10-1983

Palmore v. Sidoti

Lewis F. Powell Jr.

I denied Stay

D

Petr - white woman - remarried a black man.

Resp - Petr's first husband & father of their child - also remarried (a white woman).

February 18, 1983 Conference
List 9, Sheet 4

No. A-664

PALMORE (mother)

v.

SIDOTI (father)

Custody of child, following mother's remarriage, was awarded father (Resp)

Application for Stay addressed to Justice Marshall and referred to the Court. (Heretofore denied by Justice Powell)

There were reasons other than racial. Also no real Const Q.

SUMMARY: Pending filing and review of a petn for cert, petr (mother) seeks to stay the mandate of the Florida Dist. Ct. App., 2d Dist., scheduled to be issued February 8, 1982. That court affirmed the order of the Fla. Cir. Ct. which modified an earlier child custody award so that custody of the parties' five-year old child is now awarded to resp (father). Petr argues that the custody award violates her rights to equal protection since it is grounded on the fact that petr, a white woman, has recently married a black male. The Fla. Dist. Ct. App. declined to stay

Deny. JOE apparently thinks the stay should be granted & that cert is likely. I continue to disagree on both counts. It is noteworthy that the cases cited for the conflict go back as

its mandate, as did Justice Powell. On reapplication to Justice Marshall, the case is referred to Conference.

FACTS: On May 29, 1980 the Fla. Cir. Ct., 13th Jud. Cir., issued a final judgment of divorce between petr (mother) and resp (father), both of whom are white. Custody of their daughter, Melanie, was awarded to petr. Subsequently both parents entered second marriages: resp to a white female; petr to a black male. Resp filed an action to modify the final judgment so as to grant him custody of the child.

DECISIONS BELOW: In the action to modify, resp (father) alleged material changes in circumstances: (1) that petr's "close association with her present husband, a black male about 10 years her junior, prior to her November 21, 1981 marriage to him, created a bad environment for the child;" and (2) "that the child was found with an infestation of head lice on two occasions and with clothing stained by mildew," suggesting neglect. The trial court made no findings as to the second allegation. As to the first, it observed that petr admitted cohabitating with her present husband prior to their marriage, and it acknowledged her insistence that no sexual activity occurred in the child's presence. The court further found that "there is no issue as to either party's devotion to the child, adequacy of housing facilities, or respectibility [sic] of the new spouse of either parent."

In reaching its decision, the trial court relied entirely upon Niles v. Niles, 299 So. 2d 162 (Fla. Dist. Ct. App. 1974) which explicitly established that Fla. judges may consider in

determining the best interests of the child the fact that one parent has entered an interracial marriage. Hence the trial court reasoned:

> The father's evident resentment of the mother's choice of a black partner is not sufficient to wrest custody from the mother. It is of some significance, however, that the mother did see fit to bring a man into her home and carry on a sexual relationship with him without being married to him.[1] Such action tended to place gratification of her own desires ahead of her concern for the child's future welfare. This Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains [sic] school age and thus more vunerable [sic] to peer pressures, suffer from the social stigmatization that is sure to come.

Accordingly, the trial court modified the judgment on March 1, 1982 and awarded custody to the resp (father).

Petr took an appeal to the Fla. Dist. Ct. App., 2d Dist. and obtained a stay of judgment pending decision on the appeal. On December 8, 1982, the Dist. Ct. App. affirmed without opinion.[2] On January 24, 1983 it denied rehearing and an application to stay. Following an unsuccessful application to stay presented to Justice Powell and a reapplication to stay filed with Justice

---

[1]It is unclear whether the trial court was referring to the man who became petr's husband or another male that the court said she "entertained...overnight."

[2]The Florida Supreme Court lacks jurisdiction to review appeals from the Fla. Dist. Ct. App. where that court has written no opinion in conjunction with its judgment. Fla. Const. Art. 5 §3(b)(3); Jackson v. State, 385 So. 2d 1356 (Fla 1980).

Marshall, the case is referred to Conference.

CONTENTIONS: Petr contends that a stay is warranted in this case because a grant of cert is likely for several reasons. First, the trial court grounded its decision on Niles v. Niles which holds that the interracial nature of a marriage is intrinsically relevant in child custody proceedings. According to petr, Niles stands for the proposition that an interracial home is inherently detrimental to the best interests of white children. As such the trial court has violated petr's rights of equal protection under the Fourteenth Amendment by basing its custody decision on race without a compelling governmental interest. Such decision stigmatizes petr's new husband because of his race and burdens petr because she is married to him.

Secondly, the Fla. trial court decision is consistent with decisions from Iowa (Kramer v. Kramer, 297 N.W. 2d 359 (Iowa 1980)) and Illinois (Russell v. Russell, 399 N.E. 2d 212 (Ill. App. Ct. 1979)); but it conflicts with decisions from Pennsylvania (Myers v. Myers, 360 A.2d 587 (Pa. 1976)) and Michigan (Potter v. Potter, 127 N.W. 2d 320 (Mich. 1964)). Similarly, petr argues, the trial court's decision conflicts with this Court's decisions in Loving v. Virginia, 388 U.S. 1 (1967), where the Court invalidated Virginia antimiscegenation statutes on grounds of equal protection and due process, and McLaughlin v. Florida, 379 U.S. 184 (1964), where the Court invalidated the Florida cohabitation statute on grounds of equal protection.

Finally petr contends that irreparable harm will result in the absence of a stay. Petr has had custody of Melanie since the

dissolution of her marriage to resp. A change of custody while the case remains pending would disrupt their relationship and adversely affect the child's stability.

DISCUSSION: Issuance of a stay in this Court requires applicant in an extraordinary case to rebut the presumption that the decisions below--both on the merits and on the proper interim disposition of the case--are correct. Whalen v. Roe, 423 U.S. 1313, 1316-1317 (1975) (Marshall, J., in chambers). Such an effort requires applicant to make a four-part showing that there is a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant cert, that there is a fair prospect of reversal, that there will likely be irreparable harm absent a stay and, in a close case, that the balance of equities among applicant, resp and the public favor issuance of a stay. See Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers); Graves v. Barnes, 405 U.S. 1201, 1203-1204 (1972) (Powell, J., in chambers). Moreover, the action of the Circuit Justice in denying the original application should be accorded substantial weight and respect. Republican State Central Committee v. Ripon Society, 409 U.S. 1222, 1227 (1972) (Rehnquist, J., in chambers).

This case presents the question of whether the Fourteenth Amendment's equal protection provision prohibits a court from considering or relying upon a subsequent interracial marriage as a ground for ordering a change of custody. Because the case presents an important federal question in a manner which appears to conflict with decisions of other jurisdictions, and which has

A-664
Palmore v
Doti

I agree with Mark

This application for stay of mandate comes from a woman who presently has custody of her child, but has been ordered by a Fla. court to give the child to her husband.
former

The principal feature of the case is that the petr is a white woman who remarried a black man; resp, petr's former husband, also remarried, but to a white woman. The Fla. Circuit Court originally awarded custody, as part of a final divorce proceeding, to petr. But the husband successfully moved to modify that judgment, and has been awarded custody.

The Fla Circuit Court relied in part on the fact that petr married a black man. "This Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie (the daughter) will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from social stigmatization that is sure to come." [sic] The court also relied on the fact that petr's new husband had lived with her, and had a sexual relationship with her, prior to the marriage.

The Florida Court of Appeal affirmed without opinion. This precluded review in the Fla. Supreme Court.

Petr will have to give up the child on Feb. 8, as no stay has been granted.

Petr claims that it violates the 14th Amendment to use such explicit racial considerations in making custody determinations. She cites several State decisions holding that the fact that a marriage is interracial may not be considered.

The issue presented is very difficult, and one I think the Court will have to address eventually. I do not think this is the case, however, for several reasons: Yet

-There are no opinions below other than the Circuit Court's brief statement of the facts. Thus, the law has not been set forth or analyzed.

-This is not a case where racial considerations were the only ones used, though in fairness to the petr I would say the interracial marriage was decisive to the courts below.*

-The issue has been "out there" for some time, and the Court has not decided it. Thus, I do not see that it is likely that the Court would grant cert here.

Therefore, despite my sympathies for the petr's argument, I think the application should be denied.

Mark

*The court counselor who advised the court recommended removal of custody from the mother because she "had chosen for herself and therefore for herself and the children, a life style unacceptable to the father of the children." The Circuit Court did, however, state that the father's "evident resentment" at the remarriage to a black man was not itself sufficient to justify the custody decision.

Palmore - dot.

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far as 1964. Surely if there has been an issue out there that long, its [redacted] resolution can be delayed until an appropriate case comes along.

Mark

Court ..... *Voted on*....., 19...

Argued ....., 19... *Assigned* ....., 19... No. A-664

Submitted ....., 19... *Announced* ....., 19...

LINDA SIDOTI PALMORE

vs.

SIDOTI

Appliction for stay addressed to Justice Marshall and referred to the Court. Heretofore denied by Justice Powell.

Call for Response

D

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.										✓			
White, J.													
Marshall, J.										✓			
Blackmun, J.										✓			
Powell, J.													
Rehnquist, J.													
Stevens, J.										✓			
O'Connor, J.													

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 18, 1983

Re: No. A-664 - Linda Sidoti Palmore v.
Anthony J. Sidoti

MEMORANDUM TO THE CONFERENCE

After reconsidering my vote at conference today, I have decided to vote to grant the Stay in the above case.

T.M.

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

February 18, 1983

MEMORANDUM TO THE CONFERENCE

Re: Linda Sidoti Palmore v. Anthony J. Sidoti, No. A-664 (page 42)

This is to inform you that following the Conference today I was instructed to relist the above-entitled case for the Conference on Friday, February 25, 1983.

Respectfully submitted,

Alexander L. Stevas
Clerk

Then in the white/black marriage - child custody case. We should not get into this.

You have denied the stay.

MH

Court ..... Voted on ....., 19...

Argued ....., 19... Assigned ....., 19... No. A-664

Submitted ....., 19... Announced ....., 19...

Deny

LINDA SIDOTI PALMORE

vs.

SIDOTI

There is case where pet - a white woman remarried a black. She & first husband are fighting over child custody.

Application for stay addressed to Justice Marshall and referred to the Court. Heretofore denied by Justice Powell.

Only Q here is request for Stay

3/3 Call for Response

3/2/83:

Response received; it's miserable. One key point, though, is that resp says that he - the husband - now has custody. The mandate issued in February, it seems, & therefore by this Court's own delay, the application appears moot - the "irreparable injury" has occurred already. CTA MN

→ You denied stay on Feb 2. Mandate issued on Feb 8.

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.											✓		
Brennan, J.										Call for Response			
White, J.										Call for Response			
Marshall, J.										"	"		
Blackmun, J.										"	"		"
Powell, J.											✓		
Rehnquist, J.											✓		
Stevens, J.										Recd			
O'Connor, J.													

Court	*Voted on*....., *19...*		
Argued ....., *19...*	*Assigned* ....., *19...*	No.	A-664
Submitted ....., *19...*	*Announced* ....., *19...*		

Linda Sidoti Palmore

vs.

Anthony J. Sidoti

Application for stay addressed to Justice Marshall and referred to the Court. Heretofore denied by Justice Powell

Response now in.

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.			✓								✓		
Brennan, J.			✓								✓		
White, J.			✓								✓		
Marshall, J.											✓		
Blackmun, J.											✓		
Powell, J.											✓		
Rehnquist, J.										✓			
Stevens, J.											✓		
O'Connor, J.											✓		

mts 06/09/83

Summer Lists

This is case where white parents were divorced, & the Mother - Petr. here - remarried a black.

Resp., the father of their only child, petitioned for custody & this was granted on grounds that child would be better off in a home in which parents were of same race.

I denied a stay in this case

9/19 I'd leave this issue to state courts until we see some pattern. Isolated case. No opinion below. And father was there - competent - the racial may have predominated.

PRELIMINARY MEMORANDUM

June 23, 1983 Conference
List 1, Sheet 1

No. 82-1734 | Cert to Fla. Dist. Ct. App. (Ott, Scheb, Danahy) (order) no op

PALMORE (ex-wife)

v.

SIDOTI (ex-husband) | Federal/Civil | Timely

1. SUMMARY: Petr contends that a state court should not rely on her interracial second marriage to deny her custody of her child.

Deny. Previous papers attached. Mike

2. FACTS AND DECISION BELOW: Petr and resp, both of whom are white, were divorced in 1980. Petr was awarded custody of their daughter. Thereafter each party remarried, resp to a white woman and petr to a black man. Resp, objecting to petr's interracial remarriage, then sought to modify the divorce judgment to grant him custody of the daughter.

The TC, relying primarily on the fact that petr had entered into an interracial marriage, ordered the change in custody. It reasoned "that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that [the daughter] will, if allowed to remain [with petr] and attai[n] school age and thus [become] more vu[l]nerable to peer pressure, suffer from the social stigmatization that is sure to come." The Florida Ct. App. affirmed without opinion.

Petr sought a stay of the new custody order from JUSTICE POWELL. No. A-664. When he denied the stay, she reapplied to JUSTICE MARSHALL, who referred the application to the Conference. The case was discussed on February 18, but relisted for February 25. On the 25th, Conference voted to call for a response. Finally, on March 7, the Court denied the stay over JUSTICE STEVENS's dissent.

3. CONTENTIONS: Petr essentially repeats the arguments she made when she requested a stay. The Fla. courts have violated her equal protection rights. The decision below is in conflict with decisions of this court, e.g., Loving v. Virginia, 388 U.S. 1 (1967) (invalidating Virginia antimiscegenation statute); McLaughlin v. Florida, 379 U.S. 184 (1964) (invalidating Florida

statute prohibiting interracial cohabitation), and decisions of the supreme courts of Michigan and Pennsylvania.

4. DISCUSSION: It is, of course, possible for the Court to review this case now despite having denied the stay in March. It appears, however, that the principal reason for denying the stay was that the case did not appear cert-worthy to four Justices. (There were no opinions below, and there is a possibility that the TC's order was not based solely on racial grounds.) Nothing has happened in the last three months to make this case any more cert-worthy now than it was then.

5. RECOMMENDATION: I recommend denial.

There is no response.

June 9, 1983 Sturley Order in petn

Court ..... Voted on ....., 19...

Argued ....., 19... Assigned ....., 19... No. 82-1734

Submitted ....., 19... Announced ....., 19...

PALMORE

vs.

SIDOTI

Grant

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.			✓										
Brennan, J.		✓											
White, J.			✓										
Marshall, J.		✓			[illegible]								
Blackmun, J.					Jr. 3								
Powell, J.			✓										
Rehnquist, J.			✓										
Stevens, J.		✓											
O'Connor, J.			✓										

Court ..... Voted on....., 19...

Argued ....., 19... Assigned ....., 19... No. 82-1734

Submitted ....., 19... Announced ....., 19...

PALMORE

vs.

SIDOTI

Grant

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.			✓										
Brennan, J.		✓											
White, J.		✓	✓										
Marshall, J.		✓											
Blackmun, J.					Jan 3.								
Powell, J.			✓										
Rehnquist, J.			✓										
Stevens, J.		✓											
O'Connor, J.			✓										
.....													

January 31, 1984

PAL GINA-POW

82-1734 Palmore v. Sidoti

MEMO TO FILE

This is the Florida case that presents the following question:

> "Wether the equal protection clause of the Fourteenth Amendment prohibits a state court from relying upon the subsequent interracial marriage of a custodial parent as a ground for ordering a change in custody"?

The facts are not in dispute. The case involves a fight over the custody of Melanie, a little girl of about four years of age. The parties are her parents both of whom remarried after their divorce. At the time of the divorce, custody of Melanie was awarded the mother - the petitioner here. The mother remarried a black after living with him for several months. This prompted respondent to petition the court to reopen the custody proceeding, and award custody of Melanie to him.

The trial court made the following critical findings:

> "That both parties have remarried, and there is no issue as to either party's devotion to the child, adequacy of housing facilities, or respectibility of the new spouse of either parent.

* * *

> "This Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come."

The Florida District Court of Appeals affirmed without opinion.

In view of the findings that the mother was devoted to the child, the housing facilities provided were adequate, and that both the mother and her new husband were "respectable", this is an easy case.

Even if the Florida judge was correct as to "social stigmatism" - and he well have been - the prior cases in this Court make it clear that this possibility does not justify a racial classification. Laws prohibiting miscegenatious marriages between persons of different races, have been invalid since Loving v. Virginia, 388 U.S. 1 (1967). Moreover, in Personnel Administrator v. Feeney, 442 U.S. 256, 272 (1979), opinion by Potter Stewart, we held that "explicit racial classifications" are "presumptively invalid", and may be sustained only

upon an "extraordinary justification" showing a compelling governmental interest.

In a case where the facts clearly showed that the welfare of the child was at issue, this would constitute a compelling reason for a custody change. Here, in view of the findings by the Trial Court, no such interest has been shown in this case.

I will not need a bench memo in this case, but - as always - will welcome the views of my clerk.

LFP, Jr.

82-1734 PALMORE v. SIDOTI Argued 2/22/84

Shapiro (Petr) (See SG's Br)

Not a "neglect" case.

Under Fla. law, to change a custody award the Π has a heavy burden – must show adverse effect of joint custody on child.

Appeal re second custody case must be brought later if relevant to child's requirements

Adoption is different. Anyway 50'C, a court may take race into consideration. (cited a CA 5 case). Concedes biological consideration may be taken into account.

Not asking us to review any discretion of TC. If found parties were fit. TC's decree was based solely on racial grounds.

Hawtrey (Resp)

No. 82-1734, Palmore v. Sidoti Conf. 2/24/84

The Chief Justice Reverse. (could join remand)
Racial factor was dominant.
Interest of child here not the ~~primary~~ primary basis of opinion.
No like an adoption case - this would be different. Adoption case may come later.
Absent mixed marriage there would have been no case as child's custody had been awarded mother.

Justice Brennan Rev.
(No discussion)

Justice White Rev.
Agree with C J.
Case still goes back. There always could be another custody case. No need to remand.

Justice Marshall Rev.

Justice Blackmun Rev.

Case was well & ~~fact~~ family argued.

Adoption case may not be different. This may be next in this case.

Justice Powell Reverse

Justice Rehnquist Rev.

To avoid discussion of adoption — not here.

Justice Stevens Rev.

If this were an adoption case, it would be different. Biological considerations are important.
Stanley v. Ill due process rationale in preferred analysis.
If we rely on E/P we might prejudice adoption.

Justice O'Connor Rev.

Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: MAR 15 1984

Recirculated: _____

1st DRAFT

Renewed

SUPREME COURT OF THE UNITED STATES

No. 82-1734

LINDA SIDOTI PALMORE, PETITIONER *v.*
ANTHONY J. SIDOTI

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

[March ——, 1984]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to review a judgment divesting a natural mother of the custody of her infant child because of her remarriage to a person of a different race.

I

When petitioner Linda Sidoti Palmore and respondent Anthony J. Sidoti, both Caucasians, were divorced in May 1980 in Florida, the mother was awarded custody of their three-year-old daughter.

In September 1981 the father sought custody of the child by filing a petition to modify the prior judgment because of changed conditions. The change was that the child's mother was then cohabiting with a Negro, Clarence Palmore, Jr., whom she married two months later. Additionally, the father made several allegations of instances in which the mother had not properly cared for the child.

After hearing testimony from both parties and considering a court counselor's investigative report, the court noted that the father had made allegations about the child's care, but the court made no findings with respect to these allegations. On the contrary, the court made a finding that "there is no issue as to either party's devotion to the child, adequacy of housing

facilities, or respectability of the new spouse of either parent." App. to Pet. for Cert. 24.

The court then addressed the recommendations of the court counselor, who had made an earlier report "in [another] case coming out of this circuit also involving the social consequences of an interracial marriage. *Niles* v. *Niles*, 299 So. 2d 162." *Id.*, at 25. From this vague reference to that earlier case, the court turned to the present case and noted the counselor's recommendation for a change in custody because "[t]he wife [petitioner] has chosen for herself and for her child, a life-style unacceptable to her father *and to society*. . . . The child . . . is, or at school age will be, subject to environmental pressures not of choice." Record 84 (emphasis added).

The court then concluded that the best interests of the child would be served by awarding custody to the father. The court's rationale is contained in the following:

> "The father's evident resentment of the mother's choice of a black partner is not sufficient to wrest custody from the mother. It is of some significance, however, that the mother did see fit to bring a man into her home and carry on a sexual relationship with him without being married to him. Such action tended to place gratification of her own desires ahead of her concern for the child's future welfare. *This Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come.*" App. to Pet. for Cert. 26–27 (emphasis added).

The Second District Court of Appeal affirmed without opinion, thus denying the Florida Supreme Court jurisdiction to review the case. See Fla. Const., Art. V, § 3(b)(3) (West

Supp. 1983); *Jenkins* v. *State*, 385 So. 2d 1356 (Fla. 1980). We granted certiorari, —— U. S. ——, and we reverse.

II

The judgment of a state court determining or reviewing a child custody decision is not ordinarily a likely candidate for review by this Court. Here, however, the record is clear beyond doubt that petitioner's marriage to a man of a different race was the dispositive basis for judgment. The decision thus raises important federal concerns arising from the Constitution's commitment to eradicating discrimination based on race.

The Florida court did not focus directly on the parental qualifications of the natural mother or her present husband, or indeed on the father's qualifications to have custody of the child. As we noted, the court found that "there is no issue as to either party's devotion to the child, adequacy of housing facilities, or respectability of the new spouse of either parent." App. to Pet. for Cert. at 24. This, taken with the absence of any negative finding as to the quality of the care provided by the mother, constitutes a rejection of any claim of petitioner's unfitness to continue the custody of her child. Instead, the court's decision rests upon a somewhat opaque generalization about the impact of petitioner's second marriage on the child's future relationship with her peers and what is described as "the social stigmatization that is sure to come." *Id.*, at 27. The court made no effort to conceal or disguise the basis of its decision. It described this as a case "involving the social consequences of an interracial marriage." *Id.*, at 25. Thus, the judgment of the Circuit Court, and in turn that of the District Court of Appeal, plainly turned on race. Taking the court's findings and rationale at face value, it is clear that the outcome would have been different had petitioner married a Caucasian male of similar respectability.

A core purpose of the Fourteenth Amendment was to do away with all governmentally-imposed[1] discrimination based on race. See *Strauder* v. *West Virginia*, 100 U. S. 303, 308, 310 (1880). Classifying persons according to their race is likely to reflect racial prejudice rather than legitimate public concerns; the race, not the person, dictates the category. See *Personnel Administrator* v. *Feeney*, 442 U. S. 256, 272 (1979). Classifications based on race are subject to the most exacting scrutiny. To pass constitutional muster, a racial classification must be justified by a compelling governmental interest and must be "necessary . . . to the accomplishment" of its legitimate purpose, *McLaughlin* v. *Florida*, 379 U. S. 184, 196 (1980). Accord *In re Griffiths*, 413 U. S. 717, 721–722 (1973); *Loving* v. *Virginia*, 388 U. S. 1, 9, 11 (1967).

The state, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years. In common with most states, Florida law mandates that custody determinations be made in the best interests of the children involved. Fla. Stat. Ann. § 61.13(2)(b)(1) (West Supp. 1983). The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause.

It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. There plainly are private biases beyond the reach of the law that can inflict harm on innocent persons. There is a risk that a child living with a step-parent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.

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[1] The actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment. *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); *Ex parte Virginia*, 100 U. S. 339, 346–347 (1880).

The question, however, is whether the reality of such biases and the possible injury they might inflict may be a dispositive basis for denial of a mother's custody of an infant child. We have little difficulty concluding that they may not.[2] The Constitution cannot control such prejudices but neither can it tolerate them. "Public officials sworn to uphold the Constitution may not avoid a constitutional duty by showing the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held." *Palmer* v. *Thompson*, 403 U. S. 217, 260 (1971) (WHITE, J., dissenting).

This is by no means the first time that acknowledged racial prejudice has been invoked to justify racial classifications. In *Buchanan* v. *Warley*, 245 U. S. 60 (1917), for example, this Court invalidated a Kentucky law forbidding Negroes from buying homes in white neighborhoods.

> "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." *Id.*, at 81.

The problems that racially-mixed households pose for children in 1984 can no more support a denial of constitutional rights than could the stresses that residential integration were thought to entail in 1917. *Buchanan* requires rejection of the racial basis of the custody decision made here.[3] The

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[2] In light of our holding based on the Equal Protection Clause, we need not reach or resolve petitioner's claim based on the Fourteenth Amendment's Due Process Clause.

[3] This conclusion finds support in other cases as well. For instance, in *Watson* v. *City of Memphis*, 373 U. S. 526 (1963), city officials claimed that desegregation of city parks had to proceed slowly to "prevent interracial disturbances, violence, riots, and community confusion and turmoil." *Id.*, at 545. The Court found such predictions no more than "personal speculations or vague disquietudes," *id.*, at 536, and held that "constitutional

effects of racial bias and prejudice, however real, cannot justify a racial classification leading to the removal of an infant from the custody of its natural mother found otherwise to be an appropriate person to have such custody.

The judgment of the District Court of Appeal is reversed.

It is so ordered.

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rights may not be denied simply because of hostility to their assertion or exercise." *id.*, at 545. In *Wright* v. *Georgia*, 373 U. S. 284 (1963), the Court reversed a Negro defendant's breach-of-peace conviction, holding that "the possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right (founded upon the Equal Protection Clause) to be present." *Id.*, at 293.

We note also that several states have held that the race of a parent's new partner may not be considered even in conjunction with other factors. *In re Kraemer*, 297 N. W. 2d 359 (Iowa 1980); *Potter* v. *Potter*, 372 Mich. 687, 127 N. W. 2d 320 (1964) (dictum) (plurality opinion); *Edel* v. *Edel*, 97 Mich. App. 266, 293 N. W. 2d 792 (1980) (*per curiam*); *Boone* v. *Boone*, 90 N.M. 466, 565 P. 2d 337 (1977) (constitutional overtones); *In re Brenda H.*, 66 Ohio Op. 2d 178, 305 N. E. 2d 815 (Ohio Com. Pleas 1973) (constitutional overtones). Pennsylvania has made clear that race alone is not relevant, *Commonwealth ex rel. Lucas* v. *Kreischer*, 460 Pa. 352, 299 A. 2d 243 (1973), and has suggested that it is irrelevant in connection with other factors as well, *Commonwealth ex rel. Myers* v. *Myers*, 468 Pa. 134, 360 A. 2d 587 (1976).

March 16, 1984

82-1734 Palmore v. Sidoti

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 20, 1984

Re: Palmore v. Sidoti, No. 82-1734

Dear Chief:

My recollection of the consensus reached at Conference differs slightly from that reflected in your draft opinion for the Court. As I understood the discussion, it was agreed that race would be an improper consideration in the child custody context, irrespective of whether it was the "dispositive" factor in a court's decision.

To this end, I hope you can make some minor revisions so that I could join your opinion. For example, would you change the "may be a dispositive basis" language at the top of page 5 to "may in any respect be considered as a basis"? And would it not be preferable if the outcome-determinative language at the bottom of page 3 were amended to note that race played an important part in the lower court's judgment? Finally, could not the last paragraph in note 3 be eliminated?

Sincerely,

WJB, Jr.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 21, 1984

Re: 82-1734 - Palmore v. Sidoti

Dear Bill:

Thank you for your memo of March 20.

My approach was, as I thought, consistent with declared practice, to decide only the case before us, i.e., narrowly. Here, the true basis of holdings emerges very clearly along with generalizations other than findings. Race was the dispositive basis and that surely is clear. I gave the trial judge credit for not trying to conceal it.

This abundantly supports a holding that is consistent with our narrow question presented, i.e., that the decision of the trial judge rested solely on remarriage to a person of a different race.

This is really confirmed by what you suggest I delete from the bottom of page three: "it is clear the outcome would have been different had petitioner married a caucasian male ..." We do not have a case in which race was one factor, but where it is the only factor.

It may be that your concerns are chiefly semantical, but I will take a hard look and get back to you.

Regards,

WEB

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 22, 1984

Re: 82-1734 - Palmore v. Sidoti

Dear Chief,

Please join me.

Sincerely,

Byron

The Chief Justice

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 27, 1984

Re: No. 82-1734 Palmore v. Sidoti

Dear Chief:

Please join me.

Sincerely,

WHR

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 19, 1984

No. 82-1734 Palmore v. Sidoti

Dear Chief,

Please join me.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 19, 1984

Re: No. 82-1734 - Palmore v. Sidoti

Dear Chief:

Please join me.

Sincerely,

T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 19, 1984

Re: 82-1734 - Palmore v. Sidoti

Dear Chief:

Please join me.

Respectfully,

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 20, 1984

Re: No. 82-1734, Palmore v. Sidoti

Dear Chief:

Please join me.

Sincerely,

Harry

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 20, 1984

Re: No. 82-1734, Palmore v. Sidoti

Dear Chief:

Please join me.

Sincerely,

Harry

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 20, 1984

No. 82-1734

Palmore v. Sidoti

Dear Chief,

I agree. Thank you for your consideration of my suggestions.

Sincerely,

The Chief Justice

Copies to the Conference

&82-1734 Palmore v. Sidoti (Rob)

CJ for the Court 3/5/84
1st draft 3/15/84
2nd draft 4/19/84

Joined by LFP 3/16/84
BRW 3/22/84
WHR 3/27/84
SOC 4/19/84
TM 4/19/84
JPS 4/19/84
WJB 4/20/84
HAb 4/20/84