IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,789

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL

GEORGE FIRESTONE, et al.,

Appellants,

v.

NEWS-PRESS CO., INC., d/b/a FORT MYERS NEWS-PRESS,

Appellee.

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and CASE NO. 72,814

ENID EARLE, etc.,

Appellants,

v.

NEW-PRESS PUBLISHING COMPANY, INC., etc.,

Appellee.

BRIEF OF THE TRIBUNE COMPANY, TAMPA TELEVISION, INC. AND JACKSONVILLE TELEVISION, INC., AMICI CURIAE

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STATEMENT OF INTEREST OF AMICI CURIAE

Amicus curiae The Tribune Company (the "Tribune"), is the publisher of The Tampa Tribune, a daily newspaper of general circulation in the State of Florida. Tampa Television, Inc., d/b/a WXFL-TV ("WXFL"), and Jacksonville Television, Inc., d/b/a WJKS-TV ("WJKS"), own television stations broadcasting in Tampa on Channel 8 and in Jacksonville on Channel 17, respectively. Both stations are affiliates of the NCNB television network.

This appeal challenges Section 101.121, Florida Statutes (1985), which prohibits newsgathering within fifty feet of polling places by barring all persons not in line to vote from entering the area. In the past, no such restrictions have ever been enforced against the Tribune, WXFL or WJKS. Each has consistently published photographs and news information gathered by their own personnel (as well as other photographers and reporters) both inside and around polling places on election day. [Examples of such photographs from the Tribune's archives and other historical records are included as an appendix to this statement of interest.] These photographs reflect the historical presence of the media at Florida polls on election days over the past seven decades, the absence of disruption caused by the media presence and the purposes achieved by the taking and publication of such photographs inside Florida polling places. In fact, there has never been a reported prosecution of the media for any voter disruption.

The statute at issue directly affects the interests of the Tribune, WXFL and WJKS and poses a serious and imminent threat to

their First Amendment right to gather the news. See Branzburg v. Hayes, 408 U.S. 665 (1972). Should the ruling of the district court of appeal be reversed, the Tribune, WXFL and WJKS' capacity to gather the news will be significantly diminished.

PRELIMINARY STATEMENT

The Tribune, WXFL and WJKS adopt the description of the parties set forth in Appellant George Firestone's (the "State") Initial Brief.

STATEMENT OF THE CASE AND FACTS

The Tribune, WXFL and WJKS accept and adopt the statement of the case and the statement of the facts contained in the New-Press' Initial Brief. The amici stress that, prior to the enforcement of Section 101.121, Florida Statutes, as amended, against the News-Press photographer here, it had been commonplace for the media to photograph or videotape inside and around polling places on election days. This was true despite the fact that the statute previously prohibited any person not in line to vote from coming within fifteen feet of any open polling place.

SUMMARY OF THE ARGUMENT

Section 101.121, Florida Statutes (1985), bars any person from coming within fifty feet of an open polling place[1] unless he is there to vote. Thus, the statute denies the media -- and nearly everyone else -- access to the area in and around the polling place. This broad denial of access violates the First Amendment to the United States Constitution and Article I, Section 4 of the Florida Constitution because it seriously impairs freedom of speech and freedom of the press without furthering any demonstrated compelling state interest. On overbreadth grounds alone the statute is unconstitutional.

Moreover, the record reflects that this statute, and its predecessor (which barred access within fifteen feet of the polls), was never enforced against the media prior to the incident which gave rise to this action. Rather, the historical record reflects a long tradition of press access to polling places and no evidence that the media's presence has ever caused disruption or compromised the secrecy of the ballot. Such tradition is a significant factor in analysis of the statute's constitutionality.

Based on that exemplary historical record and the significant societal value of coverage of the polls, the First Amendment protects the right to gather news relating to that activity.

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[1] In 1986, the Legislature modified Section 101.121 to bar access within fifty feet of the actual polling room itself. That amendment, however, fails to remedy the statute's overbreadth problem.

This right is severely limited by the statute, which clearly could accomplish its claimed objectives by less restrictive means. In the complete absence of a demonstrated state interest in preventing media access, this statute must fall.

The Tribune, WXFL and WJKS join in all additional arguments raised by Appellee News-Press Publishing, Inc., d/b/a the Fort Myers News-Press (the "News-Press"), and the other amici curiae, rather than repeating those arguments here.

ARGUMENT

I. THE COURT BELOW CORRECTLY DECLARED SECTION 101.121'S BAN ON ACCESS TO POLLING ROOMS UNCONSTITUTIONALLY OVERBROAD.

This case graphically illustrates the threat which Section 101.121 poses to the fundamental freedoms guaranteed by the First Amendment to the United States Constitution and the Florida Constitution. The district court correctly struck Section 101.121 as unconstitutionally overbroad. That decision should stand.

Section 101.121 provides:

> [N]o person who is not in line to vote may come within fifty feet of any polling place [2] 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. . .Such restrictions shall not apply to commercial businesses or privately owned homes and property which are within fifty feet of the polling place.

§ 101.121., Fla. Stat. (1985). Since this litigation ensued, the Legislature amended Section 101.121 to limit access to "within fifty feet of any polling room."[3] § 101.121, Fla. Stat. (1987) (emphasis added). That amendment, as noted by the court below, does not affect resolution of the issues here.

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[2] Although the 1985 version of Chapter 97 does not define polling place, a polling place is currently defined as "the building which contains the polling room where ballots are cast." § 97.021(18), Fla. Stat. (1987).

[3] A polling room is the "actual room in which the ballots are cast." § 97.021(19), Fla. Stat. (1987).

In the instant case, Section 101.121 -- in the name of orderliness and secrecy of the ballot (X.14)[4] -- was used to eject a news photographer from the polling place. The State has never maintained that photographer caused any disruption. Nor has it shown that orderliness or ballot secrecy has ever been jeopardized by media presence at a polling place in Florida.

The threshhold issue presented by this case is whether a fifty foot ban around the polling place which excludes nearly every human being except poll workers and voters is overbroad. The United States Supreme Court in Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, 482 U.S. ___, 107 S.Ct. 2568, 55 U.S.L.W. 4855 (June 15, 1987), determined that when an overbreadth finding is made, that finding is dispositive of First Amendment issues.

In Jews for Jesus, the Board of Airport Commissioners for the City of Los Angeles adopted a resolution prohibiting all "First Amendment activitites by any individual and/or entity" in the central terminal area at the Los Angeles International Airport. Id. The Court struck that resolution as facially unconstitutional based on the First Amendment overbreadth doctrine. Id. at 4856. On that issue alone -- regardless of whether an airport terminal is a public or non-public forum -- the Court reached its decision. Id.

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[4] "(X.__)" refers to a particular page in the State's Initial Brief.

Based on Jews for Jesus, the lower court properly declared Section 101.121 facially unconstitutional solely on the over-breadth doctrine -- without reaching public forum issues. The State's lengthy challenge to the standard applied below and the forum characteristics of the polling place is therefore inapposite (X.4-26). Thus, the State fails to comprehend the proper analytical structure and ignores the preliminary over-breadth concern completely.

Moreover, Jews for Jesus supports the substantive result reached by the lower court. The Board's resolution went beyond regulating problem activities in the terminal; it touched all manners of expression. Jews for Jesus, 55 U.S.L.W. at 4856. The Supreme Court therefore voided the Board's blanket ban on all First Amendment activities. Id.[5]

Like the resolution in Jews for Jesus, the provision at issue encompasses a wide range of activities. It touches a universe of individuals and places. The fifty foot "no man's land" created here will often encompass traditionally public areas such as public streets, public parking lots, portions of public buildings, portions of private buildings not used for commercial purposes and potentially even city streets and public parks.[6]

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[5] The Court noted that the resolution would prohibit airline passengers from wearing buttons, reading newspapers or books and even talking. Id. at 4856.

[6] The amici's appendix to its statement of interest vividly illustrates the zones into which the fifty foot barrier would intrude.

For example, although the statute specifically exempts commercial buildings and private homes, it does not exempt persons congregating in a church for religious purposes unrelated to voting if within the fifty foot zone. Nor, in the case of libraries used as polling places, does it permit the public to use portions of the library facility for research or reading within that zone -- even if in a separate room.[7]

More importantly, the statute prohibits the unobtrusive presence of the press which, historically, has covered and photographed election day activities in the polling room and outside. In fact, these amici's research has failed to disclose even one disruptive incident in Florida resulting in a prosecution of the press. In contrast, as discussed below, news coverage serves vital purposes, such as disclosing voting fraud.

The State's asserted purpose is to protect the orderliness of the polling place and secrecy of the ballot. While those are legitimate interests, the statute at issue sweeps far too broadly on protected areas and encompasses too wide a variety of practical problems in attempting to effect its purposes. Section 101.121 is overbroad.

A companion voting provision was also struck as unconstitutionally broad in Florida Committee for Reform v. McMillan, 682 F.Supp. 1536 (M.D. Fla. 1988). There the court struck the

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[7] Absurdly, the provision here also precludes voters' friends or family -- even minor children -- from waiting outside the polls for them if within the prohibited zone. It reaches mere passersby. It precludes people from accompanying the elderly or insecure without prior, burdensome authorization.

provision of Florida's voting statute which prohibited solicitation within a fifty foot radius of the polling place. The statute suffered from both subject matter overbreadth and geographic overbreadth. Id. at 1540-41.

Specifically, the court in McMillan noted -- as did the district court of appeal here -- that many traditional public fora would fall within the protected area surrounding the polling place. Id. at 1541. In those places, the State could not possibly prove any threat to the voting process. Id. As such, the statute suffered from overbreadth. Id. As discussed, the provision here was properly declared overbroad for similar reasons.

Finally, the court in McMillan also noted the availability of less restrictive alternatives in achieving the statute's purpose of precluding voter harassment. Id. It recognized that Florida had a full set of statutes created to address such problems. Id. In fact, several provisions exist which directly target the ballot secrecy and orderliness interests urged by the State here. Those provisions redress more effectively than the ban cast by Section 101.121 the purposes underlying that section: ballot secrecy and orderliness.

Specifically, Section 104.061, Florida Statutes (1987), punishes those who corruptly influence voters; Section 104.20, Florida Statutes (1987), establishes penalties covering a panoply of violations of ballot secrecy; Section 104.22, Florida Statutes (1987), redresses ballot mutilation or destruction; Section 104.23, Florida Statutes (1987), prohibits disclosing an elec-

tor's vote; Section 104.26, Florida Statutes (1987), prevents destruction of voting equipment; and Section 104.30, Florida Statutes (1987), precludes tampering with voter equipment. Even more examples are found in Chapter 104. Further, any major interference could be punished under the disorderly conduct prohibition of Section 877.03, Florida Statutes (1987).[8] In essence, the Legislature itself provided examples of numerous -- and more effective -- less restrictive means of preserving the interests at stake.[9]

Section 101.121 remains unconstitutional.

II. HISTORY AND PUBLIC INTEREST MANDATE PRESS ACCESS TO THE POLLING ROOM.

The press has historically served as the public's surrogate presence in the polling room. See Richmond Newspapers, 448 U.S. 555, 574 (1980); Sweezy v. New Hampshire, 354 U.S. 234, 250-51 (1957). Before the State can exclude the press, it must therefore establish that less restrictive alternatives cannot

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[8] It is interesting to note, however, that given this massive array of potential criminal sanctions, there is not one reported Florida decision -- or any evidence in the record -- that involves a member of the press being prosecuted for disrupting the sanctity of the polling place.

[9] The McMillan court also noted the defendants' "willingness to carve out exceptions for kinds of speech and adjoining properties." Id. at 1542. That willingness suggested to the court that "the statute 'has an insufficient nexus with any of the public interests that may be thought to undergird' it." Id. at 1542 (citing United States v. Grace, 461 U.S. 171 (1983)). The State asserted similar arguments here (X.27-28).

adequately preserve the interests at stake. See Richmond Newspapers, 448 U.S. at 580-81.

The United States Supreme Court has developed a framework for determining whether the public and, consequently, the press have a First Amendment right of access to a particular event. The United States Supreme Court's recent decisions concerning public access to criminal trials established that analytical approach. In Richmond Newspapers, the Supreme Court held for the first time that the public and the press had a right of access to criminal trials under the First Amendment. Id. at 580. In reaching that decision, the Court traced the public's historical attendance at criminal trials from the days prior to the Norman Conquest in England to the present. Id. at 565. The Court also focused on the numerous societal values which were supported by public access to criminal trials, such as the enhancement of quality and integrity which the public's presence engenders. Id. at 578.

Following Richmond Newspapers, the Court employed the same analysis and held unconstitutional a Massachusetts statute that excluded the press and general public from the courtroom during the testimony of a minor victim in a sex offense trial. Globe Newspaper Company v. Supreme Court, 457 U.S. 596 (1982). Two years later, the Supreme Court recognized the public's right of access to the voir dire portion of a criminal trial. Press-Enterprise Company v. Superior Court of California, 464 U.S. 501 (1984) ("Press-Enterprise I"). In Press-Enterprise Company v. Superior Court of California, 478 U.S. 1, 106 S.Ct.

2735, 92 L.Ed.2d 1 (1986) ("Press-Enterprise II"), the Court extended the public's First Amendment right to cover preliminary probable cause hearings.

In determining the existence of the public's right of access, the Court has traditionally focused on two factors:

> (1) whether the particular event has been historically open to the public and press; and
>
> (2) whether access would contribute to the self-governing process.

Press-Enterprise II, 92 L.Ed.2d at 9-10. The broad determination underlying all access questions is whether access would provide the public with information relevant to the discussion of governmental affairs. Id.

That historical and practical analysis has been applied outside of the judicial context. In First Amendment Coalition v. Judicial Inquiry and Review Board, 784 F.2d 467 (3d Cir. 1986), the court analyzed whether the public had traditionally attended administrative proceedings; for example, judicial disciplinary board proceedings. Although the court noted that those types of proceedings had traditionally been closed, it was willing to follow the Press-Enterprise II analysis. Again, in Capital Cities Media, Inc. v. Chester, 797 F.2d 1164 (3d Cir. 1986), the Third Circuit considered whether the United States Supreme Court would extend the Press-Enterprise II analysis to executive branch files. Id. at 1174.

Undoubtedly, the press has traditionally been present at polling places throughout the history of this nation.[10] For example, the amici's appendix to their statement of interest contains photographs of Presidents Roosevelt and Truman at the polls, as well as photographs dating from 1920 of the general public exercising voting rights. Those photographs illustrate the historical presence of the press in the polling place. More specifically, the Tribune alone has published more than seventy-eight photographs of polling places and citizens voting in the past fifteen years which would be prohibited by enforcement of Section 101.121.[11]

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[10] In asserting its public forum analysis, the State makes great moment of past experiences concerning vote fraud in an attempt to establish "support for the statute in the American historical experience" because the record is devoid of such support (X.15-19). The most recent source cited is a 1926 Chicago Bar Association report (X.18). Those examples of vote fraud, however, do not even mention the press. In fact, it is obvious that First Amendment vehicles exposed the fraud discussed by the State.

The following discussion of the press' historical presence and valuable role in covering elections thus applies with equal force to answer the State's attempt to justify media exclusion from public fora.

[11] These photographs show voters of all ages, sexes and races; voters with their children; poll watchers; voting registrars; voting machines; polling rooms; polling places, such as schools, community buildings and libraries; adjacent parks, streets and public parking lots. The photographs cover all of central Florida. Numerous other examples of the press' presence at the polls are illustrative of the traditional role of the press in public elections. See, e.g., 2 C. Seymour & D.P. Frary, How the World Votes (1918). Additional examples are found in 33 Life No. 7, August 18, 1952; and 9 Life No. 21, November 18, 1940.

The press' presence at the polls has served to cover a valuable function in this society. The right to vote is one of the central tenets of this country's democratic process; it is the essence of self-government. The free, open and widespread participation by the public in the electoral process lies at the core of the democratic form of government.

Throughout our history as a nation, the breadth of the franchise has evolved. The Civil War guaranteed blacks the right to vote and birthed the Fifteenth Amendment to the United States Constitution. In 1920, the United States Constitution was amended to extend the right to vote to women. U.S. Const. amend. XIX.

The 1950's and the 1960's witnessed a multitude of voting rights cases in our courts, seeking to ensure minorities in fact were permitted to exercise their right to vote freely. Today, issues regarding multi-member or single-member districts for voting repeatedly surface for discussion. In sum, issues surrounding the right to vote have continually been at the forefront of democratic debate.

And the press has been there. The press has published heated debates of the issues, taken positions in editorials and covered election days. That election day coverage especially serves multi-faceted and important purposes.

Foremost, press access to the electoral process also furthers the interests asserted by the State. The press, if admitted to polling rooms, is there to expose problems with the process. This State has recognized the importance of public

oversight of governmental functions. E.g., Town of Palm Beach v. Gradison, 296 So.2d 473, 475 (Fla. 1974); Krause v. Reno, 366 So.2d 1244, 1250-51 (Fla. 3d DCA 1979).

Press coverage prevents -- and has historically exposed -- voting fraud. Such fraud has been perpetrated not only by candidates, but also poll workers themselves. Press coverage served to expose the discriminatory and schematic denial of voting rights to blacks in the 1960's. One need only look at Mexico's recent elections to recognize the importance of the media's presence at the polls. The press' presence also limits fraud perpetrated by candidates themselves.[12]

Coverage of the polls also serves an educational purpose. Photographs and articles illustrating the actual mechanics of voting put the public at ease and educate it on the voting process itself. Press coverage makes the public comfortable with actual voting booths, and the mechanics of filling out ballots and registering with the appropriate officials. In essence, coverage of the process removes the mystique and reduces voter anxiety.

Perhaps even more importantly, that coverage encourages people to "get out and vote." Morning, noon and evening reports serve as continual reminders to the public that an election day is at hand. That coverage encourages citizens to participate in their process of governance. The message behind the photograph

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[12] Addtitionally, this Court is well aware of the voting machine problems in Tallahassee during 1984 and the vital press coverage of those issues.

is more meaningful than the mere image any individual photograph depicts.

Just as the press has assumed a valuable role in covering criminal trials throughout our nation's history, a similar role is accomplished by the press in the voting context. It would be a tragedy of the first magnitude if the press were excluded from ever again photographing a voter at the polls in Florida.

CONCLUSION

For all of the reasons set forth in this Brief, the Tribune Company, WXFL and WJKS respectfully request that this Court affirm the opinion of the Second District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by PUROLATOR COURIER on this 26th day of August, 1988, to the following:

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