IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA

72,789

NEWS-PRESS PUBLISHING CO., INC. d/b/a FORT MYERS NEWS-PRESS,	)	
Appellant,	)	
v.	)	APPEAL NO.: 87-1504
GEORGE FIRESTONE, et al.,	)	
Appellees.	)	

APPEAL FROM THE CIRCUIT COURT OF THE TWENTIETH
JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA

BRIEF OF AMICI CURIAE PENSACOLA NEWS-JOURNAL, INC., d/b/a PENSACOLA NEWS-JOURNAL; CAPE PUBLICATIONS, INC., d/b/a FLORIDA TODAY; FLORIDA PRESS ASSOCIATION AND FLORIDA SOCIETY OF NEWSPAPER EDITORS

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INTRODUCTION

Plaintiff/Appellant News-Press Publishing Co., d/b/a Fort Myers News-Press, appeals from an order which granted summary judgment in favor of defendants and which upheld the constitutionality of §101.121, Fla.Stats. (1986).

This brief is filed by Pensacola News-Journal, Inc., d/b/a Pensacola News-Journal, Cape Publications, Inc., d/b/a Florida TODAY, and the Florida Press Association as amici curiae in support of Plaintiff/Appellant pursuant to Rule 9.370, Fla.R.App.P.

References to the record will be noted with the symbol (R-). References to the appendix to this Amici Curiae brief will be designated (ACA -).

INTEREST OF THE AMICI CURIAE

Amici Curiae are two Florida corporations engaged in the business of publishing The Pensacola News-Journal and Florida TODAY newspapers, and two statewide voluntary professional associations of Florida newspaper publishers and editors.

The newspapers here represented share the concerns of the Fort Myers News-Press regarding our state's newly imposed restrictions on routine newsgathering at polling places on election day -- practices which these Amici have engaged in for as long as they have been in the news reporting business.

The statute at issue, §101.121, imposes an arbitrary limit on the media's ability to photograph and interview voters at the polls. Such photographs and interviews are an integral part of election-day journalism.

The State has made no showing that this limitation on traditional First Amendment activity is necessary to protect any legitimate state interest. Neither does the record show that §101.121 is the least restrictive means to a legitimate end.

The State appears to have conceded that the polling place is a "nontraditional public forum" and that, as such, only reasonable time, place and manner restrictions may be imposed upon First Amendment-related activities, such as the newsgathering the Fort Myers News-Press sought to do (R-53).

Counsel for Defendants Firestone and Glissen asserted at trial that the statute is reasonable (R-53), but no evidence was offered to support that claim.

In a recent case dealing with the issue of access to trial documents in a divorce proceeding, the First District observed that "knowing when to properly close a trial court proceeding is inextricably tied to our penchant for doing things by the numbers." Florida Freedom Newspapers, Inc. v. Honorable Don T. Sirmons, et al., ___So.2d ____; 12 Fla.L.Wkly. 1365 (Fla. 1st DCA June 1, 1987).

This brief explores "the numbers" as they pertain to state-imposed restraints on newsgathering at the polling place.

STATEMENT OF THE CASE AND FACTS

Amici Curiae adopt the News-Press Publishing Co.'s statement of the case and facts.

SUMMARY OF ARGUMENT

Fla.Stats. §101.121 is unconstitutional regardless of whether the Court characterizes the polling place as a public or a private forum, or whether the Court reaches that issue at all. Because the statute severely and unreasonably curtails the guarantees of free speech and free press, the Court could properly declare it unconstitutional without ever entertaining the public/private forum issues. Moreover, it is impermissibly vague.

In addition, the statute fails the rational relationship test that is required for public forum regulations purporting to limit First Amendment rights, since the State has not proved the presence of any election-day disturbance, let alone disturbances caused by public or media access to the polls.

The statute also fails to meet the requirement of reasonableness that is demanded of a statute that regulates semi-public or private fora.

Fla.Stats. §101.121 is also unconstitutional because it violates the procedural due process rights of Plaintiff. The statute is impermissibly vague and overbroad, and cannot be saved by judicial reconstruction. This vagueness makes even-handed enforcement impossible.

Furthermore, since the statute impinges on free speech and association, settled principles of law dictate that it cannot be sustained absent the State's showing of a compelling interest that cannot be attained by less restrictive means. No such showing was attempted.

These deficiencies require reversal. The constitutional prohibition against unjustified usurpation of the First Amendment rights guaranteed to all individuals, coupled with the State's total failure of proof, requires entry of summary judgment in favor of Plaintiff.

ARGUMENT

I. SECTION 101.121 (Fla.Stats.) (1986) IS AN IMPERMISSIBLE SOLUTION TO A NONEXISTENT PROBLEM

A. §101.121 IS IMPERMISSIBLY OVERBROAD AND VAGUE

The trial Court's order gives the shortest of shrift to the substantial First Amendment issues raised by the News-Press' challenge to Florida's unprecedented attempt to ban routine election-day news coverage at state polling places. The only insight into the Court's reasoning is that §101.121 (Fla.Stats. 1986) is rendered constitutional by "...giving the law a common sense interpretation." (R-306).

This cryptic rationale does not bear the weight of the record, for the only credible evidence offered at trial demonstrated that the system the statute purportedly seeks to fix wasn't broken in the first place.[1]

Last month in Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, 55 U.S.L.W. 4855 (June 15, 1987),

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1/ One poll worker testified that the media's presence at the polls "...takes your attention off what you're doing." Significantly, she did not testify that journalists had engaged in disruptive behavior. For all we can tell from the record, her attention was diverted by concern over whether she would photograph well.

Such "evidence" does not justify a substantial incursion into historically recognized First Amendment rights, although it may demonstrate the need for less distractable poll workers. Nor does the trial Court's assertion that "common sense" supports its decision take into account the United States Supreme Court's insistence that First Amendment rights be accorded the greatest deference in our democratic society.

the Supreme Court of the United States held a statute which prohibited the exercise of First Amendment activities to be facially unconstitutional because of its overbreadth. The statute, which declared a blanket ban on First Amendment activities at Los Angeles International Airport, was struck down as being "substantially overbroad and...not fairly subject to a limiting construction." Id. at 4856.

Unlike the statute at bar, the Los Angeles Airport even-handedly declared its central terminal area "not open for First Amendment activities by any individual and/or entity." Jews for Jesus, a religious group known for accosting uninterested passersby at busy airports, challenged the regulation.

Writing for a unanimous Court, Justice O'Connor's opinion demonstrates that First Amendment protection extends far enough to cover behavior that a significant portion of the populace might find offensive.2/

Jews for Jesus is simply the latest illustration of this nation's belief that the exercise of First Amendment rights will not be restricted merely because it is an inconvenience to others, such as the lone Florida poll worker who testified in support of §101.121.

That statute and its blanket prohibition of non-voter access to areas located within 50 feet of polling places is similar in its overbreadth to the Los Angeles ordinance invalidated in Jews

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2/ This result is consistent with this Court's broad view of First Amendment freedoms. See, infra. p.9.

for Jesus. It is impossible to interpret the statute in a way that appropriately limits it. To do so would involve the addition or subtraction of words from the statute, and this the courts cannot do.[3]

The statute reads in full as follows:

> As many electors may be admitted to vote as there are booths available, and no person who is not in line to vote may come within 50 feet of any polling place from the opening to the closing of the polls, except the officially designated watchers, the inspectors, the clerks of election, and the supervisor of elections or his deputy. However, the sheriff, a deputy sheriff, or a city policeman may enter the polling place with permission from the clerk or a majority of the inspectors. Such restrictions shall not apply to commercial business or privately owned homes and property which are within 50 feet of the polling place.
>
> §101.121 Fla.Stats. (1986)
> (emphasis added).

When read together with the other election statutes which were also revised at the same time[4] in 1985, §101.121 becomes

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[3] See fn. 15, infra. p.17.

[4] A full discussion of the election code's revision is provided in Appellant's brief. Amici would underscore, however, that although the predecessor statute to §101.121 was on the books since 1895 and was far more restrictive in its scope, there is no record that any election supervisor ever found its enforcement necessary to preserve order at the polls.

Prior to enactment of §101.121 "...the media that did go into the polls were allowed to go in, they were not thrown out and not told not to take pictures prior to this particular incident, isn't that true?"

[By defendant Enid Earle] "That's right, Mr. Carta."

(R-35-36)

intolerably ambiguous. §101.121 provides that no non-voters may come within 50 feet of a polling place. However, if these non-voters happen to be soliciting opinions, they may be barred from coming within 100 feet if they fail to obtain the approval of the board of electors, pursuant to §102.031(3).[5] If however, they do receive permission pursuant to §102.031, it is unclear whether opinion-pollers are to be bound by the 50-foot prohibited zone established by §101.121, or whether the permission they have

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[5] Florida Statute §102.031 (1986) reads in relevant part as follows:

> (3) Any person, political committee, committee of continuous existence, or other group or organization that intends to solicit voters within 100 feet of any polling place on the day of any election shall notify the supervisor of elections at least 3 days prior to the day of the day of the election of such intent. The notice shall include:
>
> (a) the name of the person, committee, group, or organization soliciting;
> (b) the issue on which persons will be solicited;
> (c) the polling places where soliciting will occur;
> (d) the time soliciting will occur; and
> (e) the nature of the soliciting activity, including, but not limited to, distribution of pamphlets, flyers or other material; requesting signatures on a petition form, and requesting voter opinions on candidates and issues.
>
> Upon receiving such notice, the supervisor shall take any action necessary to ensure order at the polling places affected by such soliciting.

received pursuant to §102.031 is superseding.[6]

In order to be constitutional, a statute must be understandable. §101.121 fails that test. See Papachristou v. Jacksonville, 236 So.2d 141 (Fla. 1st DCA 1970), rev'd, 405 U.S. 156 (1972) (where statute's failure to give person of ordinary intelligence fair notice that his contemplated conduct was forbidden led to its invalidation on vagueness grounds.)

B. §101.121 VIOLATES STANDARDS GOVERNING LIMITATIONS UPON FREEDOM OF SPEECH AND PRESS IN PUBLIC FORUMS

In Jews for Jesus, the overbreadth of the statute at bar was so patent that the Court did not bother to decide if the Los Angeles Airport terminal was a public forum. Yet there, as here, the regulation could have been analyzed from the standpoint of whether the government was impermissibly limiting speech in a public forum.

The Court below did not decide that question, and this Court, following the Jews for Jesus precedent, could properly ignore the issue as well and simply and declare §101.121 invalid on overbreadth grounds.

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[6] Although this provision is not directly at issue, it illustrates the casualness with which the Legislature has revised the election code. Under §102.031, poll officials are given no guidelines by which to evaluate the activity of potential opinion-pollers. How can they assess what effect a given activity might have on the orderliness of the polling place? Since there are no express guidelines contained in §102.031 for evaluating this question, there is nothing preventing a poll official from using his own personal political bias as a basis for excluding a would-be opinion poller.

However, ample evidence exists to support a finding that Florida's polling places are public forums.[7]

The standard is whether the government has expressed an intent to create a public forum. See Cornelius v. NAACP Legal Defense & Education Fund, 105 S.Ct. 3439, 87 L.Ed.2d 2567 (1985). A polling place, where voters express their personal choice about who should become an elected official, and which is expressly designated to receive a steady stream of people on designated election days, qualifies under this test.

Once the Court determines that the affected area is a public forum, the statute must pass a rational relationship test, relating the regulation to a permissible state objective, such as that of preventing disruption. Regulations showing no such rational relationship are unconstitutional. See Clean-up '84 v. Heinrich, 582 F.Supp 125 (M.D. Fla. 1984), aff'd, 759 F.2d 1511 (11th Cir. 1985).

The regulation in question must also be narrowly tailored to the goal of achieving a permissible state objective. See Irish Subcommittee v. Rhode Island Heritage Commission, 646 F.Supp. 347, 354 (D.R.I 1986); also see Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, (dissent at 2569); KTSP-Taft

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[7] The State appears to have expressly conceded the issue (R-53); in any event, the trial transcript as a whole reveals no serious dispute that the plaintiff is in fact engaged in legitimate newsgathering activity which the State may not unreasonably impede. The dispute centers upon whether there is sufficient evidence upon which §101.121 may be deemed reasonable.

Television v. Arizona State Lottery, 646 F.Supp. 308 (D.Ariz. 1986).

Only where there is clear evidence of intent not to create a public forum, or where the nature of the property is inconsistent with expressive activity,[8] will the Supreme Court refuse to find a public forum. Neither factor applies to polling places.

Since voters are exercising their constitutional rights by going to the polls, any expression of governmental intent to restrict the public aspect of the polling place is unconstitutional, not only as applied to the voters, but also as applied to journalists who are attempting to exercise their constitutional right to gather and disseminate the news. This right was identified in Branzburg v. Hayes, 408 U.S. 665, 681 (1972), as well as in United States v. Gurney, 558 F.2d 1202, 1208 (5th Cir. 1977). Furthermore, the very function of a polling place indicates that it is not an area inconsistent with expressive activity. Moreover, the fact that many polling places are often located within public facilities such as schools supports their designation as a public forum.

§101.121 cannot pass the rational relationship test that is required to justify regulations which infringe on First Amendment rights in public forums. The State fails to provide any justification for its 50-foot "First Amendment Free Zone."[9] Although

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[8] Cornelius, supra., 105 S.Ct. at 3450.

[9] Jews for Jesus, supra., at 4856.

the State's witnesses and attorneys claimed the restriction is necessary to prevent disruption at the polls, they failed to provide any evidence of this disruption, aside from the comments of one poll worker, who testified that the presence of newsmen distracted her and made it difficult for her to do her job. (R 44). The assertions of counsel, of course, are not evidence.

It is also significant that the state has provided no facts to support its contention that orderly elections can only be effectuated by a 50-foot prohibited zone around the polling place.

Instead, the only demonstrated effect of §101.121 has been the increased hardship on employees of the News-Press as they attempted to perform a function which is a natural extension of their constitutionally protected freedom of the press.[10] (R-6-29).

Absent proof that the activities of non-voters around poll sites are disruptive, the state cannot regulate access to polls by excluding members of the media.[11]

10/ The principle that media access to "matters relating to the functioning of government" may not be abridged absent some "overriding interest articulated in findings" was established in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). See discussion infra., p. 21-24.

11/ Even if the state had provided evidence of the "disruptive" nature of media presence at the polls, §101.121 would still be unconstitutional, since there is no particular justification for a 50 foot prohibited zone. For all the Court can tell, this number was pulled from a hat.

The statute should also be found unconstitutional even if the Court finds the polling place to be a limited public forum.

Amici are of the view that polling places are public forums, although a principled argument can be made that they are limited in nature. The term "limited public forum" has been used to describe a state fair because "it exists to provide a means for a great number of exhibitors temporarily to present their products or views, be they commercial, religious, or political, to a large number of people in an efficient fashion." Heffron v. International Society for Krishna Consciousness, 452 U.S. 640, 655 (1981).

By analogy, a polling place, since it exists to allow the temporary presence of a great number of voters for the particular purpose of casting their ballots, may be deemed a limited public forum.

It is important to remember that the News-Press does not claim unlimited access to the polling places for unlimited purposes. The News-Press seeks only to do what photographers throughout Florida and the nation have always done on Election Day: to accurately portray citizens exercising the cherished franchise.

Limited public fora are not "Hyde Parks," where anyone may get up on his soapbox to harangue spectators on any subject; rather, they must be analyzed on a case-by-case basis, and First Amendment activity appropriate to and consistent with the particular forum should be permitted.

In a limited public forum, time, place and manner regulations have been held to be constitutional only when they provide alternative means of access for the groups that have been excluded. See Heffron v. International Society for Krishna Consciousness, supra. There, the Court reasoned that defendants could employ the alternative means of renting a booth at the Minnesota State Fair so that their distribution of religious literature would not violate a state statute. §101.121 does not provide such alternative means; instead, it effectively prevents media photographers from taking election day poll-site photos altogether. (R 8-9, 16).[12]

An additional criterion in determining the constitutionality of a time, place and manner restriction is that it must be applied evenhandedly to all, and must serve a significant government interest. Heffron at 648, 649. §101.121 fails this test, because it has not been applied to exclude groups other than the media and because there has been no showing that the increase of the prohibited zone around the polls from 15 feet to 50 feet actually cuts down on election day chaos. Nor has the existence of this chaos been established, aside from the testimony of one

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12/ Ironically, trial testimony revealed one instance where the statute was ignored and press photographers permitted to take pictures within 50 feet of the polls. (R-13-14; 19-20). Significantly, there was no testimony that this incident brought chaos or disruption to the electoral process.

poll worker who complained of a disturbance in one polling place on one day (R-44).

Through a series of Supreme Court decisions, the principle has emerged that governmental regulation of limited public fora may not prohibit peaceful speech or assembly under the guise of preserving order. Instead, these governmental regulations may only restrict behavior that is unsuitable to the forum. See Brown v. Louisiana, 383 U.S. 131 (1966) (upholding plaintiff's constitutional right to silently protest in a library); Gregory v. City of Chicago, 394 U.S. 111, 112 (1969) (upholding plaintiffs' constitutional right to conduct peaceful and orderly protest march from city hall to Mayor's residence); Eisenstadt v. Baird, 405 U.S. 438, 460 (1972) (Douglas, J., concurring)(upholding appellee's constitutional right to distribute contraceptives to unmarried persons).

Permitting the media to continue its tradition of showing Election Day activity at the voting booth is completely consistent with the Supreme Court's view of limited public fora. Like schools and libraries, polling places exist to promote a certain kind of expressive activity. Providing an opportunity for voters to express their political views before and after they exercise their franchise is consistent with the purpose of the polling place.

It is settled law in the Eleventh Circuit that the state may enact reasonable time, place and manner regulations of elections

only insofar as these regulations do not exceed constitutional limitations. Clean-Up '84 v. Heinrich, 759 F.2d 1511, 1513, 1514 (11th Cir. 1985).

This Court should follow the precedent established in Clean-Up v. Heinrich and should declare §101.121 invalid as an unconstitutional time, place and manner regulation.

C. §101.121 VIOLATES PROCEDURAL DUE PROCESS

Historically, in the First Amendment area, the Supreme Court painstakingly examined statutes accused of vagueness.[13] This is because "uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone," allowing a "vague statute...to inhibit the exercise of [First Amendment] freedoms." Grayned v. City of Rockford, 408 U.S. 104 (1972).

The Supreme Court has held that a statute that deters real and substantial expression is void for vagueness when it cannot be construed by the court in such a way as to cure this vagueness. See Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610 (1976). Record Revolution No. 6 v. City of Parma, 638 F.2d 916 (6th Cir. 1980); Postscript Enterprises, Inc., v. Whaley, 638 F.2d 1249, 1253 (8th Cir. 1981).

It is apparent that §101.121 suffers from the deficiency of vagueness, and history demonstrates that Florida courts are hostile to vague legislation that limits free speech.

13/ L. Tribe, American Constitutional Law, 719 (1978)

Long before Jews for Jesus, this Court invalidated part of a statute on vagueness grounds even where defendant's behavior was clearly offensive.[14] Here, §101.121 has condemned conduct that, by contrast, has been a routine part of election-day coverage in Florida.

Fla.Stats. §101.121 is a classic example of a vague statute for which judicial reconstruction is impossible. There is really no way for a court to guess just what the legislature meant by enacting this statute; any attempt to do so would be judicial legislation.[15] From reading the staff analysis of the legislation,[16] it is possible to conclude that §101.121 was revised to compensate for the court's having struck down §104.36 as overbroad in Clean-Up '84 v. Heinrich. Unfortunately, in attempting to cure a fault of overbreadth, the Legislature has passed a statute which is flawed by vagueness.

14/ Waller v. City of St. Petersburg, 245 So.2d 685 (Fla. 2d DCA 1971) (holding that an arrest for verbal abuse was unlawful due to the overbreadth of the relevant section of the statute).

15/ See Silverstein v. Wakefield, 112 So.2d 406 (Fla. 3d DCA 1959) (holding that court has no power to modify laws passed by the legislature). The Florida Supreme Court has ruled the same way. State v. Egan, 287 So.2d 1 (Fla. 1973); accord, Purvis v. State, 377 So.2d 674 (Fla. 1979).

16/ The staff analysis is reproduced in full as an appendix to this brief. (ACA 31-35)

The statute also runs afoul of procedural due process because the State has failed to show that no less restrictive alternative to the statute exists for the purpose of maintaining order at the polls.

Furthermore, the statute also fails procedural due process requirements for criminal statutes. It is black letter law that criminal statutes cannot be extended by construction, but instead must be strictly construed. If there is any reasonable doubt as to the meaning of a criminal statute, it must be construed in favor of the accused. 14 Fla. Jur. 2d Criminal Law §14 (1979).

Fla.Stat. §101.121 is a criminal statute whose meaning is unclear. As such, it is not properly enforceable by the courts.

In addition, it is well-settled that the burden of proof rests with the State to justify §101.121, and the burden is a high one. "State action impinging on free speech and association will not be sustained unless the governmental interest asserted to support such impingement is compelling." Talley v. California, 362 U.S. 60, 66, 67, (1960) (Harlan, J., concurring).[17/]

In Talley, the state's failure to prove that its ordinance prohibiting the distribution of anonymous handbills was the only means by which it could prevent fraud, false advertising and libel, led the Court to declare the ordinance unconstitutional. Plaintiff's right to distribute handbills was upheld without his

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17/ Also see NAACP v. State of Alabama, 357 U.S. 449, 463, 464 (1958); Bates v. City of Little Rock, 361 U.S. 516 (1960).

being required to put his name and address on them. The Court also commented on the State's failure to make a showing that it had attempted to use alternative, less restrictive means to prevent undesirable conduct. Id. at 66, 67.

More recently, it has been held that a finding that the challenged statute is not the least restrictive means available to achieve an asserted, legitimate governmental purpose suffices to invalidate the law. Village of Schaumburg v. Citizens for A Better Environment, 444 U.S. 620, 639 (1980).

Here, the State has not even attempted to show that §101.121 is the least restrictive means of fulfilling its alleged purpose of ensuring law and order at the polls, a deficiency which is as fatal in Florida as in the other 49 states. Clean-Up '84 v. Heinrich, 582 F.Supp. 125 (M.D. Fla. 1984), aff'd, 759 F.2d 1511 (11th Cir. 1985).

Another overly restrictive polling place statute was addressed in Daily Herald v. Munro, 747 F.2d 1251 (9th Cir. 1984), aff'd, 758 F.2d 350 (9th Cir. 1985).

There, as here, the trial court summarily upheld a statute prohibiting exit-polling within 300 feet of a polling place. The Ninth Circuit reversed, in part, because the State had failed to prove that its law was necessary to prevent disruptions at the polling place. Neither had the state shown that the 300-foot barrier was the least restrictive means available to accomplish the asserted legislative purpose. Id. at 1253.

The State of Florida has not even attempted to prove that §101.121 is the least restrictive alternative for maintaining

order at the polls. It is highly doubtful that such proof could ever be offered; the State already has a formidable array of criminal statutes aimed at insuring orderly election behavior. Brief of Appellants p. 23 fn. 9.

An analysis of §101.121 does not foreclose the possibility that an intent to suppress protected speech is present. The Senate staff analysis flatly states that "the Attorney General's office is seriously considering appealing" the decision which declared §104.36 unconstitutional.[18] This statement, found in a document that also presents the proposed revisions of §101.121 and §102.031, suggests that the Legislature's intent is to have overlapping and redundant statutes on the books. Presumably, there is a less restrictive alternative to two statutes which control protected speech.

The added fact that §101.121 and §102.031 both control protected speech strongly suggests an intent to suppress. The State must provide justification for its revision of §101.121 in order to refute this inference. No such proof was attempted in the trial Court. Absent this proof, the revision of §101.121 constitutes a *prima facie* violation of Plaintiffs' constitutionally guaranteed right to freedom of speech and press.

Even if the state could sustain its burden of proof that no less restrictive alternative to §101.121 is available, it still must sacrifice this regulatory interest where a valid but non-

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[18] Senate Staff Analysis & Economic Impact Statement (May 21, 1985) (CS/HBs by Ethics & Elections Committee and Representatives Morse, Gordon) (ACA - 31, 32).

compelling purpose threatens the significant inhibition of protected expression or association.

The right of the public to have access to the workings of government is a fundamental one. The Supreme Court has declared that "expressly guaranteed freedoms [of the First Amendment] share a common core purpose of assuring freedom of communication on matters relating to the functioning of government." Richmond Newspapers, Inc. v. Commonwealth of v. Virginia, 448 U.S. 555, 575 (1980).

The broad language used by the Court in identifying this First Amendment right is significant. Had the Court meant to restrict the precedential value of this decision, such expansive language would have been unthinkable. But, instead, the Court spells out these expressly guaranteed freedoms: free speech, freedom of the press and the right to peaceably assemble. Id. at 575.

While the Richmond decision dealt specifically with the right of access to criminal trials, its broad language readily supports the position of Amici. A policy factor behind the Richmond decision was its recognition of the sociological function that is served by allowing the public access to criminal trials. Identified as a way of satisfying the community that justice has been done, public access, as described by the Court, seems to serve a deterrent value as well as a cathartic one. Id. at 571.

By granting the news media access to criminal trials the Richmond Court in effect declared the media's role in dissemina-

tion of this socially valuable information to be a vital one. Allowing voters to express their opinions after voting serves a similar socially valuable function: that of educating others about the political climate, facilitating the electoral process and stressing the importance of voting. Just as seeing a criminal "get his due" may deter crime,[19] seeing or reading about other citizens voting may encourage a citizen himself to vote.[20]

Again, the most effective means of disseminating this sort of information is through the efforts of the media.

> No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities...the press therefore acts as an agent of the public at large...by enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the first amendment.
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> Miami Herald Publishing Co. v. Collazo, 329 So.2d 333, 337 (Fla. 3rd DCA 1976)(citation omitted.)

The importance of allowing the media to observe and report on governmental functions has been recognized on the federal level as well. In Florida, the Middle District has declared that "all citizens have an interest in robust debate on public issues." Clean-Up '84 v. Heinrich, 582 F.Supp. 125 (M.D. Fla. 1984). Also see In Re Washington Post Company, 807 F.2d 383 (4th Cir. 1986)

19/ Richmond, supra., 448 U.S. at 571.

20/ Daily Herald v. Munro, supra., 758 F.2d at 363.

(right of media to attend criminal trials); Cable News Network v. American Broadcasting, 518 F.Supp. 1238 (N.D. Georgia 1981) (right of media to attend limited-coverage White House events); WPIX v. League of Women Voters, 595 F.Supp. 1484 (SDNY 1984) (right of media to attend presidential debates).

Florida has also recognized that the state's commitment to open government mandates permitting cameras in the courtroom.

Following its review of evidence derived from a detailed empirical study which surveyed, among others, the Florida Conference of Circuit Judges, the Supreme Court of Florida concluded that "there is no...discernible effect [that] the very presence of electronic media in the courtroom detracts from the decorum of the proceedings." In Re Petition of Post-Newsweek Stations of Florida, 370 So.2d 746 (1979). As a matter of fact, the Court went on to observe, the effect of televising legislative sessions had already "had a favorable impact on the lawmaking process." Id. at 775.

If cameras are not disruptive in courtrooms, because the proposition that they are disruptive did not stand up to empirical studies, it is hard to see how the State can support its contention that cameras are disruptive in the comparatively casual atmosphere of the polling place, absent any empirical evidence. As the Supreme Court observed in Post-Newsweek, "a democratic system of government is not the safest form of government, it is just the best man has devised to date, and it works best when its citizens are informed about its workings." Id. at 781.

Although the Supreme Court of the United States has not directly addressed the issue of public access to polling places, the two-part test announced in Richmond can be interpreted as a basis for validating the media's right to enter polling places on election day.

Under this test, the right of public access can be based on either historical precedent or on the court's judgment of "whether access to a particular governmental process is important in terms of that process." Richmond, 448 U.S. 555, 589 (1980).

The News-Press and its employees fulfill both parts of this test, and therefore should be allowed access to the Lee County polling places.

An implied consent to media access, where custom and usage have previously allowed it, has been recognized by the Supreme Court of Florida. Florida Publishing Co. v. Fletcher, 340 So.2d 914 (Fla. 1976), cert. den., 431 U.S. 930 (1977). In this case, the Court held that evidence of such custom and usage was enough to turn an otherwise-actionable trespass into a lawful entry. Id. at 917. The Court concluded that affidavits of state officials--and members of other news organizations--which averred that it was "common...practice for news media to enter private premises and homes to report on matters of public interest or a public event," constituted such evidence. Id. at 917.

Applying the principle of Fletcher to the case at bar suggests that the longstanding custom of allowing the media to enter polling places constitutes an implied consent to media access. It is significant that the Supreme Court of Florida has

held that the "custom" rationale is sufficient grounds for allowing media access into private homes. This view suggests that upholding the media's right of entry into the more public polling place requires less of a showing that this practice is established custom.

In any event, the record on appeal contains sufficient evidence that this practice is established custom in Lee County. Mrs. Earle's testimony, that the 15-foot ban on media access was only sporadically enforced (R. 36) supports the proposition that entry by members of the press was by implied consent. Just like the presence of media is "often helpful to the investigations in developing leads, etc,"[21] so, too, the presence of newsmen at polling places can help voters intelligently discharge their political responsibilities.[22]

The historical precedent of allowing the media entry into polling places has been long-established, and was proven at trial. (R-6-28). The passage of §101.121 has curtailed in Lee County a practice that was longstanding both in Florida and throughout the nation.

The value of such media access to the polls is self-evident. Corrupt practices at the polls such as ballot-stuffing and dis-

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21/ Florida Publishing Co. v. Fletcher, 340 So.2d 914, 918 (Fla. 1977).

22/ See p. 21-24, supra.

crimination against voters -- and the resulting abuse of the electoral process -- are less likely to occur when the polling facility is under public scrutiny. The State has not made any serious attempt to prove the advantages to the public of abolishing this scrutiny.

The Supreme Court has held that two of the justifications for allowing public scrutiny of governmental functions are the goal of "discussion of governmental affairs" and the goal of implementing the First Amendment. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 839 (1978).

Voting is a part of the electoral process. The electoral process is a governmental affair. Thus, public access to the polls is vital to insuring the continued integrity of the electoral process.

Florida Statute §101.121 is unconstitutional too, because its vagueness prevents evenhanded application, thereby further violating the procedural due process rights of plaintiffs.

A time, place and manner restriction may be upheld as valid if it is not "based upon either the content or the subject matter of speech," ...since [it can be shown to apply] evenhandedly to all who wish to distribute...materials or...solicit funds. Heffron v. International Society for Krishna Consciousness, 425 U.S. at 648, 649. However, the vagueness of §101.121 and its companion statutes make evenhanded enforcement difficult.

Prior to the 1985 revision of selected provisions of the election code (effective January 1, 1986), non-voters were allowed to come as close as 15 feet from the polling places on election

day. §101.121, Fla.Stats. (1982) The election board had authority to keep order in the polling place (§102.031), and a deputy sheriff could be called on to enforce order (§102.081). Lastly, there was to be no solicitation of votes, contributions or opinions on any subject for a 100-yard radius around the polling place.

Overall, the 1985 revisions point up the Legislature's intent to increase the state's control over polling places, at the sacrifice of the First Amendment rights of voters and the press.

The 1985 changes are arbitrary and bear little relation to the state's avowed goal of preserving law and order.

An examination of the revisions reveals no changes that attempt to directly compensate for any anticipated reduction in law and order resulting from the disabling of §104.36. Instead, the 1985 revision of §101.121 extends a blanket prohibition on non-voter access to the polls from 15 to 50 feet. No justification for this figure has ever been offered by the State.

By incorporating §102.081 into §102.031, a deputy sheriff is now required to be at the polls to carry out the instructions of election board members on keeping order. A subsection has also been added to §102.031, requiring all persons or organizations intending to solicit votes within 100 feet of a polling place on election day to obtain prior permission from the supervisor of elections. This subsection circumvents the ruling of the District Court in Clean-Up '84 v. Heinrich.[23] It effectively reestab-

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[23] 582 F.Supp. 125 (M.D. Fla. 1984), aff'd, 759 F.2d 1511 (11th Cir. 1985)

reestablishes §104.36 on a smaller scale, making the right to solicit opinions subject to the permission of each particular election board and its interpretation of the statute.

It is precisely for this reason that the revised election code as a whole -- and §101.121 in particular -- is impossible to enforce. With poll officials at each polling place using their own subjective criteria for evaluating the suitability of a certain activity, the demonstrated result is the arbitrary and selective deprivation of voters' and media-workers' First Amendment rights.

CONCLUSION

Statutes that infringe on First Amendment rights must be more carefully drawn than other kinds of statutes, in order to prevent a chilling effect on these protected rights.[24/]

If §101.121 is upheld, a genuine and totally purposeless chilling effect will be felt at polling places throughout the State. Election news coverage will be stripped of vital raw materials for reasons no one -- not the Legislature, the Defendants nor the trial Court -- has adequately explained.

24/ See Smith v. Goguen, 415 U.S. 566, 573, (1974); State v. Dye, 346 So.2d 538 (Fla. 1977); State v. Hamilton, 388 So.2d 561 (Fla. 1980).

The trial Court's order granting summary judgment for the State should be reversed and final summary judgment should be entered in favor of the News-Press Publishing Co.

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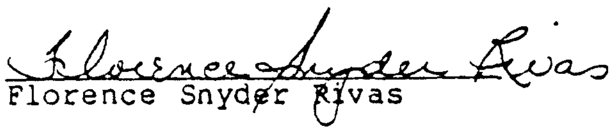
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