

NO. 05-10187-F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STEWART GREENBERG,
Plaintiff/appellant,

v.

JAMES ZINGALE,
FLORIDA DEPARTMENT OF REVENUE, and
FIFTEENTH JUDICIAL CIRCUIT,
Defendants/appellees.

On Appeal from the United States District Court
for the Southern District of Florida
Case No. 04-80443-CV-KLR

PETITION FOR HEARING
(OR REHEARING) EN BANC

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Greenberg v. Zingale, et al.
Case No. 05-10187-F

Appellant files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

Charlie Crist	Attorney General's Office (Florida)
Edward Fine	Judge, Fifteenth Judicial Circuit
Elaine Greenberg	Former spouse of Appellant
Stewart Greenberg	Appellant/Plaintiff
Valerie J. Martin	Attorney General's Office (Florida)
Valentin Rodriguez	Appellate Attorney for Plaintiff
Honorable Kenneth Ryskamp	United States District Judge
Ann E. Vitunac	U.S. Magistrate Judge
James Zingale	Defendant (Florida Department of Revenue)

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STATEMENT OF COUNSEL

I express a belief, based on reasoned and studied professional judgment, that the panel's decision in determining that Florida's alimony statutes, as a matter of law, do not interfere directly and substantially with one's marriage rights in violation of the due process clause is contrary to the decision of the United States Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), and that consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions

I also believe, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: whether the proper constitutional analysis for any law which interferes with one's right to engage in intimate associations such as marriage, and one's ability to terminate such associations, is strict scrutiny. *Lawrence v. Texas*, 539 U.S. 558 (2003).

**STATEMENT OF COURSE OF PROCEEDINGS AND STATEMENT OF
FACTS NECESSARY TO ARGUMENT OF THE ISSUES**

The Appellant is an alimony payor who is forced to make alimony payments by judgment of a Florida court. He sought to challenge Florida's alimony scheme, Section 61.08, Florida Statutes, as unconstitutional on three grounds: a facial challenge to the statutes on due process grounds, an equal protection challenge, and a challenge that such alimony payments violate the Thirteenth Amendment (involuntary servitude). Appellant seeks *en banc* consideration solely on the issue of whether the panel erroneously determined as a matter of law, as part of the due process analysis, that Florida's alimony scheme does not interfere directly and substantially with one's marriage and association rights.

The panel concluded in its unpublished opinion that Appellant failed to state a substantive due process claim because "not every statute which relates in any way to the incidents of or prerequisites for marriage must be subjected to strict scrutiny." Opinion, p. 3, citing *Parks v. City of Warner Robins, Ga.*, 43 F.3d 609, 613 (11th Cir. 1995). The panel concluded, without any substantive analysis, that "Florida's alimony provisions do not directly and substantially interfere with the right to marry . . . [they] do not prohibit marriage, nor prevent a person from marrying, nor substantially interfere with the right to marry." Opinion, p. 4. Moreover, the panel

surmised that “the alimony provisions do not prohibit divorce, prevent a person from dissolving his or her marriage, nor substantially interfere with the decision to divorce.” Opinion, p. 4. Accordingly, the panel upheld the district court’s dismissal of the complaint without an evidentiary hearing on these constitutional issues.

STATEMENT OF THE ISSUE(S) TO MERIT EN BANC DISCUSSION

Whether The Panel Erred in Determining that Florida’s Alimony Statutes, As a Matter of Law, Did Not Interfere Directly and Substantially With the Right to Marry and/or Associate, in Violation of the Due Process Clause

ARGUMENT AND AUTHORITIES

- I. The Panel Erred in Determining that Florida's Alimony Statutes, As a Matter of Law, Did Not Interfere Directly and Substantially With the Right to Marry or Association, in Violation of the Due Process Clause

The panel erred because it failed to properly analyze the application of Florida's alimony statutes to alimony payors. Appellant is an alimony payor who challenged Florida's alimony payments on due process grounds, arguing that the State of Florida cannot show a compelling state interest to justify interfering with his marital and associational rights. The district court never required the State of Florida to prove a compelling state interest. Appellant focused on the fact that the application of alimony payments interfered with his marital rights, rights of association, and his right to dissolve a marriage without governmental interference, absent a compelling state interest.

The panel concluded, without any substantive analysis, that "Florida's alimony provisions do not directly and substantially interfere with the right to marry ... [they] do not prohibit marriage, nor prevent a person from marrying, nor substantially interfere with the right to marry." Opinion, p. 4 (*attached hereto*). Moreover, the

panel surmised that “the alimony provisions do not prohibit divorce, prevent a person from dissolving his or her marriage, nor substantially interfere with the decision to divorce.” Opinion, p. 4. Accordingly, the panel upheld the district court’s dismissal of the complaint without an evidentiary hearing on these constitutional issues.

A hearing en banc is necessary to maintain uniformity of court decisions. It is well established that the strict scrutiny analysis should necessarily apply in this type of case:

The Court has held that limitations on the right of privacy are permissible only if they survive ‘strict’ constitutional scrutiny - that is, only if the governmental entity imposing the restriction can demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest.

Griswold v. Connecticut, 381 U.S. 479, 485 (1965). The panel should have determined that the payment of alimony, in effect, operates to violate the due process rights of alimony payors because it not only substantially alters the right to marry, but also substantially alters one’s right to associate with others and to make the penultimate decisions incumbent in the decision to formulate marriage plans, dissolve a marriage, and settle any differences as a result of that marriage.

Since *Griswold*, the United States Supreme Court decided *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472 (2003), where it reiterated that constitutional privacy principles applied to sodomy laws, and that there was a tradition of American citizens

from the inception of our democracy to value the constitutionally protected right to be left alone in the privacy of their bedrooms and personal relationships. The *Lawrence* Court recognized that there is a broader right to sexual privacy, and that encompassed therein is the right to marriage, associations, and all factors relating to that marriage or association. The panel has failed to analyze *Lawrence* in the context of marriage, associations, and alimony. Rather, Appellant requests that the full court adopt the reasoning of Justice Barkett's dissent in *Williams v. Attorney General of Alabama*, 378 F.3d 1232, 1251-52 (11th Cir. 2004):

The majority's decision rests on the erroneous foundation that there is no substantive due process right to adult consensual sexual intimacy in the home and erroneously assumes that the promotion of public morality provides a rational basis to criminally burden such private intimate activity. These premises directly conflict with the Supreme Court's holding in *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). This case is not, as the majority's demeaning and dismissive analysis suggests, about sex or about sexual devices. It is about the tradition of American citizens from the inception of our democracy to value the constitutionally protected right to be left alone in the privacy of their bedrooms and personal relationships. As Justice Brandeis stated in the now famous words of his dissent in *Olmstead v. United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928), when "[t]he makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness ... [t]hey conferred, as against the government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men." . . .

Indeed, the United States Supreme Court has found that some decisions are so fundamental and central to human liberty that they are protected as part of a right to

privacy under the Due Process Clause, and the government may constitutionally restrict these decisions only if it has *more* than an ordinary run-of-the-mill governmental purpose. *Id.* Appellant further suggests that the State of Florida would have had to show proof of more than a run-of-the-mill governmental purpose for enforcing Florida's alimony scheme, because that scheme impairs one's right to exit a marriage, and also affects the terms of the marriage, the settlement of a dissolution, and the like. When a court subjects governmental restrictions to a heightened scrutiny, requiring that legislation be "narrowly drawn" to achieve a "compelling state interest," then the burden is on the State to produce the appropriate evidence of its interest in the legislation – the State of Florida never even offered such a compelling state interest in this case.

Nevertheless, the panel determined, without any concrete analysis, that alimony is not one of those areas where a compelling state interest is required. The panel failed to distinguish those cases where the United States Supreme Court has explained that strict scrutiny is applicable: the right to abortion, *Roe v. Wade*, 410 U.S. 113, 139 (1973); contraception, *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and *Griswold v. Connecticut*, 381 U.S. 479 (1965); marriage, *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817 (1967); family relationships, *Prince v. Massachusetts*, 321 U.S. 158 (1944); procreation, *Skinner v. Oklahoma*, 316 U.S. 535 (1942); and child rearing and

education, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) and *Meyer v. Nebraska*, 262 U.S. 390 (1923).

Accordingly, applying the analytical framework of *Lawrence* compels the conclusion that the Due Process Clause protects a right to privacy in the arena of choosing to divorce an individual. *Lawrence* reiterated that its prior fundamental rights cases protected individual choices "concerning the intimacies of [a] physical relationship." *Lawrence*, at 123 S.Ct. at 1243. Because of this precedent, the *Lawrence* Court overruled *Bowers*, concluding that *Bowers* had "misapprehended the claim of liberty there presented" as involving a particular sexual act rather than the broader right of adult sexual privacy. Hence, "personal decisions related to marriage" are afforded the fundamental protection of privacy, *Carey v. Population Services Intl.*, 431 U.S. 678 (1977), and because entry into a marriage, and dissolution of that marriage, is a personal decision clearly related to an intimate association, state-imposed alimony at the dissolution of a marriage deserves strict scrutiny review. Indeed, this Court need only look to the historical root of Florida's alimony system to determine that the alimony scheme is suspect. See *Jacobs v. Jacobs*, 50 So.2d 169 (Fla.1951) ("Alimony" is based on common-law obligation of husband to support wife, and it signifies nourishment or sustenance and is allowance which a husband may be compelled to a pay wife for her maintenance when living apart from her or

has been divorced.”)

The panel decision in this case failed to determine why *Lawrence* was not applicable. In fact, there is no analysis of *Lawrence*. Rather, the panel relied on its prior decision in *Parks v. City of Warner Robins, Ga.*, 43 F.3d 609, 613 (11th Cir. 1995), which pertained to an anti-nepotism policy. The difference between an anti-nepotism policy and the application of state-enforced alimony is stark: an alimony payor has no choice but to pay the alimony as an incident of the marriage, whereas the employee in *Parks* had the right to be re-assigned or find another job.

Indeed, liberty to do something, particularly that which is intimate, is the very essence of our legal system, the purpose of our society, and the principle to be applied to the application of alimony. The panel failed to address the precise liberty issue inherent in alimony schemes – and instead, narrowly surmised without analysis that alimony does “. . . not prohibit divorce, prevent a person from dissolving his or her marriage, nor substantially interfere with the decision to divorce.” Opinion, p. 4. This panel should review the issue more carefully in light of *Lawrence* so that a more concise view of privacy and liberty is recognized to be inherent in the application of Florida’s alimony laws.

CONCLUSION

Appellant respectfully requests this Court to grant a Hearing (or Rehearing) *En Banc*, to determine that the imposition of alimony requires this Court to conduct a strict scrutiny analysis, and requires the State to provide a compelling reason to substantiate laws which infringe on a citizen's right to marry, exit a marriage, or to associate with another.

CERTIFICATE OF COMPLIANCE

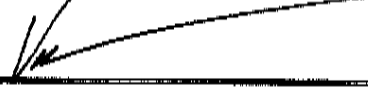
I certify that this Petition complies with the type-volume limitation set forth in F.R.A.P. 32(a)(7)(B). This Petition contains 2,406 words, as computed by the Corel WordPerfect 2000 word processing system, and contains Times New Roman, 14 point typeface. The undersigned has also prepared to download the file to the Eleventh Circuit Court of Appeals when permission is received from the Court.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing Petitioner for Hearing En Banc was served by mail this 5th day of July, 2005, to:

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