IN THE SUPREME COURT OF FLORIDA

CAMPUS COMMUNICATIONS, INC., a Florida corporation not for profit,

Petitioner

vs.

DEPARTMENT OF REVENUE, STATE OF FLORIDA,

Respondent

CASE NO. 65,786
DCA CASE NO. AW-352

ON PETITION TO REVIEW A DECISION OF THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER

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STATEMENT OF THE CASE[1]

On September 12, 1980, the Department of Revenue (hereinafter referred to as the "Department") issued a Notice of Proposed Assessment of Tax, Penalties and Interest under Chapter 212, Florida Statutes (1979), against Campus Communications, Inc. (hereinafter referred to as "The Alligator"). (R. 7) On July 9, 1982, the Department's Notice of Decision sustaining the assessment was issued and The Alligator's petition for reconsideration was denied on September 21, 1982. (R. 2)

The Alligator filed an action challenging the tax assessment in the Circuit Court in and for Alachua County, Florida, pursuant to Chapter 72, Florida Statutes, (1981). The Alligator subsequently admitted liability for $368.11 of the tax assessment, and the parties stipulated that $22,979.59 was the amount of the tax challenged, plus penalties and interest thereon. (R. 43)

Both parties filed Motions for Summary Judgment with supporting memoranda (R. 44-113) and on November 9, 1983, the Honorable Elzie S. Sanders, Circuit Judge, issued an order

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1/ (R.) will be used to refer to the Record and (A.) to refer to the Appendix.

granting The Alligator's Motion for Summary Judgment. (A. 1)

The Department appealed the trial court's order and the First District Court of Appeal reversed. (A. 5) The First District, however, certified the following question to this Court as one of great public importance:

> Is Rule 12A-1.08, Fla. Admin. Code, which requires taxation of all publications which are not sold but are given away, unconstitutional as applied to The Alligator and similarly situated school publications?

STATEMENT OF THE FACTS

Campus Communications, Inc. publishes a newspaper, The Independent Florida Alligator. It does not have its own printing facilities, and therefore contracts with an outside printer. The printer purchases the materials and supplies, such as newsprint and ink, which become components of the finished newspapers. The Alligator then purchases the finished newspapers from the printer. Those purchases are the basis of the Department's sales tax assessment. (R. 7, 92) The Alligator's claim of exemption under Section 212.08(6), Florida Statutes (1979)[2], was denied by the Department on the basis of Rule 12A-1.08, subsections (3)(d)

2/ The statute reads, in pertinent part: 212.08 Sales, rental, use, consumption, distribution and storage tax; specified exemptions. -- The sale at retail, the rental, the use, the consumption, the distribution, and the storage to be used or consumed in this state of the following tangible personal property are hereby specifically exempt from the tax imposed by this chapter....

...(6) EXEMPTIONS; POLITICAL SUBDIVISIONS, COMMUNICATIONS. -- There are also exempt from the tax imposed by this chapter sales made to the United States Government, the state, or any county, municipality, or political subdivision of this state...Likewise exempt are newspapers; film rentals, when an admission is charged for viewing such film; and charges for services rendered by radio and television stations, including line charges, talent fees, or license fees and charges for films, video tapes, and transcriptions used in producing radio or television broadcasts.

and (4), Fla. Admin. Code.[3]

The Alligator is published by a not for profit Florida corporation which is also a tax-exempt educational organization under Section 501(c)(3) of the Internal Revenue Code. The corporation is not officially associated with the University of Florida, but is produced by students. (R. 56, 58)

The Alligator contains campus, local, state, national and international news, opinions, editorials, sports, weather, entertainment features, staff photographs and art, syndicated editorial cartoons, United Press International wire service stories, and advertising. (R. 59, 60) Circulation during the assessment period averaged over 27,000 copies per issue. (R. 34)

Over ninety-nine percent of the copies of The Alligator are distributed to readers free of charge. (R. 12) Distribution is primarily by racks located throughout the Gainesville area. There are a small number of paid and free mail subscriptions. (R. 57, 58) The Alligator has not held

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3/ Those subsections provide that in order to constitute a newspaper, the publication must have been entered or qualified to be admitted and entered as second-class mail matter and must be sold and not given to the reader free of charge.

a second-class mail permit since January 30, 1976 (R. 56) and cannot qualify for one solely because of its free circulation. (R. 49)

Both the trial court (A. 2) and the First District (A. 5) found that The Alligator is a newspaper within the common understanding of the word.

ARGUMENT

INTRODUCTION

The First District Court of Appeal certified the following question to this Court:

> Is Rule 12A-1.08, Fla. Admin. Code, which requires taxation of all publications which are not sold but are given away, unconstitutional as applied to The Alligator and similarly situated school publications?

The real issue is the constitutionality of Rule 12A-1.08 as applied to The Alligator and similarly situated newspapers. That is, The Alligator is a "school publication" only in the sense that it is produced by students. There is no official relationship with the University of Florida and the publisher is a not for profit Florida corporation which is exempt from federal income tax under Internal Revenue Code Section 501(c)(3). In that sense it is unlike some school publications, such as high school publications, which are funded by the schools themselves. Those publications would be exempt from sales and use taxes by virtue of Section 212.08(7)(a), Florida Statutes (1979). The newspaper exemption of Section 212.08(6) would not come into play. The fact that a publication like The Alligator is produced by students has nothing to do with whether it is a newspaper and thus entitled to the statutory exemption.

POINT I

RULE 12A-1.08, FLA. ADMIN. CODE, IS AN INVALID EXERCISE OF DELEGATED LEGISLATIVE AUTHORITY INSOFAR AS IT DENIES THE STATUTORY NEWSPAPER TAX EXEMPTION TO THE ALLIGATOR AND SIMILARLY SITUATED NEWSPAPERS.

Although without question there are significant constitutional reasons why denial of exemption to The Alligator and similarly situated newspapers is invalid, this Court need not reach those constitutional claims if it determines that the Department has exceeded its authority in promulgating Rule 12A-1.08, subsections (3)(d) and (4). Therefore, this brief will first address the nonconstitutional [4] claims.

A. The Paid Circulation Requirement of Rule 12A-1.08 Constitutes an Unauthorized Restriction of the Exemption Granted Newspapers by the Legislature.

Chapter 212, Florida Statutes, imposes a sales tax, a use tax, and an admissions tax on certain specified transactions. The sales tax includes transfers of personal

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4/ "Nonconstitutional" only in the sense that a specific constitutional infirmity is not involved. However, even the requirement of reasonableness is a consitutional one. See 1 FLA JUR 2d Admin. Law, § 56, and cases cited therein.

property for a consideration, including certain rentals of both real and personal property. § 212.02(2), Fla. Stat. (1979). It is the sales tax with which we are concerned here.

The sales tax is a generally applicable tax on purchases of tangible personal property. All such purchases are subject to the tax unless specifically exempt. Newspapers are exempt by virtue of Section 212.08(6), Florida Statutes (1979). No definition of the term "newspaper" is provided in Chapter 212, but the Department has promulgated Rule 12A-1.08, Fla. Admin. Code, which provides:

> (3) In order to constitute a newspaper, the publication must contain at least the following elements:
>
> (a) It must be published at stated short intervals (usually daily or weekly).
>
> (b) It must not, when successive issues are put together, constitute a book.
>
> (c) It must be intended for circulation among the general public.
>
> (d) It must have been entered or qualified to be admitted and entered as second-class mail matter at a post office in the county where published.
>
> (e) It must contain matters of general interest and reports of current events. If the publication is devoted primarily to matters of specialized interests such as legal, mercantile, political, religious or sporting matters, and it contains in addition thereto general news of importance and of current interest to the general public, it is entitled to be classified as a

newspaper.

> (4) To qualify for exemption as a newspaper, a publication must be sold and not given to the reader free of charge. So-called-newspapers which are given away for advertising and public relations purposes are taxable.

The Alligator below challenged subsections (3)(d) and (4) of the rule, insofar as they require it to sell its publication to readers in order to qualify for exemption as a newspaper.[5]

Both the trial court and the First District recognized the fact that The Alligator is a newspaper within the common sense of the word. (A. 2, 5) The paid circulation requirement of the Department's rule, however, restricts the scope of the statutory exemption by allowing the exemption to paid circulation newspapers only, rather than to all newspapers. As stated by the First District in State, Department of Business Regulation v. Salvation Ltd., 452 So.2d 65, 66 (1984):

> It is axiomatic that an administrative rule cannot enlarge, modify or contravene the provisions of a statute...A rule which purports to do so is an invalid exercise of delegated legislative authority. (citations omitted)

5/ As for the second-class requirement of (3)(d), The Alligator fails to qualify solely because it is primarily distributed free of charge to readers. (R. 49-54) Therefore, the sale requirement is, in effect, the only reason The Alligator fails to qualify for exemption as a newspaper under the Department's rules.

The cases of Pedersen v. Green, 105 So.2d 1 (Fla. 1958), and State, Department of Health and Rehabilitative Services v. McTigue, 387 So.2d 454 (Fla. 1st DCA 1980), are examples of situations where administrative agencies went beyond their authority in enacting rules to implement statutes. In Pederson, the statute exempted "feeds" from sales taxes. An administrative rule was adopted which restricted the exemption to feeds used for agricultural animals. The taxpayer objected to this restrictive definition and this Court agreed, finding the rule unreasonable and not within the intendment of the statute in that it unduly restricted the exemption granted "feeds" by the statute. Id. at 4.

In McTigue, a statute required lay midwife license applicants to provide a statement from a licensed physician attesting to the applicant's skill and competence. The administrative agency enacted a rule defining "physician" as a Florida physician and the Court held that "[b]y adding the requirement that the physician be a Florida physician the rule is an invalid exercise of delegated legislative authority because it modifies the statute by adding an additional criterion to be met by the applicant." Id. at 456. Likewise, in this case the Department has added the requirement that a newspaper have a paid circulation. This

additional criterion is unauthorized and must be invalidated. Pederson and McTigue cannot be distinguished.

B. The Paid Circulation Requirement of Rule 12A-1.08 is in Conflict with This Court's Interpretation of the Exemption Granted Newspapers by the Legislature.

If there were any doubt that the paid circulation requirement is an unauthorized addition to the requirements for exemption as a newspaper, this Court's decisions in Gasson v. Gay, 49 So.2d 525 (Fla. 1950), and Green v. Home News Publishing Co., 90 So.2d 295 (Fla. 1956), make such a conclusion inescapable.

Gasson provided the first judicial construction of the statutory newspaper exemption. In deciding that magazines did not qualify as newspapers for statutory exemption purposes, this Court held that the statute:

> ....had reference to the natural, plain and ordinary significance of the word newspaper - the understanding of the word newspaper in general and common usage...Id. at 526.

The trial court's order invalidating the rule specifically relied upon Gasson (A. 2), and the record fully supports the finding that The Alligator is a newspaper within the common understanding of the word. The First District also expressly recognized this fact. (A. 5)

The Home News case provides even further support for The Alligator's position. There, this Court was faced with a free-distribution weekly publication, the "Shopper Advertiser", which claimed entitlement to exemption from sales and use taxes. Although the publication met the minimum requirements of the regulations - which at that time did not include a sale requirement - the Court found that:

> The "Shopper Advertiser" unquestionably has for its principal purpose the advertising of business concerns in the area and not the dissemination of news. It is, in practical effect, simply an advertising "give-away"... Id. at 296.

Thus, the proper focus of inquiry is on the primary purpose of the publication. In this case, there can be no doubt that the primary purpose of The Alligator is the dissemination of news, not the advertising of business concerns. Again, both the trial court (A. 2) and the First District recognized this fact, the latter stating:

> The Alligator is clearly not a "shopper" but is a "newspaper" within the common sense of the word and is not given away for advertising and public relations purposes. (A. 5)

Therefore, because The Alligator clearly comes within the scope of the exemption as interpreted by this Court in Gasson and Home News, the paid circulation requirement must be struck down.

C. Earlier DCA Cases Upholding the Validity of Subsections (3)(d) and (4) of Rule 12A-1.08 are Distinguishable From This Case.

While Gasson and Home News, supra, compel the conclusion that the Department's paid circulation requirement represents an erroneous and unauthorized interpretation of the statutory exemption, three district court of appeal cases have upheld the rule. The Alligator submits that those cases are distinguishable from this one.

In Department of Revenue v. Skop, 383 So.2d 678 (Fla. 5th DCA 1980), a free-distribution weekly publication, the "Metro News", sought exemption as a newspaper. The court was unable to distinguish the "Metro News" from the "Shopper Advertiser" in the Home News case. The advertising content of the publication was approximately 85%[6] and the court stated:

> We must therefore hold, as did the Supreme Court in Home News, that the Metro News unquestionably has for its principal purpose the advertising of business concerns in the area and not the dissemination of news. Although perhaps not called a "shopper", it is in practical effect simply an advertising give-away. Id. at 680.

Thus, as in Home News, the focus was on the primary purpose

6/ The advertising content of The Alligator during the assessment period was between 53% and 55%. (R. 59)

of the publication. The court did endorse the second-class mail and sale requirements which are at issue in the present case, but in the context of a publication which "unquestionably" was not a newspaper within the common understanding of the term. Again, the record in this case clearly demonstrates that we are dealing with a bona fide newspaper, not an advertising give-away. Both the trial court and the First District have recognized this significant distinction.

In Boca Raton Publishing Co., Inc. v. Department of Revenue, 413 So.2d 106 (Fla. 1st DCA 1982), the court was faced with a situation involving four free-distribution weekly publications which sought sales tax exemptions. The publisher claimed that the word newspaper was unambiguous, and therefore the Department's rule requiring a second-class mail permit and sale to the reader was invalid. The First District rejected the publisher's "fundamental premise", id. at 107, that the word "newspaper" is unambiguous and then upheld the rule. Here, The Alligator does not challenge the Department's authority to promulgate rules restricting the exemption to those publications which are in fact newspapers within the common understanding of the term, having for their primary purpose the dissemination of news. Furthermore, The

Alligator does not argue that second-class status or paid circulation are absolutely irrelevant in determining whether a publication is a newspaper, but only that such criteria cannot be made conclusive. Finally, while the decision in Boca Raton does not describe with particularity the publications at issue therein,[7] the record now before this Court presents a publication which can only be described as a bona fide newspaper.

The recent case of North American Publications, Inc. v. Department of Revenue, 436 So.2d 954 (Fla. 1st DCA 1983), rev. denied, 449 So.2d 265 (Fla. 1984), involved a free-distribution weekly publication upon which sales tax was imposed for purchase of paper, ink and plastic bags used in the production and distribution of The Neighbor. The court found the case indistinguishable from Boca Raton and Skop, and thus upheld the rule. However, a review of the administrative order appealed from in North American, 4 FALR 2212-A (Oct. 18, 1982), reveals significant factual distinctions between The Neighbor and The Alligator. The

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7/ However, in a declaratory statement issued by the Department, In re: Tallahassee Advertiser, 4 FALR 1982-A (May 17, 1982), reference is made to the publication in Boca Raton, stating that the publication's "primary purpose was for the use of selling advertisements even though that publication contains some local news." Id. at 1983-A.

Neighbor was distributed only weekly, whereas The Alligator is distributed Monday through Friday during the University of Florida academic sessions (twice weekly during the summer sessions). (R. 56) Distribution of The Neighbor is directly to residences, apparently unsolicited, whereas The Alligator is primarily distributed to racks. (R. 57) This makes it much more likely, of course, that the reader is seeking out the publication as a source of news and information. The Neighbor's advertising content was approximately 76%, whereas The Alligator's advertising content was 53% to 55% during the assessment period. (R. 59) Finally, the content of The Neighbor did not include national or international news, wire service reports, weather reports or state capital news, whereas The Alligator contains all of these. (R. 60) These "traditional newspaper features" were specifically noted by the First District (A. 5) and The Alligator submits that this distinction compels the conclusion that the Department's rule is indeed an invalid exercise of delegated legislative authority. While North American may have been decided correctly on the issue of The Neighbor's entitlement to exemption, this case clearly demonstrates that the rule is overbroad because it operates to deny exemption to publications which are in fact bona fide newspapers.

In conclusion, Skop, Boca Raton and North American did not involve bona fide newspapers and are therefore distinguishable from this case. Gasson and Home News are controlling here and The Alligator is clearly entitled to exemption under the rationale of this Court in those cases.

POINT II

RULE 12A-1.08, FLA. ADMIN. CODE, IS UNCONSTITUTIONAL AS APPLIED TO THE ALLIGATOR AND SIMILARLY SITUATED FREE-DISTRIBUTION NEWSPAPERS.

A. The Paid Circulation Requirement Violates the First Amendment to the United States Constitution.[8]

As noted before, there is no doubt that The Alligator is a newspaper within the common understanding of the word. Both the trial court and the First District recognized this fact. (A. 2, 5) In spite of this, the Department refuses to allow The Alligator the statutory exemption granted other newspapers. This differential treatment of The Alligator, based solely upon its method of circulation, violates the First Amendment.

In Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, ____ U.S. ____, 103 S.Ct. ____, 75 L.Ed.2d 295 (1983), the United States Supreme Court held that a tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the

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8/ There is, of course, also a violation of the Florida Constitution, Article I, Section 4, because the scope of that guarantee of freedom of speech and press is the same as that of the First Amendment. See Florida Canners Ass'n v. State, Dep't of Citrus, 371 So.2d 503 (Fla. 2nd DCA 1979).

State to justify its action. The Supreme Court reasoned that:

> [a] power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern....When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government.... ...Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation. 75 L.Ed.2d at 304, 305. (citations omitted) (footnote omitted)

The fact that some newspapers, such as The Alligator, are taxed, while others, ~~such as The Alligator~~, are not, triggers the First Amendment. see errata sheet. The Department must demonstrate an interest of compelling importance to justify this differential treatment. Furthermore, the means used to achieve that goal must be no more burdensome on First Amendment interests than necessary.

In this case, the Department has not met its burden. The State has an interest in raising revenue, of course, but this is insufficient to justify the differential treatment of free-circulation newspapers. As was suggested in Minneapolis

Star, the State could tax all newspapers and avoid First Amendment problems. 75 L.Ed.2d at 305. Thus, the State must have some other interest it is seeking to further if the rule is to withstand constitutional scrutiny.

Another possible State interest is the desire to exclude from the scope of the exemption those publications which are not bona fide newspapers. This is certainly a legitimate goal, one which this Court endorsed in Home News, supra. "Shopper" publications obviously should not come under the newspaper exemption and The Alligator agrees that some restrictions are necessary to exclude those publications. The means chosen by the Department, however, are not narrowly drawn and thus cannot stand. The paid circulation requirement, in the context of both (3)(d) and (4), is completely irrelevant in making a determination of the bona fides of a newspaper if that is the only characteristic which the publication lacks. That is, while it may be true that most "shopper" publications have free circulation, it is not the free circulation which makes them "shoppers". Rather, it is the lack of news content, such as in Home News, Skop, Boca Raton and North American. Conversely, if a publication has a significant percentage of news, and meets the other requirements of the rule, the fact that it is distributed

free of charge is completely irrelevant in determining whether it is a newspaper. The content and purpose of a publication determine whether it is a newspaper, not the amount of money a reader pays for it. The paid circulation requirement is thus overbroad and unconstitutional as applied to The Alligator and similarly situated newspapers.

The Alligator suggests that the Department could have accomplished the legitimate goal of excluding "shoppers" from the newspaper exemption simply by limiting advertising content percentage. In fact, one of the requirements for issuance of a second-class mail permit is a 75%/25%, advertising to editorial content ratio, i.e., any publication with more than 75% advertising content cannot qualify for second-class treatment. Domestic Mail Manual, § 422.231. The 75% cap on advertising content is well above The Alligator's 55%, and exceeds the 62.2% newspaper average reported by an industry publication. [9] The present paid circulation test furthers the goal of eliminating "shoppers", but at the expense of legitimate newspapers such as The Alligator. A reasonable advertising cap would eliminate this overreaching.

9/ Editor and Publisher, March 19, 1983, at 10, col. 2.

Turning to the specific reasons for the enactment of subsections (3)(d) and (4) of Rule 12A-1.08, as articulated by the Department in answers to interrogatories propounded by The Alligator, it is claimed that these requirements have:

> ...been generally imposed in other sections of the Florida Statutes and believed to be reasonable as one of the criteria used by the Department to limit the exemption to those publications generally recognized by the public as a newspaper. (R. 14, 15, 18)

Sections 50.011 and 165.031, Florida Statutes (1979), do in fact require second-class mail status in order for a newspaper to carry legal notices. Those statutes, however, do not attempt to define the word "newspaper", but only state which newspapers may carry legal notices. Moreover, in the context of designating which newspapers may carry legal notices, there is an overriding consideration not present in the context of this case - the due process requirement of notice. That is, the purpose of limiting publication to newspapers meeting certain standards is to assure that notice will be given to the public. Tylee v. Hyde, 52 So. 968 (Fla. 1910); Yaeger v. Rose, 114 So. 373 (Fla. 1927). That concern is not present here. Furthermore, even the postal regulations do not define the word "newspaper." If there is

a relationship between second-class mail status and the bona fides of a newspaper, it is an extremely tenuous one. The Alligator suggests, in fact, that such a relationship does not exist.

As for the Department's assertion that the paid circulation requirement limits the exemption to those publications generally recognized by the public as newspapers, it is submitted once again that the price a reader pays for a publication does not determine its character. The public looks to the publication itself and examines the content and purpose. The trial court and the First District made such an examination of The Alligator and found that it is a "newspaper" within the common understanding of the word. Once that determination is made, the paid circulation requirement, as applied to The Alligator, cannot withstand First Amendment scrutiny.

Discrimination on the basis of method of circulation and distribution is prohibited. The United States Supreme Court has said that "[l]iberty of circulation is as essential...as liberty of publication; indeed, without the circulation the publication would be of little value..." Lovell v. Griffin, 303 U.S. 444, 452, 58 S.Ct. 666, 82 L.Ed. 949, (1938). The Alligator chooses to distribute its newspaper to readers free

of charge, just as the Gainesville Sun may choose to charge a quarter for its newspaper. If the choices are reversed, does The Alligator then become a newspaper and the Gainesville Sun a "non-newspaper"? How much does the publisher have to charge? A penny? A quarter? A dollar? Do all of the copies printed have to be sold or just some of them? Are those that are not sold subject to the tax? These questions may seem ludicrous, but they illustrate the fact that paid circulation has nothing to do with the character of a publication. And more importantly, they illustrate the very real threat to the First Amendment if the Department can condition the right to an exemption upon the price, or lack of a price, the reader pays for a newspaper.[10]

In Grosjean v. American Press Company, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936), the United States Supreme Court struck down, as violating the First Amendment, a statute which imposed a license tax on the business of publishing advertising in publications having a circulation of more than twenty thousand copies a week. Publications with lower circulations were not taxed. The Court said that

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10/ Furthermore, if one assumes that the Legislature's grant of exemption to newspapers was motivated by a desire to promote the free flow and dissemination of news to the public, a sale requirement can hardly be said to further that goal.

the tax:

> ...operates as a restraint in a double sense. First, its effect is to curtail the amount of revenue realized from advertising, and, second, its direct tendency is to restrict circulation. This is plain enough when we consider that, if it were increased to a high degree, as it could be if valid..., it might well result in destroying both advertising and circulation. 297 U.S. at 244, 245. (citations omitted)

The threat to The Alligator is no less and, in fact, has become a reality because the sales tax has been increased from four percent to five percent since this controversy began. Compare §212.05, Fla. Stat. (1979) with § 212.05, Fla. Stat. (1983). Ironically, the lower court in Grosjean had said:

> If the state, upon the same classification which it is seeking to uphold, had reversed the process and taxed the country journals and exempted the metropolitan newspapers, the inequality probably would be readily conceded, but the constitutional infirmity, though more strikingly apparent, would have been the same. 10 F.Supp. 161, 163, 164 (E.D.La. 1935)

The Alligator suggests that the supposition of the lower court in Grosjean has presented itself in this case and the constitutional infirmity of the Department's rule is no

greater than that of the tax in Grosjean, but certainly no less.[11]

Finally, The Alligator would note that the postal regulations which deny second-class mailing privileges to free-distribution publications have been held unconstitutional as applied to free-distribution newspapers. Enterprise, Inc. v. Bolger, 582 F. Supp. 228 (E.D. Tenn. 1984). In Enterprise, the Postal Service offered no reasons for the distinction between free and paid-circulation newspapers, but merely stood behind the regulations as "time-honored and reasonable." Id. at 229. The court recognized that the regulations were content-neutral, but said they:

> ...might well work to stifle the dissemination, through the mails, of different points of view and opinions....In addition, the challenged regulations do appear to create two arbitrary classifications of newspapers and accord them unequal treatment. The defendants suggest absolutely nothing to indicate that the distinction is reasonably related to a legitimate governmental objective. Id. at 229, 230.

Likewise, the Department has offered insufficient

11/ The fact that the Department may have had no "bad motive" in denying exemption to free-distribution newspapers makes no difference. See Minneapolis Star, 75 L.Ed.2d at 309 ("We need not and do not impugn the motives of the Minnesota legislature...").

justification for its denial of exemption to The Alligator and, in effect, merely stands by its rule as time-honored and reasonable. The "heavy burden" required of the Department by Minneapolis Star has not been met.

B. The Paid Circulation Requirement Violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[12]

As the previous discussion has shown, the Department has denied the statutory exemption to free-distribution newspapers like The Alligator. In the trial court, the Department argued that:

> The taxing scheme treats all "newspapers" alike and treats all publications not entitled to be classified as "newspapers" alike. There is no discriminatory treatment within these two classes. (R. 88)

This argument merely begs the real issue of whether the establishment of the two classes of bona fide newspapers, free-circulation and paid-circulation, is proper. The Alligator submits that it is not, for the reasons previously

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12/ Because Campus Communications, Inc. is a corporation, only protection under the Federal Constitution may be claimed to support the equal protection argument. Florida's equal protection clause protects only natural persons. Art. I, §2, Fla. Const.

set forth in this brief.[13] Those reasons will not be restated here, but a brief discussion of the basic principles of equal protection as applied to this case is in order.

Laws which affect fundamental rights are subject to strict scrutiny, which requires a careful examination of the governmental interest claimed to justify the classification in order to determine whether that interest is substantial and compelling, as well as an inquiry as to whether the means adopted to achieve the goal are necessarily and precisely drawn. In re Estate of Greenberg, 390 So.2d 40 (Fla. 1980). Among these fundamental rights are First Amendment rights. Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968). Under the Department's rule, some newspapers are taxed, while others are not. The Department, however, has utterly and completely failed to meet its heavy burden of justification for such disparate treatment.

In fact, The Alligator contends that the paid circulation requirement fails even a minimum rational basis

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13/ This is particularly so with respect to the First Amendment discussion because the equal protection claim in this case is "closely intertwined with First Amendment interests." Police Dep't of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972), Cf., Minneapolis Star, 75 L.Ed.2d at 305, fn. 7 (viewing the case as one arising directly under the First Amendment).

test,[14] as shown by an analogy to this Court's decision in Osterndorf v. Turner, 426 So.2d 539 (1982). There, a constitutional provision granted an enhanced homestead exemption to permanent residents. A statute, however, limited this exemption to permanent residents who had lived in the state for five years or more. Saying first that the statute effectively established two categories of permanent residents, this Court went on to find:

> ...no rational basis for distinguishing between bona fide residents of more than five consecutive years and bona fide residents of less than five consecutive years in the payment of taxes on their homes. This disparate treatment of resident homeowners cannot be allowed if our equal protection clause is to have any real meaning. Id. at 545. (emphasis in original)

Likewise, in this case there is no rational basis for distinguishing between bona fide newspapers with paid circulations and bona fide newspapers with free circulations. The Department's rule cannot survive even minimal scrutiny under the equal protection clause.

14/ As discussed above, however, The Alligator maintains that strict scrutiny is the proper equal protection analysis here.

C. The Paid Circulation Requirement Violates the Due Process Clauses of the State and Federal Constitutions.[15]

By creating an irrebuttable presumption that otherwise bona fide newspapers are not qualified as newspapers for tax exemption purposes because of their free circulation, the Department's rule violates the state and federal due process clauses. Such irrebuttable presumptions have long been disfavored under the due process clause. Vlandis v. Kline, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973).

As with the analyses under the First Amendment and equal protection clause, a strict test is invoked under the due process clause when a constitutionally preferred right or privilege is involved. In re Estate of Greenberg, 390 So.2d 40 (Fla. 1980). The irrebuttable presumption is deemed invalid "when that presumption is not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination." Vlandis, 412 U.S. at 446.

In this case, First Amendment rights are involved because of the disparate treatment of some newspapers, such as The Alligator, which are denied exemption solely on the

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15/ Art. I, 9, Fla. Const.; Fourteenth Amendment, U. S. Const.

basis of their method of circulation. Therefore, the strict test referred to in Vlandis must be applied. The Alligator submits that the rule completely fails that test. As stated before, if the Department wishes to "weed out" the "shopper" publications it has a reasonable alternative means of doing so - simply put a cap on advertising content. In fact, the rule already does this by incorporating the United States Postal Service's cap in the second-class mail restrictions. The elimination of the paid circulation requirement does not effectively increase the administrative burden on the Department because a sufficient safeguard is already in place.

Finally, it is submitted that the Department's rule fails even a minimal test of reasonableness. There is no rational connection between the fact proved - free circulation - and the ultimate fact presumed - not a newspaper. See Bass v. General Development Corp., 374 So.2d 479 (Fla. 1979). It is simply not reasonable to assume that if an individual receives a publication free of charge, then that publication is not a newspaper. The price has nothing to do with the character of the publication. The Alligator is the perfect example of this fact.

The Department's conclusive presumption, that The

Alligator and similarly situated newspapers are not bona fide newspapers because they are distributed free of charge is unsupportable by any standards, and therefore violates the due process clause.

CONCLUSION

For the foregoing reasons, Rule 12A-1.08, subsections (3)(d) and (4), insofar as they require The Alligator and similarly situated newspapers to be sold to readers in order to qualify for the statutory exemption, are invalid exercises of delegated legislative authority. Moreover, as applied to The Alligator and similarly situated newspapers, subsections (3)(d) and (4) are unconstitutional as violative of the First Amendment, the equal protection clause of the Fourteenth Amendment, and the due process clauses of the United States and Florida Constitutions.

Accordingly, this Court should answer the question certified by the First District in the affirmative, quash the decision of the First District and direct the affirmance of the order of the Circuit Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF PETITIONER has been furnished by United States Mail to Edwin A. Bayo, Assistant Attorney General, Department of Legal Affairs, Room LL04, The Capitol, Tallahassee, Florida 32301, this 17th day of October, 1984.

Lee S. Johnson Jr.

Lee S. Johnson, Jr.