, that statute becomes -- when the Governor signs it, that automatically, since there's an outstanding injunction here, suspends the operation of the statute we have before us?

MR. JOHNSON: As long as there is an injunction pending, restraining the enforcement of that statute, yes.

QUESTION: So you are --

MR. JOHNSON: And another statute comes into play that slightly modifies the statute under question.

QUESTION: Let me approach it from the other side. If the statute which is now on the Governor's desk had been in effect at the time this case arose, would there be any case?

That's what I think we're trying to prove that.

MR. JOHNSON: I believe because of the accommodation

in the new statute to give the court greater discretion in terms of people who have never been married before, that the statute -- that there would be no -- that Mr. Redhail would not have been a suitable representative plaintiff.

QUESTION: But he still would have had to seek the approval of the court? Under the -- if the new statute had been in effect, this new statute we're talking about, had been in effect then, he would still have to go to the courts, would he?

MR. JOHNSON: Not Mr. Redhail.

QUESTION: Then we come to what we've been trying to get at.

MR. JOHNSON: Okay.

QUESTION: Is there a case left here? If the new statute is signed by the Governor tomorrow or the next day.

MR. JOHNSON: Yes, Mr. Chair Justice, in that that statute is only operative when there is a restraining order against the enforcement of the present statute, 245 --

QUESTION: And there is a restraining order?

MR. JOHNSON: By the three-judge court, the District Court for the Eastern District of Wisconsin, yes.

QUESTION: Well, when that new statute becomes operative, it means Mr. Redhail then can get married without applying to a court for permission to get married, doesn't it?

MR. JOHNSON: Mr. Redhail could have gotten married

as soon as the court issued its injunction.

QUESTION: But if this Court were to reverse the judgment of the District Court, then the new statute would be inoperative.

MR. JOHNSON: That is correct. That is correct, and --

QUESTION: Subsection (8) on page 4 of this Supplemental Memorandum of the Appellees is the provision of the statute to which you're referring then, I think?

MR. JOHNSON: Yes.

QUESTION: I don't understand why this case isn't moot now.

All he has to do is to apply for a marriage license.

MR. JOHNSON: He could have applied for a marriage license under the restraining order; we are restrained now from enforcing 245.10.

QUESTION: He could have been married, divorced, remarried by now, couldn't he?

MR. JOHNSON: Because of the restraining order issued by the District Court, yes.

QUESTION: Well, what do we have -- what's he complaining about now?

MR. JOHNSON: We have a class action that embraces all people --

QUESTION: Well, can't all of them register now?

MR. JOHNSON: They all could, because of the restraining order. Under the statute that might become operative, --

QUESTION: That's right.

MR. JOHNSON: They would have to -- if they had been divorced, they would have to go to a court for permission to remarry.

QUESTION: Well, is the statute kind of a second line of defense for the State, so to speak?

MR. JOHNSON: Yes. This -- the Legislature wanted to keep our present -- the statute that is now on appeal here, the decision regarding the statute intact. In the meantime, --

QUESTION: If possible.

MR. JOHNSON: If possible. In the meantime, they have enacted this interim statute. If this Court affirms the restraining order of the three-judge court, the new statute will be in effect and, for all practical purposes, the present statute is dead.

But should this Court lift the restraining order of the three-judge court, the statute that we're talking about immediately springs back into life.

QUESTION: In other words, if we reverse and sustain the constitutionality of the old statute, the new statute then becomes inoperative?

MR. JOHNSON: That is correct.

And the old statute springs --

QUESTION: So we've got to decide the case, is what you're telling us.

MR. JOHNSON: Oh, I'm suggesting that it isn't moot, that the Legislature --

QUESTION: I had hoped you would agree that it was.

QUESTION: Mr. Johnson, let me go back to my question. You indicated there was nothing in the record that implied he had a second child. In the complaint it is alleged that he was adjudged to be the father of a baby girl born in 1970. And then I also read: "plaintiff desires to marry. He and the woman he intends to marry are expecting a child to be born in early March 1975."

My question is: was that child ever born?

MR. JOHNSON: I do not know.

So Mr. Redhail filed a complaint with the District Court, and at this point I would point out that he did not go to a judge to seek permission to remarry, and counsel for the plaintiffs have made a great point of the fact that the statute permits a judge to grant permission, when he finds that the child of the non-custodial parent is a public charge or likely to become a public charge.

Mr. Redhail felt that, apparently, that he could never meet the test required by "or likely to become a public

charge". This phrase has never been construed by Wisconsin courts. If construed very narrowly, I would suggest that it could be equated with a settling of accounts up to date.

It is on the basis of this that we have suggested perhaps the District Court might have abstained, as suggested in Reetz vs. Bozanich and subsequent cases under that doctrine.

Now, the three-judge court decided that this should be a class action, carefully noting in their decision that we have two classes, really, of plaintiffs; one, the named plaintiff, who had never been married before; and the other category would be people who had been married before and were divorced.

They also found and certified as a class all of the County Clerks of the State of Wisconsin; we have 72 County Clerks. The class is very easily identifiable. We objected in oral argument, as noted in the court's decision, to certifying such a class without notification to the 71 other County Clerks.

QUESTION: Mr. Johnson, could I go back one point? You said the reason that perhaps the court should have abstained was that the "likely to become a public charge" language might or might not apply. But is not the child now a public charge? Didn't the District Court find that?

MR. JOHNSON: There was no determination on this

particular occasion whether this child was a public charge, but the child was an AFDC recipient, and there's no question that Mr. Redhail would not have obtained judicial permission to remarry, because of the AFDC benefits being extended to his daughter.

QUESTION: Then you wouldn't have any occasion to worry about the "likely to become a public charge" language.

MR. JOHNSON: I don't know. We're speculating about the future, but --

QUESTION: But not as to this particular litigant. We know that he could not have gotten the approval.

MR. JOHNSON: Not without paying up the arrearages which --

QUESTION: Even if he paid the arrearage, the child would still be a public charge. Isn't that true?

As long as she is receiving the $109 a month, from AFDC.

I just want to be sure I understand your argument.

MR. JOHNSON: Okay. Yes. But it's possible that had he paid up his arrearages, and showed his ability to meet the support order, that he would have secured judicial permission to marry.

QUESTION: Even though the child was still on AFDC?

MR. JOHNSON: If she was on AFDC, no.

QUESTION: All right. And she is on AFDC.

MR. JOHNSON: She was at the time.

QUESTION: But presumably, if he went into court and showed that he had a job making $900 a month and paid up the arrearages and the child was off of welfare, then you suggest the permission would have been granted?

MR. JOHNSON: I think so.

QUESTION: Does it make a difference under your statute whether the child is in the father's custody?

MR. JOHNSON: Yes. It is that --

QUESTION: Why?

MR. JOHNSON: The statute says so. The rationale, I suppose, Justice Blackmun, being that the custodial parent already has the burden of the care and has the right to expect contribution from the non-custodial parent.

QUESTION: Well, the child may be on welfare even when she's in the father's custody; couldn't she?

MR. JOHNSON: Sure.

We're not suggesting that the law is absolutely perfect and that there are no gaps, loopholes, whatever you want to call them. We do the best we can in terms of a standard for marriage requirements.

QUESTION: Well, it certainly isn't perfect. I suppose there's as much risk to the State of Wisconsin to allow a marriage of a childless indigent as there is to one who has a child. The childless indigent can produce, too.

MR. JOHNSON: Well, let's look at --

QUESTION: Presumably.

MR. JOHNSON: Presumably. But at least here we have a record to go on. Whereas we do not have in the case you suggested.

QUESTION: That's why I was trying to help you out, wondering whether there was a second one that he spawned.

MR. JOHNSON: We don't know.

QUESTION: Well, wouldn't a judge -- in this case, if there is another child about to be born, illegitimately, and this man wants to marry the girl in order to give that child a name, do you mean the judge wouldn't give him that permission?

MR. JOHNSON: I do not know. If I were to predict --

QUESTION: Yes.

MR. JOHNSON: -- I would say that the judge would probably stick by the statute and refuse. But that's just my prediction.

QUESTION: So the State of Wisconsin's public policy is that it's better to have two illegitimate children than one.

MR. JOHNSON: The policy is that we are not going to condone, by a piece of paper called a marriage license, --

QUESTION: You don't condone it, you'll compel it?

MR. JOHNSON: So that's one of the weaknesses of

the statute. But there's something to be said on the other side, too, and I guess that's why I'm here.

All right. The three-judge court then certified a class action for all of the named defendants. At oral argument we objected, on the basis of no notice to them. The court, the Circuit Court, split on this, one following the ironclad rule to give a notice; the other Circuit saying, well, if there's adequate representation, the notice can be dispensed with.

Now, then, the court, the three-judge court said this statute of Wisconsin impinges upon a fundamental right, the right to marry, and that this requirement of going to the judge and getting permission to remarry impinges upon that fundamental right, and it's therefore a suspect statute and follows that the State must show a compelling State interest to sustain its validity.

And we object on this appeal to the application of this stringent, result-oriented type of test.

I think it was back in United States vs. Caroline Products, where a footnote by the writer of that opinion indicated that statutes are entitled to a strong presumption of constitutionality except perhaps where there is a right expressly set forth in the Constitution itself.

This idea, of course, has grown and culminated, as we pointed out, in Shapiro vs. Thompson in 1969, when the

Court found that the right to travel -- and of course it was in connection with welfare benefits -- was a fundamental right and the State had to show some compelling State interest that would override this impingement or this entitlement to exercise the fundamental right.

Since that time, that case, the Boddie case on right to divorce, the Griswold case, have all been cited in terms of their language to suggest this familial privacy right, and to suggest that anything that touches upon the marriage, the right to marriage, all of its collateral attributes, is suspect and subject to this test.

Though we note that in the Iowa case regarding the durational residency requirement of Iowa, Shapiro vs. Thompson, doctrine of compelling State interest was not applied.

QUESTION: Does Wisconsin recognize common-law marriages?

MR. JOHNSON: It does not.

Now, Justice Harlan, in his dissent in Shapiro, pointed out the danger of labeling something as a fundamental right, which invokes this, as we call it, result-oriented test, stringent test, that the State must show a compelling State interest to override the impingement.

I would suggest --

QUESTION: Shapiro held, did it not, that the right of interstate travel is a constitutional right, a

constitutionally protected right?

MR. JOHNSON: Yes.

QUESTION: And that was emphasized in the concurring opinion, that it was more than just a subjective view of this Court that it was a fundamental right, but held rather that it was the right of interstate travel as contrasted with international travel and is a constitutionally protected freedom.

MR. JOHNSON: Okay. Expressed in the Constitution, I presume.

But now we are talking about rights that are not --

QUESTION: Exactly.

MR. JOHNSON: -- expressly contained in the Constitution.

QUESTION: Exactly.

MR. JOHNSON: And I think it's a fundamental right that a youngster should be surpported by his parents. We talk about rights, we have duties. The right to get married, procreate, has an attendant duty to support children of that marriage.

QUESTION: But how does the refusal -- if he remarries, you still can get the money out of him, can't you?

MR. JOHNSON: True. There are other laws with respect to --

QUESTION: Well, how does the refusal to get -- to

permit him to marry, get the money to the child?

MR. JOHNSON: It requires him to square up accounts, to pay the arrearages.

QUESTION: Before he gets married.

MR. JOHNSON: Yes.

QUESTION: But, I mean, how does thatmake him do it?

MR. JOHNSON: It makes him do it. We had resolutions from innumerable county boards requesting us to take this appeal. The --

QUESTION: I still don't understand. You can still -- how do you collect the money? You can sue him; right?

MR. JOHNSON: Yes.

QUESTION: In Wisconsin, how do you collect this money?

MR. JOHNSON: Well, if he's --

QUESTION: The support money. How do you collect it?

MR. JOHNSON: All right. The county -- the Clerk of the Court collects the money in an ordinary case, a divorce case or support case. The Clerk of the Court.

QUESTION: And how does his marrying prevent the Clerk from doing that?

MR. JOHNSON: Because --

QUESTION: Now listen to my question.

MR. JOHNSON: All right.

QUESTION: How does preventing him from marrying prevent the Clerk -- no, no, how would his marrying prevent the Clerk from collecting the money?

MR. JOHNSON: Well, the actual fact of his marriage, remarrying or marrying, would not prevent the Clerk from collecting the money.

QUESTION: Well, why --

MR. JOHNSON: But it puts pressure on him to bring himself up to date with respect to arrearages.

QUESTION: You mean it saves the Clerk from going through the motions?

MR. JOHNSON: Well, the Clerk doesn't -- the Clerk just receives the money, he doesn't enforce support obligations.

QUESTION: Well, who does?

MR. JOHNSON: The custodial parent.

QUESTION: I thought you said the Clerk did.

MR. JOHNSON: You asked me how does the -- how is the money mechanically gotten to the child.

QUESTION: But here's a man who says, "I will not give my child a nickel", now what does the State of Wisconsin do to get the nickel?

MR. JOHNSON: Where it's wilful, they can press criminal charges.

QUESTION: And they can do that whether he gets

married or not?

MR. JOHNSON: That is true.

QUESTION: What other way can they do it?

MR. JOHNSON: The --

QUESTION: Contempt powers?

MR. JOHNSON: The private person can bring an action for contempt for wilful --

QUESTION: And he can do that after his marriage, too, can't he?

MR. JOHNSON: Yes, he can.

QUESTION: So what good is it, stopping him from marrying?

MR. JOHNSON: The pressure is put on him --

QUESTION: Moral pressure. Moral.

MR. JOHNSON: Moral.

QUESTION: That's all?

MR. JOHNSON: To square accounts.

QUESTION: Is that all?

MR. JOHNSON: Well, --

QUESTION: It does prevent him from undertaking another legal obligation.

MR. JOHNSON: And incurring further obligations.

QUESTION: Well, he's already incurred one. Didn't you say he's got an illegitimate child coming along?

MR. JOHNSON: Unh-hunh.

QUESTION: Well, he's already incurred that.

MR. JOHNSON: Okay. And before he incurs further, let's have him face up to the responsibility that he's already acquired.

QUESTION: Yes, but at least the complaint says he's already incurred a second one.

MR. JOHNSON: Well, --

QUESTION: So what does your statute do?

MR. JOHNSON: For Mr. Redhail, it doesn't seem to do very much. But down the line somewhere, he is going to be called to square accounts if he wants that piece of paper from the State of Wisconsin saying, "Hey, we condone your marriage."

In conclusion, I would just point out that in its domestic relation policy, the State of Wisconsin has attempted to effect a higher standard of conduct than has normally been expected. We have been shot down by the three-judge court, who failed -- which failed to balance the interest of the custodial spouse, the interest of the child, the protection of the child.

And I'd point out that the purpose of this statute is enunciated by our Supreme Court, the State of Wisconsin Supreme Court, in State v. Mueller, is to protect the child and protect the integrity of the marital relationship.

That's all.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Johnson.

QUESTION: Let me just ask one question. Which marital relationship would be protected in this area? There was no marital relationship at all here, was there?

MR. JOHNSON: Down the line, it is perhaps a deterrent, that you can't walk out on a family and discard them --

QUESTION: That is, protect the integrity of the pre-existing marriage, if there was one?

MR. JOHNSON: Yes.

MR. CHIEF JUSTICE BURGER: Mr. Blondis.

ORAL ARGUMENT OF ROBERT H. BLONDIS, ESQ.,

ON BEHALF OF THE APPELLEE

MR. BLONDIS: Mr. Chief Justice, may it please the Court:

The defendants have not denied that marriage involves a fundamental right. The source of the right is found, not in State law but in our intrinsic human rights.

QUESTION: Mr. Blondis, before you get into your legal argument --

MR. BLONDIS: Yes.

QUESTION: -- the judgment of the District Court, I guess, was entered in the spring of '75.

MR. BLONDIS: That's correct.

QUESTION: No stay was entered?

MR. BLONDIS: That's correct.

QUESTION: Did your client go ahead and get married?

MR. BLONDIS: Your Honor, our client got married in Illinois before the injunction was entered by the court. A substantial period of time elapsed between the time that the class was ordered maintainable as a class action as to the plaintiffs, then oral argument was held, and then, lastly, the opinion was rendered and the order for judgment and judgment were rendered.

QUESTION: Did you call the attention of the District Court to the fact that your client had gotten married in Illinois?

MR. BLONDIS: At that -- we couldn't get ahold of our client, Your Honor; we weren't aware that he had gotten married in Illinois.

The Illinois marriage is invalid, and he is still affected by Section 245.10. Section --

QUESTION: You mean it's made invalid by the Wisconsin statute?

MR. BLONDIS: Yes. Correct.

QUESTION: You don't challenge that?

MR. BLONDIS: We hadn't at that time -- he got married after all the pleadings, after the case had been completely submitted to the court.

QUESTION: I know, but I'm just curious. I guess

it's not here.

But here you've got a statute which -- a Wisconsin statute that purports to be operative on an Illinois marriage?

MR. BLONDIS: Well, Mr. Redhail was a resident of Wisconsin when he went in seeking --

QUESTION: So? So?

Well, you --

MR. BLONDIS: The constitutionality of that provision may be questionable, Your Honor. It hadn't -- when Mr. Redhail came into our office, he was not being affected by that statute. He couldn't have cared less about the statute, he wanted to get married.

QUESTION: Is he still a resident of Wisconsin?

MR. BLONDIS: Yes, he is.

QUESTION: Did he ever tell the judge?

MR. BLONDIS: Did he ever --?

QUESTION: Did he ever tell the trial judge that he was a married man, when he was asking for permission to get married?

MR. BLONDIS: No, Your Honor, he and his --

QUESTION: Well, do you think that's proper?

MR. BLONDIS: He and his intended --

QUESTION: Do you think that's proper? To mislead a judge.

MR. BLONDIS: Your Honor, he never was in fact married. His marriage was invalid --

QUESTION: Well, did he tell him that he had invalidly married?

MR. BLONDIS: The federal judge?

QUESTION: Yes.

MR. BLONDIS: No, he did not.

QUESTION: Well, don't you think he should have?

MR. BLONDIS: In light of the fact, Your Honor, that his marital status was the same as if he had never gotten married in Wisconsin.

QUESTION: Well, why did he get married in Illinois?

MR. BLONDIS: He got married in Illinois because he was having a second child by his intended spouse, had been refused -- had been refused permission by the State to receive permission to marry; sought desperately to get married. And I haven't discussed with him his exact reason for getting married, but it could have been that he just simply got impatient, and went into Illinois and then --

QUESTION: Well, with all of this imagination, don't you think it was your duty as a lawyer and a member of the bar to give the judge the true facts of the case that you were presenting to him, the truth, the whole truth?

MR. BLONDIS: Your Honor, we were not aware that he had gotten married until after the opinion and injunction.

In other words, we lost touch with Mr. Redhail --

QUESTION: Well, did you think then you should tell the judge?

MR. BLONDIS: Your Honor, no, we didn't.

QUESTION: And was the child born?

MR. BLONDIS: Yes.

QUESTION: I take it, then, that the marriage -- that the formalization of the marriage and the blessing by the State must have meant something to Mr. Redhail, if he was willing to go down to Illinois and get married.

MR. BLONDIS: To Mr. Redhail, it did. We have since explained the legal predicament that he has put himself in, for whatever reason the solemnization of his relationship, which in fact is void under the eyes of Wisconsin law, it did mean something to him and his spouse.

QUESTION: Well, I still don't understand why you say so readily that the marriage is void.

MR. BLONDIS: Because under the --

QUESTION: Well, since Wisconsin law says that an out-of-State marriage --you don't suppose there's any question about that?

QUESTION: Suppose it was just a matter of age under Wisconsin law, that a male can't marry before he's 21, and he happened to be 19, and the age in Illinois was 18?

MR. BONDIS: I believe that under Wisconsin law,

Wisconsin law, even in the age requirement, is if one leaves the State for the purpose of intentionally evading its State marriage laws, then returns to the State and retains residency, that law or that marriage is invalid and would have to be validated.

In Mr. Redhail's case, Mr. Redhail would have to go through an annulment proceeding --

QUESTION: Was this one of those overnight trips to Waukegan?

MR. BLONDIS: Yes. Fromwhat I understand.

[Laughter.]

QUESTION: Mr. Blondis, what worries me is you spending so much time trying to make your client's child illegitimate.

MR. BLONDIS: Your Honor, I am --

QUESTION: Isn't that what you're doing?

MR. BLONDIS: No. I am trying to have a law --

QUESTION: Well, if you make the marriage invalid, the child will be illegitimate.

MR. BLONDIS: Your Honor, I didn't make the marriage invalid, the statute in question, Section 245.10, --

QUESTION: But you're spending a whole lot of time now trying.

MR. BLONDIS: Well, I'm trying to persuade the Court that the statute is invalid and that Mr. Redhail has

been victimized by the statute; not only has he been victimized by the statute, but his intended spouse has been victimized by the statute, and his second child has been victimized by the statute.

QUESTION: Well, his legal predicament with respect to his present marriage -- to his additional marriage in Illinois, isn't going to be affected by whether you win or lose this case.

MR. BLONDIS: Oh, yes, it will, Your Honor.

QUESTION: Why is that?

MR. BLONDIS: If he -- if this statute -- if this Court affirms the lower court, Mr. Redhail would then --

QUESTION: Well, he can get a license.

MR. BLONDIS: Yes.

QUESTION: Well, I know, but just winning his case isn't going to validate the marriage -- isn't going to --

MR. BLONDIS: No, he would then have to undergo a State court proceeding, --

QUESTION: Exactly.

MR. BLONDIS: -- which has absolutely nothing to do with the question in this case.

QUESTION: That's right.

MR. BLONDIS: And --

QUESTION: Well, why is that, Mr. Blondis? If the statute is invalid, it' no longer presents any impediment

to the validity of the Illinois marriage.

MR. BLONDIS: But that --

QUESTION: That provision isn't involved in the --

MR. BLONDIS: The Illinois marriage complicates things, because in -- I don't believe it complicates things for purposes of this case. It complicates things for Mr. Redhail, because he would have to, Your Honor -- under Wisconsin law there is no such thing as a void marriage.

That is, in order for a marriage to be declared void --

QUESTION: Well, it sure is, according to paragraph (5) of the statute, "Any marriage" --

MR. BLONDIS: But even then he would have to go through a court procedure, so that a judge says that it's void.

In other words, it may be void in fact, but a court has to announce that it's void.

QUESTION: But if we hold the statute unconstitutional, there's no basis for holding it void, and the marriage would be good. I don't understand why the marriage can be bad if the statute is bad.

MR. BLONDIS: Oh, I see your point. Yes. I think I -- that's correct.

QUESTION: But that provision just isn't at issue here.

MR. BLONDIS: That's right. That's right.

QUESTION: Well, yes, it is, because it says "Any marriage contracted without compliance with this section", and without compliance -- if we hold this section which needs to be complied with invalid, there's no non-compliance.

MR. BLONDIS: That's correct. As long as 245 is on the books in Wisconsin, then Mr. Redhail's marriage is as if he never got married.

QUESTION: But 245 was never attacked on that grounds in the District Court.

MR. BLONDIS: The extraterritorial effect of it? That's correct.

QUESTION: Is the second child living with Redhail now?

MR. BLONDIS: To my knowledge, Your Honor, there --

QUESTION: Is the woman that he purported to marry in Illinois living with him?

MR. BLONDIS: Yes.

QUESTION: All right.

QUESTION: Mr. Blondis, the class certification was on February 20th, 1975, as I understand it.

MR. BLONDIS: Yes.

QUESTION: Was the marriage before or after that?

MR. BLONDIS: Afterwards, Your Honor.

QUESTION: So the class had been certified before the Illinois marriage took place?

MR. BLONDIS: Yes. The class -- yes, that's right. And after, well after oral argument had taken place.

Your Honor, the State, in its brief, proposed to this Court that because this is a statute dealing with marriage and divorce, the State has a peculiar interest in that area and therefore this Court should supply a rational relationship, equal protection or, I suppose, substantive due process analysis to this case.

The State, in my opinion, gave no good reason why that should be the case. We are aware of cases, both in marriage and divorce and in voting and probate, where this Court has held that States have a peculiar interest in those areas. But we don't believe that the Court has ever gone so far as to hold that regulations which adversely affect serious long-standing fundamental constitutional rights are going to be completely deferred to by the State, by the application of the rational relationship, equal protection test.

Concerning the purposes of the statute, the State argued in the lower court that the purpose of the statute was the provision of counseling to persons who are about to undergo marriage. I bring that up only because the only legislative history available behind this statute, which is cited at pages 29 through 32 of our brief, indicates that that, in fact, was the benevolent purpose of this statute. It was to provide

counseling for persons who had support obligations and were about to undergo marriage.

This statute obviously has nothing to do with counseling. Counseling isn't even mentioned in the confines of the statute.

Courts are not encouraged or mandated to give counseling, nor are applicants to the courts encouraged to get it.

So if counseling is still the purpose of the statute, it's completely irrational.

The reason most seriously put forth by the State presently, in this appeal, is that this statute protects the interests that Mr. Redhail's child has to support.

We don't believe that that, either, is the intent of this statute.

Mr. Redhail's child has been supported by -- under the AFDC program, almost since her birth. That is the first child. The debt that Mr. Redhail owes is not to that child; the debt that he owes is to the State of Wisconsin.

What Wisconsin is saying, in effect, to Mr. Redhail is that: Until you pay us, you can't get married.

QUESTION: You mean a father has no responsibility in --

MR. BLONDIS: No, Your Honor, I'm not saying that at all.

Mr. Redhail -- when Mr. Redhail went to paternity court in 1972, he admitted paternity in that action, and the court ordered that he pay support of $109 per month. That, although as the State agreed he was a minor and a high school student.

In any event, the AFDC, which he received, which his child is receiving, is substantially above the $109 per month that he was ordered to pay.

Therefore, what I am saying is that even if Mr. Redhail tomorrow came into the Clerk of the Court with all of his arrearages, under the $109 support order, and paid every cent of it, and even paid the $109 sometime into the future, he still could not get married, because his child would still become -- would still remain a public charge.

So, how the State can justify the statute by saying that it --

QUESTION: But it's not up to the State to justify the statute, is it? The State has enacted the statute, and it's presumptively constitutionally valid. Isn't it?

MR. BLONDIS: I understand that, Your Honor. But what I'm saying is that what I just said indicates that it really doesn't have much to do with its intended purpose.

QUESTION: Well, then, why -- then the State should not put support orders in at all.

MR. BLONDIS: Your Honor, --

QUESTION: Isn't that what you're arguing?

MR. BLONDIS: No, not at all.

QUESTION: Because you say that the 109 doesn't do any good --

MR. BLONDIS: It won't do Mr. Redhail any good, it would do the child a lot of good.

QUESTION: Well, that's what I thought, it would do the child some good.

MR. BLONDIS: Certainly.

QUESTION: Well, that's what the State says.

MR. BLONDIS: What I am saying is that the statute is not -- this particular statute is not related to child support.

If the State is serious about collecting child support from Mr. Redhail, the State has many methods available to it, which are very effective. The State can take Mr. Redhail back into that paternity court, which originally set the $109 per month support, and the State can say: Mr. Redhail, you tell the court why you haven't paid the $109.

QUESTION: In the meantime, the State could have enacted some other legislation, --

MR. BLONDIS: The State has enacted --

QUESTION: -- but it did enact this legislation.

MR. BLONDIS: Yes, Your Honor.

QUESTION: And the question is: is it constitution-

ally valid?

MR. BLONDIS: Yes.

But the reason I make that point, the point that there is legislation which -- there is other legislation available to it --

QUESTION: Well, that's always true, with any law.

MR. BLONDIS: -- is that it's my understanding, under either the substantive due process or the equal protection strict scrutiny analysis, that the last prong of that analysis is that there must be a showing, not only that there's a compelling State interest, and that the legislation is tied to that interest, but that there is no less intrusive method available for the State to accomplish its legitimate goal.

In accomplishing -- presuming that this accomplishes the State's goal, in coercing, somehow, Mr. Redhail to pay support, it also takes away his fiancee's right to marry; it absolutely prohibits her from marrying.

In Mr. Redhail's case --

QUESTION: Well, marrying him.

MR. BLONDIS: Marrying him, yes.

QUESTION: There are 230 million, or I guess there are 115 million people, males, in the United States.

MR. BLONDIS: But she was adamant that she wanted to marry him.

It also has had the effect, in Mr. Redhail's case, of stimatizing his second child as an illegitimate child. So the statute not only affects Mr. Redhail, it also affects many other persons --

QUESTION: What about -- now, most if not all States have laws that tell a man who is married to somebody else that he can't get married, as long as he's married to somebody else.

MR. BLONDIS: Yes, Your Honor.

QUESTION: This, I suppose, does not in fact prohibit him from impregnating some other female. Do you think that such a State law would be unconstitutional, --

MR. BLONDIS: No, Your Honor.

QUESTION: -- just because, particularly with -- as it affects somebody who has made another woman pregnant?

MR. BLONDIS: No, Your Honor. I think this statute is unique in Wisconsin.

I think that --

QUESTION: Well, now, why doesn't your argument run -- make equally invalid a bigamy law?

MR. BLONDIS: Okay. Under the --

QUESTION: Either law is a disqualification, not a criminal law.

?

MR. BLONDIS: In the offer decision, that this Court decided last term, the Court again reiterated that the right

to marry is a fundamental right, and state that the right again is not a source of State law but is a basic human right --

QUESTION: What if a man wants to marry his sister, and the State says you can't do it?

MR. BLONDIS: I'm getting to that, Your Honor.

The Court held that the right to marry is contoured in our society and in our tradition, and I think that no one would argue that the tradition of marriage, as this society knows it, would prohibit a person, either from having two wives at one time or two husbands at one time, for that matter, or from marrying his sister.

QUESTION: Well, that's only because of statutory law, isn't it?

MR. BLONDIS: Yes, Your Honor. But the statute reflects the history and traditions of the fundamental right to marry. And this compelling a person, or prohibiting a person from marrying because his children are receiving public assistance, I don't believe is a part of that fundamental -- or of that tradition, as we know the right to marry in this country.

QUESTION: Well, are you making kind of a natural law argument to us?

MR. BLONDIS: No, I don't think --

QUESTION: Pseudo-Christian morality?

MR. BLONDIS: No, Your Honor. All I'm saying, as

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far as the language in the Offer opinion is the language of this Court. And the language noting that the Court -- that the right to marriage is in fact older than the Bill of Rights.

QUESTION: You say the Legislature can only enact, then, the things that you regard as traditional unto the notions of marriage?

MR. BLONDIS: Well, Your Honor, I don't believe that the -- presuming that there was legislation which seriously prohibited the right to marry, and let's say that that legislation was an age limitation, I believe that that type of limitation would be justifiable, both because the State could show a very strong interest in it, and because it has traditionally been a part of the State's role to define an age limit before which one can marry. Now --

QUESTION: You say "justifiable". You suggest the State has to justify that legislation?

MR. BLONDIS: Well, I don't -- I think -- I don't want to get into semantics. I think that -- which either side is trying to justify it. There are some prohibitions on marriage that can certainly be justified, and I think that there are others that can't.

The point that I would stress is that the Court does not have to decide, in this case, every justification or non-justification concerning the interference on the right to marry.

QUESTION: By the State.

QUESTION: But it has to lay down some principled reason for ruling in your favor, if it does so.

MR. BLONDIS: Yes, sure.

QUESTION: I take it you're suggesting that some principled reason can be laid down that would not also invalidate bigamy statutes.

MR. BLONDIS: Oh, certainly.

QUESTION: Well, what is it?

MR. BLONDIS: I believe, Your Honor, that the Court, in these kinds of cases, has considered each prohibition or has weighed each marriage, divorce law that it's been dealing with on its own individual merits.

In this case, --

QUESTION: Well, how does it determine its own individual merits, as you put it? I thought that was for the Legislature.

MR. BLONDIS: All right. We start from the analysis that marriage is a fundamental right. A fundamental constitutional right. And I think the Court has reiterated that in numerous cases.

QUESTION: Is it a fundamental right for a person 12 years old?

MR. BLONDIS: No.

QUESTION: Now, when a State passes a statute saying

that they can't marry under the age of 18, is not one of the reasons attributable to the Legislature that most people under 18 are not able to support wives and children? Is that not one of the considerations of the Legislature?

MR. BLONDIS: I'm not sure, but it very well may be, Your Honor.

QUESTION: Well, isn't that a reasonable one?

MR. BLONDIS: Yes.

QUESTION: Which could be attributed to the Legislature?

MR. BLONDIS: Yes.

But, Your Honor, this statute doesn't even have that kind of a justification. In order to justify -- in order to justify this statute on those grounds, one would assume, one would have to assume that, by entering into a marriage, a person is becoming less able to support a prior child.

With the number of childless new marriages today, and the number of households in which both spouses work, it is entirely possible that by entering into a marriage one could actually improve one's ability to support a child from a former marriage or a child who was born out of marriage.

QUESTION: Well, that's a good argument to advance to a Legislature, but it doesn't carry much weight as far as I'm concerned.

QUESTION: Well, how about your client?

MR. BLONDIS: Your Honor, in our -- in my --

QUESTION: In that respect. That might be true of a lot of other people, but are you entitled to raise that unless you have some concrete objection in this regard?

MR. BLONDIS: Well, Your Honor, the class was defined to cover everyone who is affected by the statute. And the class wasn't defined on the basis of indigency versus non-indigency.

QUESTION: Well, does the other side object to the class designation?

MR. BLONDIS: It has no -- it has never objected to the definition of the class.

QUESTION: So, are you -- you think you can raise the problems of the indigent, even though your petitioner, your client, might be wealthy?

MR. BLONDIS: In this case, it would be exactly the opposite.

But the --

QUESTION: So you say your client is indigent, or not?

MR. BLONDIS: Yes.

And I don't --

QUESTION: That's all I really wanted to know.

MR. BLONDIS: Yes.

There's a stipulation of fact in the record that

during all times that are relevant to the litigation, Mr. Redhail was indigent, was unemployed, and for a good deal of that time was a high school student.

QUESTION: And incapable of supporting his child, is that correct?

MR. BLONDIS: That's correct.

QUESTION: Mr. Blondis, are you going to comment on the new statute?

MR. BLONDIS: Your Honor, I believe that the appellants' summary of the new statute is fairly accurate. If Mr. -- in addition to making some exceptions that aren't found in the present statute, Mr. Redhail would not be covered at all by the new statute, because it only covers support obligations which were entered into as a result of a marriage; it does not cover out-of-wedlock children.

And I would hope that it might indicate suspicion on the part of the State Legislature as to some of the problems with the present statute.

QUESTION: Well, do you agree with him that if we reverse the lower court here, and sustain this statute, then the new statute becomes -- is not operative?

MR. BLONDIS: Unless another court -- the legislation does not specifically refer to this case, the legislation says that the new section will go into effect if any court stays or enjoins 245.10, which is the present statute.

We made, after submitting the Supplemental Memorandum to this Court, made as much of an investigation as we could, and to our knowledge there is no litigation, either pending or already decided, which would have that effect.

QUESTION: Mr. Blondis, may we ask you and the Attorney General, both, to let us know forthwith when the Governor moves on the bill that's pending on his desk?

MR. BLONDIS: Most certainly.

QUESTION: So that we know whether it is approved.

QUESTION: Is there an override provision in Wisconsin? If it's vetoed.

MR. BLONDIS: It won't be -- my understanding is that it will not be vetoed. Yes, there is an override provision.

QUESTION: You might consider --

QUESTION: May I ask a question?

QUESTION: You might consider, also -- excuse me, Mr. Justice Marshall, --

QUESTION: Go right ahead.

QUESTION: -- submitting a memorandum, each of you, on the impact of this statute.

Now Justice Marshall's question.

QUESTION: What I was wondering, this statute, I don't know about this, is peculiar to me -- is there any other statutes in Wisconsin, is it the normal procedure in

passing statutes, that are limited to a court decision? And say so in the statute?

MR. BLONDIS: This is the first time that I've seen this in Wisconsin, Your Honor. I understand it's happened in some other States.

QUESTION: Mr. Blondis, does the record tell us anything about the financial circumstances of the wife of the plaintiff, the present wife?

MR. BLONDIS: No, Your Honor.

QUESTION: So that even if he had alleged that she was a very wealthy person who would enable him to discharge his support obligations, he still couldn't have married her, could he?

MR. BLONDIS: That's correct, Your Honor.

Mr. Redhail could -- Mr. Redhail, I would like to emphasize again, under this statute, for all intents, can never get married unless his -- the custodian of his first child gets off of welfare. And that's completely beyond his control.

So --

QUESTION: If your child becomes a multi-millionaire, I think that would let him out, wouldn't it?

MR. BLONDIS: Yes. Yes. Because then the child would no longer receive welfare.

But again the child's becoming a multi-millionaire

is probably beyond his control.

Just a few comments concerning the abstention argument.

The defendants did not even seriously forward the abstention argument in the lower court, and this Court has noted in a number of opinions that it will take that into consideration in determining whether abstention applies.

It is our opinion that abstention does not apply in any of its forms.

The defendants argued that the Pullman doctrine applies because the statute is constitutionally unclear. But it is our understanding of the Pullman doctrine that it only applies when the statute itself is unclear.

Concerning notice to the class of defendants, the trial court noted in its opinion that there was as much unity of interest among those defendants as possibly there could have been. Every defendant --

QUESTION: Why did you want a defendants class?

MR. BLONDIS: Pardon me?

QUESTION: Why did you want a class of defendants here?

MR. BLONDIS: Because Mr. Redhail could not have received permission in any county in the State of Wisconsin. Because each defendant in the State -- each defendant, which is every County Clerk in the State of Wisconsin, has exactly

the same obligations under the statute.

QUESTION: Yes, but surely a court decision affecting one would be honored by every other County Clerk in the State, would it not?

MR. BLONDIS: I would hope so, Your Honor.

QUESTION: Well, he only wants one marriage license, doesn't he?

MR. BLONDIS: That's correct. But --

QUESTION: So why does he need 72 County Clerks to be enjoined?

MR. BLONDIS: At the time that the action was brought -- well, if -- the real answer is that if the action is a class action as to a Statewide class of plaintiffs, all of those plaintiffs are not going to be applying to the Milwaukee County Court Clerk, Mr. Zablocki.

QUESTION: Did you allege that every one, every county was represented?

MR. BLONDIS: Pardon me?

QUESTION: Do you have a member of your class in every county?

MR. BLONDIS: Yes.

QUESTION: Do you allege that?

MR. BLONDIS: Every member of the plaintiff class?

QUESTION: Yes.

MR. BLONDIS: I'm not sure that it's --

QUESTION: Well, if you don't, I don't see why you need every County Clerk.

MR. BLONDIS: I would --

QUESTION: Right?

That problem is unanswered.

MR. BLONDIS: That's correct.

QUESTION: That problem is unanswered.

MR. BLONDIS: In any event, I would hope that, were this Court to affirm, the other members of the class, of the defendant class, would abide by the Court's decision.

QUESTION: Why is everybody so eager to get class actions going, on both sides of a case? Is this the law school theory these days, or what is it?

[Laughter.]

MR. BLONDIS: Your Honor, in my law school we didn't study class actions.

QUESTION: Isn't it a fact, in Wisconsin, during the abortion litigation, they ignored the orders in certain districts, and they had to do it classwise? In the State of Wisconsin.

MR. BLONDIS: There was some problem in that litigation with non-class actions and enforcement of federal court orders.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Johnson, do you think in your two remaining minutes there's anything you can do to help clarify this?

REBUTTAL ARGUMENT OF WARD L. JOHNSON, JR., ESQ., ON BEHALF OF THE APPELLANT

MR. JOHNSON: I will, along with counsel for the appellees, submit memorandum with respect to the new law, which the Governor, we expect, will sign. And I will answer any question in the remaining two minutes that any Justice has.

MR. CHIEF JUSTICE BURGER: I hear none.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:08 p.m., the case in the above-entitled matter was submitted.]

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