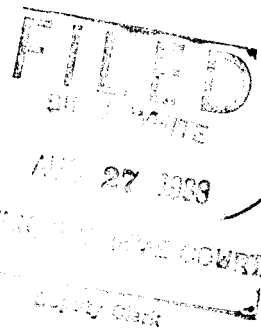

IN THE SUPREME COURT

STATE OF FLORIDA

GEORGE FIRESTONE, ETC., Appellant, vs. NEWS-PRESS PUBLISHING CO., INC., ETC., Appellee.	)	CASE NO. 72,789
ENID EARLE, ETC., Appellant, vs. NEWS-PRESS PUBLISHING CO., INC., ETC., Appellee.	)	CASE NO. 72,814

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

ANSWER BRIEF OF APPELLEE

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PREFACE

Appellants, GEORGE FIRESTONE, as duly elected Secretary of State, State of Florida; DOROTHY GLISSON, as duly appointed Deputy Secretary for Elections; ENID D. EARLE, as duly elected Supervisor of Elections in and for Lee County, Florida; and FRANK WANIKA, as duly elected Sheriff of Lee County, Florida, will be collectively referenced herein as the "State", unless the context dictates an individual reference. Appellee, News-Press Publishing Co., Inc., will be referenced herein as the "News-Press".

Reference to the Appendix to the Brief will be designated (A-); and to the Record on Appeal as (R-).

The District Court of Appeal, Second District, State of Florida, will be referred to herein as the "District Court". The decision of the District Court from which this appeal is taken is reported as News-Press Pub. Co., Inc. v. Firestone, 527 So.2d 223 (Fla. 2nd DCA 1988).

AREAS OF DISAGREEMENT WITH THE STATE'S STATEMENT OF THE FACTS

The State's recitation of the facts of this case are somewhat abbreviated, incomplete and in some instances misstated. The News-Press therefore states that the relevant facts involved in this Appeal are as follows:

1. The 1985 Florida legislature amended Section 101.121, Fla. Stat., to provide that no person could come within 50 feet of a polling place unless in line to vote, increasing the distance from 15 feet under the prior statute. The legislature also exempted from that prohibition commercial businesses and privately owned property within the 50 foot zone. The effective date of the amendment was January 1, 1986. See, Ch. 85-205, Fla. Sess. Laws. That statute contained no definition of a "polling place"; but presumptively it was that part of a building that contained the voting booths.* While this case was pending in the District Court, the 1987 legislature amended Section 97.021, Fla. Stats., so as to create a distinction between the term, "polling place", and the newly added term, "polling room". The polling place is now the building in which the polling room is located; and the polling room is now the room where the voting booths are located, that is, what was formerly referred to as the polling place. See, Section 97.021(18) and

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*This presumption is based on the langauge of the prior statute that as many electors will be admitted to a polling place as there are voting booths available. The use of the terms "pollings places" and "polling rooms" in this brief will be in the context of their present statutory definition.

(19), respectively. Thus, contrary to the assertion of the State, these amendments did not affect the physical boundaries of the 50 foot zone nor have any effect upon the issues on appeal, as expressly recognized by the District Court. See, 527 So.2d at 224.

2. The following Fall, during the conduct of the September 30, 1986, state-wide primary election, the statute was enforced in Lee County, Florida against a News-Press news-photographer, and other members of the media (R-77-79). The photographer was barred from coming within 50 feet of four polling rooms for the purpose of taking photographs (R-77-79), not just one, as indicated by the State. The photographer did photograph then gubernatorial candidate, Frank Mann, entering the polling place from a distant parking lot, but could not take a photograph of the candidate from within either the polling place or room (R-77-79). During the photographer's last attempt to enter a polling place, he was physically escorted out the door and was threatened that the Lee County Sheriff's Department would be called if he did not leave (R-77-79).

3. At the hearing on the News-Press' prayer for temporary relief in the trial court, the News-Press submitted the affidavit of the photographer (R-77), together with his testimony and the testimony of Keith Moyer, Executive Editor of the News-Press. The News-Press also entered into evidence a list of the current polling places in Lee County, Florida (R-113; A-1), a Voter's Solicitation Request Form (R-118),

certain photographs taken by the News-Press photographer outside the polling places during the primary election (R-120-126) and copies of certain photographs taken within polling rooms in Lee County during prior years' elections (R-132-144). See also newspaper clippings at page 7 of Appendix.

4. The News-Press photographer, Joe Burbank, testified he was on assignment that day to take photographs in various polling rooms that show voters exercising their right to vote (R-8); that this purpose could not be accomplished from a distance of 50 feet from the polling room since photographs taken from such distance and outside the polling place or room cannot depict what is occurring within the polling room (R-8-9), that when attempting to enter polling places and rooms on that day he conducted himself professionally, did not cause any disruption, and did not interfere with any citizen's ability to vote (R-9), that he had been a news photographer for 5 years, had covered prior elections, and that this election was the first at which he was not allowed to photograph within a polling room, and that it was customary in the media field to take photographs of citizens and candidates casting their ballots on election day (R-9-10).

5. Keith Moyer, the News-Press Executive Editor, testified that he had worked as a reporter or editor for eleven (11) years (R-22), that during that time he covered approximately five (5) elections in the 1970's (R-22), that no complaint was ever filed regarding his presence in the polling room during

those elections (R-23), that he was not aware of any such complaints against other members of the media, that it was "traditional" to allow photographers into polling rooms (R-25), and that he was always welcomed into the polling rooms he covered as a reporter (R-25). Mr. Moyer also testified that the purpose of photographing within polling rooms is to show the public the election process in action (R-26), to show the human side of the process and to graphically depict the turnout at the polls (R-27). Access also permits the media, Moyer testified, to cover and report any improprieties or unusual events occurring within the polling room, and that being restricted to a 50 foot distance from the polling room defeats all of these purposes (R-27).

6. The State first called Mrs. Enid Earle, Lee County Supervisor of Elections, who testified, as set forth by the State, that in the past she instructed her poll workers to be cautious when admitting the media into polling rooms because of the potential for disruption (R-33). Mrs. Earle also testified, however, that during prior election years, the media was allowed into polling rooms and not asked to leave or not to take photographs (R-35-36).

7. The State next called a Mr. Joseph Resta, who testified that he was the precinct sheriff at candidate Mann's precinct (Precinct 48), located at the Presbyterian Apartments, during the September 30th election (R-38), that the media tried to enter the lobby of the apartments to gain access to the polling room adjacent to the lobby, but were not allowed

(R-39), and that they took photographs of Mr. Mann through windows while outside the polling place from a 50 foot distance (R-40).

8. The last witness called by the State was a Ms. Sally Fris, a poll worker, who testified that she found the media's presence "disruptive" because "It takes your attention off what you're doing." (R-44) As to this point, the State indicates in its Statement of the Facts that this disruption was caused when the media was photographing Mr. Mann through the windows of the polling room. The State fails to point out that any such disruption was a direct result of enforcement of the statute by barring the media from the polling room, and forcing them outside. (R-40-43)

9. The trial court granted temporary relief to the News-Press by allowing the media access to the polling rooms during the 1986 general election (R-128). No complaints of disruption, disorder or the like were reported as a result of such access.

10. The News-Press thereafter based its Motion For Summary Judgment (R-153) upon the respective pleadings of the parties, the exhibits thereto, the affidavit of Joe Burbank, and the testimony of the witnesses and documentary evidence introduced at the temporary injunction hearing. The State did not file any affidavits in contravention of the matters of record relied upon by the News-Press in support of its motion for summary judgment.

SUMMARY OF ARGUMENT

Point I: The decision of the District Court holding Section 101.121, Fla. Stat. unconstitutional due to facial overbreadth is wholly correct and fully supported by the record. The challenged 50 foot zone in many instances necessarily encompasses traditional public forums, such as streets, sidewalks and parks, which occupy a special position in regard to First Amendment protections. The restriction also prohibits innocent, everyday activity within the zone, including the exercise of fundamental First Amendment rights, including, without limitation, gathering the news. The District Court properly found that the statute applied to such activities and substantially infringed upon them. The statute is therefore unconstitutionally overbroad, regardless of the fact it may properly regulate other activities. The State has ignored such basis of the District Court's ruling, erroneously framing the constitutional issue in a public forum vs. non-public forum context. Nevertheless, even an analysis of the standard for lawful public forum restrictions demonstrates that the statute imposes unreasonable time, place and manner restrictions on traditional public forums falling within the zone.

Point II: The statute also implicitly bars the media from entering polling rooms on election day for the purpose of gathering the news. The News-Press, in fact, was barred from

doing so during a state-wide primary election under the authority of the statute. While the polling room itself is a "limited public forum", as defined by the United States Supreme Court, the media has a right of access to this forum, on behalf of itself and the public, in order to gather information about this significant governmental operation, i.e., the conduct of elections. This access right has been recognized by the federal and state courts in the context of both judicial and non-judicial governmental proceedings. Given this right, the statute was unconstitutionally applied to the News-Press in violation of its First Amendment rights.

Point III: In amending Section 101.121, Fla. Stats., the Florida legislature attempted to exempt from the purview of its restrictions privately owned businesses, homes and other private property which fell within the 50 foot zone. However, in so attempting, the legislature enacted the exemption to read in such a manner as to render it impossible for a person of common and ordinary intellect to determine if one falls within the exemption in a myriad of circumstances. Such being the case, the prohibition itself is impermissibly vague, and, therefore unconstitutional under the due process clause of the Fourth Amendment and the free speech/press clause of the First Amendment.

ARGUMENT

I. THE DISTRICT COURT PROPERLY FOUND SECTION 101.121, FLA. STAT., UNCONSTITUTIONAL ON ITS FACE DUE TO OVERBREADTH, SINCE THE STATUTE SWEEPS WITHIN ITS AMBIT CONSTITUTIONALLY PROTECTED ACTIVITIES INCLUDING THE RIGHT TO FREE SPEECH AND PRESS GUARANTEED BY THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 4 OF THE FLORIDA CONSTITUTION[1].

The State attacks the decision of the District Court holding the statute facially unconstitutional for overbreadth with a somewhat confusing and, as will be shown, erroneous analysis. The State engages in a lengthy discourse on what it perceives to be a meaningful distinction between content-based and content-neutral legislative prohibitions, and various types of public fora, while totally ignoring the fact that the District Court held the statute unconstitutional on an entirely different basis. The fact is that the District Court correctly grounded its decision on facial overbreadth, not a public fora analysis. Thus, as will be shown, the State's arguments are totally misplaced.

Before addressing those arguments, a brief explanation of the underlying factors motivating the recent amendments to and

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[1]Although the News-Press asserts violations of the free speech and free press provisions of both the federal and state constitutions under all Points of this Brief, only decisions interpreting the federal constitutional right are discussed herein. This approach is proper since the Florida Supreme Court has held that the state constitution provides free speech/press protections which are at least as extensive as those provided by the federal constitution. Department of Education v. Lewis, 406 So. 2d 455, 461 (Fla. 1982). The same has been said about the due process clause argued under Point III of this Brief. See, Heller v. Abess, 134 Fla. 610, 184 So. 122 (1938).

enforcement of the statute would be instructive.

In 1985, the legislature amended the statute, along with Section 102.031, Fla. Stat., apparently in direct reaction to a ruling of a U.S. Circuit Court of Appeals, which found Section 104.36, Fla. Stat., unconstitutional on its face. See, Clean-Up '84 v. Heinrich, 759 F.d 1511 (11th Cir. 1985). Section 104.36 prohibited the solicitation of petition signatures within 100 yards (300 feet) of a polling place.

After Clean-Up '84 was decided, the election code was amended by adding subsection (3) to Section 102.031, which permitted solicitation within 100 feet of a polling place so long as notice of intent to so solicit was filed with the supervisor of elections. The legislature, however, did not stop there. It also amended at the same time Section 101.121 to prohibit any person (unless in line to vote) from coming within 50 feet of a polling place, increasing such distance from 15 feet as provided in the then existing statute. These amendments were effective January 1, 1986; and violation of Section 101.121 was (and remains) a criminal offense under the provisions of Section 104.41, Fla. Stat.

The 1987 legislature then repealed the notice and solicitation procedures of Section 102.031, amending the statute to prohibit any solicitation of voters within 150 feet of a polling place. See, Section 102.031(3), Fla. Stats. (1987).[2]

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[2]The enforcement of that statute has recently been enjoined by a federal district court, due to its apparent facial overbreadth. See, Florida Committee For Liability Ref. v. McMillan, 682 F.Supp. 1536 (D.C. Fla. 1988).

Prior to the enforcement of the Section 101.121 against the News-Press photographer, it had been commonplace during elections for the media to photograph or videotape from within the polling room itself (R-25;35)[3]; and there have been no known cases of complaints or enforcement of the statute against the media or any other person either within the prior 15 foot zone or the present 50 foot zone (R-25).

One can reasonably assume, however, that the State is now vigorously enforcing the statute because of the Clean-Up '84 decision and the legislature's misguided attempt to circumvent or limit its effect on the state's ability to regulate exit polling. Regardless, however, of the legislature's motivations, the enactment of the statute in its present form is facially unconstitutional due to overbreadth for the reasons explained by the District Court and hereinafter discussed.

While the courts have recognized the right of the states to enact reasonable laws to ensure orderly elections, Brown v. Hartlage, 456 U.S. 45, 52, 71 L. Ed. 2d 732, 102 S. Ct. 1523 (1982); Town of Lantana v. Pelczynski, 303 So. 2d 326 (Fla. 1974), that right is circumscribed by and subject to

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[3]Included in the Appendix to this brief (A-11) are a series of election day photographs taken by the Florida Today, a newspaper published in Cocoa Beach, Florida, during the years 1980 through 1986. Apparently, as shown by the dates of the photographs, not only has the media been customarily granted access to polling rooms prior to the 1985 amendment, but the statute since then has not been uniformly enforced throughout the state. Similar photographs from other newspapers may be found in the appendix to the amici brief of the Tribune Company being filed in this appeal.

constitutional limitations. Mills v. Alabama, 384 U.S. 214, 16 L. Ed. 2d 484, 86 S. Ct. 1434 (1965); NAACP v. Button, 371 U.S. 415, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963); Rock v. Bryant, 459 F. Supp. 64 (D.C. Ark. 1978), aff'd, 590 F. 2d 340 (8th Cir. 1978).

As stated by this Court in Adams v. Sutton, 212 So. 2d 1 (Fla. 1968):

> The Florida Constitution, Sec. 26 of Article 3, requires that laws be passed to prevent all undue influence from improper practice in the conduct of elections. Our decisions recognize that "what is an 'improper practice' is for the Legislature to ascertain and prohibit under adequate penalties, within the reasonable limitations implied in the exercise of all expressly stated Legislative powers.

Id., at 3 (e.s.). See also, Sadowski v. Shevin, 351 So. 2d 44, 46 (Fla. DCA 1976).

Since its decision in Mills, supra, the U.S. Supreme Court has consistently reaffirmed that First Amendment rights are entitled to the fullest constitutional protection even when measured against a state's important interest in ensuring fair and orderly elections. See, e.g., First National Bank of Boston v. Bellotti, 435 U.S. 765, 55 L. Ed. 2d 707, 98 S. Ct. 1407 (1978); Buckley v. Valeo, 424 U.S. 1, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 41 L. Ed. 2d 73, 94 S. Ct. 2831 (1974). See also, Falzone v. State, 500 So. 2d 1337 (Fla. 1987); and Clean-up '84 v. Heinrich, supra.

It is also axiomatic that streets, sidewalks and public parks are "traditional public forum property" which "occupy a

special position in terms of First Amendment protection." Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 80 L. Ed. 2d 772, 104 S. Ct. 2118 (1984); U.S. v. Grace, 461 U.S. 171, 75 L. Ed. 2d 736, 103 S. Ct. 1702, 1707-1708 (1983); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 33 L. Ed. 2d 212, 92 S. Ct. 2286 (1972). In many instances, access to these traditional public forums is totally prohibited by the 50 foot "no man's" zone created by the statute, a fact recognized by the District Court.[4] See, 527 So.2d at 225.

It is further without question that news gathering is a recognized First Amendment activity. United States v. Sherman, 581 F. 2d 1358 (9th Cir. 1978); In Re Express News-Corp., 695 F. 2d 807 (5th Cir. 1982); Daily Harold Co. v Munro, 838 F.2d 380, 384 (9th Cir. 1988). The Florida courts have also recognized the protected nature of this right.[5]

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[4]The State asserts that there is no evidentiary basis for this conclusion. However, the State conceded in the District Court, through an amicus brief filed on its behalf, that, "[T]he fifty foot zone of exclusion established by the statutes does encompass areas traditionally considered public forums." Amicus Brief of Association of Supervisors of Elections, Inc., at p. 8. Moreover, some of the photographs in the record and others included in the amicus brief of the Tribune Company in the District Court, clearly showed streets and sidewalks within the 50 foot zone. Lastly, given the customary location of and nature of polling rooms (see, e.g., the list of Lee County Precincts, at page 1 of the Appendix), the District Court could, and this Court may, properly take judicial knowledge of this generally known fact.

[5]The record in the case clearly reflects the News-Press was exercising this right when excluded from polling rooms and the 50 foot zone (R-77).

See, e.g., Johnson v. Bentley, 457 So. 2d 507 (Fla. 2nd DCA 1984); Tribune Co. v. Huffstetter, 489 So. 2d 722 (Fla. 1986); and Gadsden County Times, Inc. v. Horne, 426 So. 2d 1234 (Fla. 1st DCA 1983).

Given the statute's infringement upon these First Amendment protections, the issue under this Point is whether the District Court correctly found Section 101.121 to be unconstitutional on its face due to substantial overbreadth.

In deciding whether the statute suffered from impermissible overbreadth the District Court expressly determined the statute, in attempting to regulate or prevent activities subject to regulation, sweeped within its ambit areas of constitutionally protected freedoms, citing State v. Gray, 435 So. 2d 816, (Fla. 1983). See, 527 So.2d at 225.

In Gray, this Court recognized that where a law "...directly or indirectly infringes on the exercise of some constitutionally protected freedom...," the courts have the power to strike down the law as impermissibly overbroad. Id., 435 So.2d at 819. In that regard, this Court has also held that legislation may be overbroad "...if it is susceptible of application to conduct protected by the First Amendment." Carricarte v. State, 384 So.2d 1261, 1262 (Fla. 1980). See also, State v. Saiez, 489 So.2d 1125, 1126 (Fla. 1986); State v. Greco, 479 So.2d 786, 789 (Fla. 2nd DCA 1985).

Citing the recent U.S. Supreme Court decision of Airport Comm'rs v. Jews For Jesus, Inc., 482 U.S. ____, 96 L.Ed. 2d 500, 107 S.Ct. 2568 (1987), the District Court found the

statute's overbreadth to be substantial since (1) it precluded many persons from the zone who in no way impede the voting process, (2) its broad language was applicable to persons who wished to exercise free speech or free press rights, and (3) that the zone banned mere presence in many traditional public forums, even where the purpose was to exercise a constitutionally protected right. See, 527 So.2d at 226. Therefore, since First Amendment rights, such as petitioning, giving speeches or, in this case, gathering the news within the 50 foot zone, are clearly swept within the purview of the statute by its absolute terms, the statute is facially invalid, even though the statute may not be directly aimed at preventing such activities.

Interestingly enough, the Supreme Court in the Jews For Jesus case was presented with virtually the same competing arguments as presented in this issue of appeal, to wit, whether the law is unconstitutional due to overbreadth or whether the law improperly limited First Amendment rights in a public forum. These arguments are closely related, but clearly separate and distinct under the law.

The lower courts in Jews For Jesus had struck down a regulation that banned all First Amendment activities in the Los Angeles airport by using a public forum analysis. The Supreme Court affirmed the lower courts' decisions, but on the separate and distinct ground that the regulation was overbroad, stating:

> Because we conclude that the resolution is facially unconstitutional under the First

> Amendment overbreadth doctrine regardless of the proper standard (for public forum analysis), we need not decide whether LAX is indeed a public forum, or whether the Perry standard is applicable when access to a nonpublic forum is not restricted.

Id., at 96 L.Ed. 2d at 507. While Jews for Jesus involved a law directly aimed at First Amendment activity, one case relied upon by the Court for its holding was Houston v. Hill, 482 U.S. ____, 96 L.Ed. 2d 398, 107 S.Ct. ____ (1987), which involved a law which was indirectly aimed at such activity. That law was a city ordinance prohibiting the assault or interference with a policeman in the execution of his duty, but which was applied to an individual involved in a purely verbal altercation with the police.

The city contended the ordinance was content-neutral and aimed only at "core criminal conduct," not free expression. In response, the Court stated that laws which make unlawful a substantial amount of protected conduct suffer from overbreadth, even if they have a legitimate application. The Court then found the ordinance potentially applicable to speech, regardless of its innocent nature, and, consequently, overbroad.

Likewise, the District Court in this case recognized the substantial applicability of the statute to constitutionally protected activities, not the least of which being the News-Press' right to gather the news under the free press clause of the First Amendment. Hence, the District Court did not apply an improper standard to a public forum limitation, as asserted by the State; rather the District Court in holding

the statute void for overbreadth simply was not required to engage in such an analysis. Therefore, the District Court's finding that the statute substantially infringed upon First Amendment freedoms, a finding supported by the record, and was therefore overbroad is correct and should be affirmed.

Thus, the first major flaw in the State's argument is that an analysis of the permissible standard for restricting public forums is required in this case.[6] Nevertheless, even if for some reason such an analysis is necessary to a determination of the facial invalidity of the statute, the statute, as will be shown, remains unconstitutional.

In this regard, while it is recognized that the exercise of certain First Amendment rights in public or non-public fora are subject to reasonable time, place and manner restrictions, such restrictions must also be narrowly tailored to serve a significant government interest, leaving open ample alternative channels for the exercise of such rights. Consolidated Edison Co. of New York v. Public Service Commission, 447 U.S. 530, 65 L.Ed. 2d 319, 100 S.Ct. 2326,

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[6]Such an analysis is not necessary for another reason. All of the public forum analysis cases deal with limitations on speech and other expressive behavior under the free speech clause of the First Amendment. The News-Press' First Amendment rights in this case are being violated under the free press clause of the First Amendment (its right to gather the news) a closely related, but somewhat different constitutional right, the exercise of which is not circumscribed by the public forum limitations attributable to free speech rights. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 482 (1965), stating, "The right to freedom of... press includes not only the right to...print, but the right to receive...and freedom of inquiry."

2332 (1980); Daily Herald Co. v. Munro, supra, 838 F.2d at 386.

The State vainly attempts to argue the reasonableness of the statute's time, place and manner restrictions; but even a cursory analysis compels a contrary conclusion.

The time restriction, election day, is patently unreasonable, considering the absoluteness of the ban, since election day is a day when political expression is at its peak, and, likewise, the day for gathering news of and photographing the election process in action.

The place restriction, 50 feet around a polling room, is patently unreasonable, since the polling room is exactly where the newsworthy event is taking place, and includes a 50 foot area outside the polling room where those wishing to exercise free speech rights, even if non-disruptive,[7] are prohibited from doing so.

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[7]The Florida Election Code and other Florida statutes contain a number of provisions designed specifically to control disruptive activities, intimidation of voters, order at the polls, secrecy of the vote and other potential wrongs on election day. See, Sections 101.71 (1) (protection of voter while in booth), 102.031 (1) (maintenance of order at polls), 104.051 (official neglect of duty), 104.0515 (deprivation of or interference with voting rights), 104.061 (corruptly influencing voting), 104.081 (threats of employers to control votes), 104.091 (intermingling ballots), 104.15 (unqualified elector voting at election), 104.185 (knowingly signing a petition more than one time), 104.21 (changing electors' ballot), 104.22 (stealing and destroying records, etc., of election), 104.23 (disclosing how elector votes), and 877.03 (breach of the peace and disorderly conduct).

The manner restriction, an absolute ban on presence within the 50 foot zone, is patently unreasonable since it not only bars the exercise of non-disruptive First Amendment rights in the zone, but also affords no alternative channels to gather news and photographs about the voting process in action, which process occurs only in the polling room. Gathering such news cannot reasonably be performed beyond the 50 foot zone as the evidence in the record clearly establishes (R-8-9). See, Daily Herald v. Munro, supra, 838 F.2d at 386, where the court reached a similar conclusion regarding a content-neutral analysis of the reasonableness of a 100 yard exit polling statute.

Turning now to the State's public forum analysis, it has already been shown above that on election day sidewalks, streets and parks within 50 feet of a polling room remain traditional public forums,[8] a status which cannot be destroyed by legislative fiat. United States v. Grace, 461 U.S. 171, 75 L.Ed. 2d 736, 103 S.Ct. 1702 (1983).

In Grace, supra, a case cited without discussion in the State's brief, the U.S. Supreme Court struck down a federal

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[8]As the record clearly shows, polling rooms are also located within privately-owned buildings, such as condominiums, churches, private meeting halls and other group facilities. (R-112-117; A-1). The statute thus prohibits the exercise of free speech and other First Amendment freedoms inside veteran or fraternal halls (Precincts 4; 72: A-1, 4), in a meeting room of a condominium (Precinct 59: A-3), and, indeed, even in the lobby of an apartment complex comprised of elderly owners and occupants (Precinct 48: A-3), if within 50 feet of the polling room. The statute is thus grossly over-inclusive.

prohibition which banned certain types of expression in the Supreme Court building and its grounds. Finding that the grounds surrounding the Supreme Court building included public sidewalks, the Supreme Court held that inclusion of sidewalks in the statute's prohibitions resulted "...in the destruction of (the sidewalks') public forum status that is at least presumptively impermissible." Id., 75 L. Ed. 2d at 745. The Court further held that the government could not transform the character of the public forum "...by the expedient of including it within the statutory definition of what might be considered a nonpublic forum...", without a showing of actual occurrences involving disruptive activities within the prohibited area. Id., 75 L. Ed. 2d 745, 747. See also, Grayned v. City of Rockford, 408 U.S. 104, 118; 33 L. Ed. 2d 222, 233, 92 S. Ct. 2294 (1972); Jacobsen v. U.S. Postal Service, 812 F. 2d 1151 (9th Cir. 1987).

The State, however, attempts to transform the traditional public forums that fall within the 50 foot zone into non-public forums by merely announcing that the interior of the polling room and the 50 foot zone around it is a "non-public forum". The News-Press readily acknowledges the distinctions between public, limited public and non-public forums, and further recognizes that the polling room itself is

not a traditional public forum, but more appropriately a limited public forum.[9] The polling room, other than the voting booth, is limited to use by those persons having legitimate purposes and needs for access thereto in connection with the election process, such as voters expressing their political choices through the vote, poll workers and, as the News-Press contends, the media.[10] The area outside a polling room, however, demands a somewhat broader allowance for the exercise of First Amendment rights.

Clearly, streets, sidewalks, residences and businesses within the 50 foot radius must be exempted from any absolute restriction,[11] since these places are undeniably traditional public forums. United States v. Grace, supra. Moreover, once the prohibited area extends beyond the polling room itself, the State's concern for restriction seems to be less and less with its legitimate interests - - prevention of obstruction, delay, interference, coercion, disturbance, etc. - - and more and more with a constitutionally forbidden interest - - prevention of peaceful speech, exit polling or other legitimate activities. In the News-Press' view, the

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[9]Section 101.71, Fla. Stat., specifically provides that polling places "...shall be accessible to the public on election day..."

[10]The right of access by the media to the polling room itself is discussed under Point II of this Brief.

[11]The statute, as amended, does attempt to exempt businesses and private property from its restrictions, but in such a vague manner as to render the statute void for vagueness. See Point III of this Brief for the News-Press' argument on this issue.

State's only legitimate interest in restricting access to these outside areas is the prevention of obstruction, delay, etc., whether that occurs immediately outside the doors of the polling room itself or any given distance from it. Thus, even assuming for arguments sake that some given area immediately outside the polling room is only a limited public forum, the statute would still not pass constitutional muster under the applicable guidelines.

In Grayned v. City of Rockford, supra, the Supreme Court succinctly articulated the applicable legal test for determining reasonableness of time, place, and manner restrictions in limited public forums:

> The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place and manner that are reasonable." (Citations omitted). Although a silent vigil may not unduly interfere with the public library, (citation omitted), making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression basically incompatible with the normal activity of a particular place at a particular time. Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legitimate interest.

Id., 33 L. Ed. 2d at 232.

Surely, there is nothing inherently incompatible about otherwise peaceful, non-disruptive everyday activities outside a polling room with the normal activity occurring within a

polling room on election day. The record is devoid of even a scintilla of competent evidence to suggest any such incompatibility. In fact, the record shows that many everyday activities are wholly compatible with and actually occur within close proximity to polling rooms, since polling rooms are located within public schools, parks, banks, fire stations and churches, none of which are closed on election day and none of which actually restrict students, customers, employees or worshipers from using such facilities during election day.

Therefore, even if a public forum analysis is necessary in this case, such an analysis mandates that the absolute restriction on any type of activity within the 50 foot zone, including the exercise of First Amendment rights, is unconstitutional.

II. SECTION 101.121, FLA. STAT., AS APPLIED TO THE NEWS-PRESS, IS UNCONSTITUTIONAL SINCE THE STATUTE VIOLATES THE NEWS-PRESS' RIGHT TO GATHER THE NEWS AND RIGHT TO ACCESS TO GOVERNMENTAL ACTIVITIES GUARANTEED BY THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 4 OF THE FLORIDA CONSTITUTION.

Assuming for arguments sake that the statute is not facially unconstitutional on overbreadth or other First Amendment grounds, the statute is nonetheless unconstitutional as applied to the News-Press.[12]

As shown above, the First Amendment right of free press includes the right to gather the news. United States v. Sherman, supra; In Re Express-News Corp., supra. See also, Branzburg v. Hayes, 408 U.S. 665, 681 33 L. Ed. 2d 626, 639, 92 S. Ct. 626 (1972). It is also undisputed in the record that the News-Press photographer's purpose for seeking entry to the various polling rooms during the primary election was to gather news about the ongoing electoral process (R-8).

The issue then under this Point is whether the State has the right to absolutely bar the News-Press, as a member of the media, from access to polling rooms on election day when exercising this news-gathering right.

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[12]The District Court deemed it unnecessary to address this issue and the vagueness issue (see, Point II, supra) raised by the News-Press, because of its finding that the statute was facially overbroad. Nonetheless, these issues remain a viable basis for this Court to hold the statute unconstitutional in this proceeding. Stuart v. State, 360 So.2d 406 (Fla. 1978); Escara v. Winn Dixie Stores, Inc., 131 So2d 483 (Fla. 1961).

The State argued in the District Court and trial court that the statute applied to the public in general, not just the media, and that the media had no greater right to access to polling rooms than the public at large, citing Pell v. Procunier, 417 US 817, 834, 31 L. Ed. 2d 495, 94 S. Ct. 1800 (1973) and Houchins v. KQED, Inc., 438 U.S. 1, 57 L. Ed. 2d 553, 98 S. Ct. 2588 (1978), both of which dealt with access to prison facilities (R-51). However, it is erroneous to frame this issue as a contest between public access rights and media access rights, since the media acts as the public surrogate in many instances where general public access is not conducive to the governmental operation taking place.[13]

Subsequent to the Pell and Houchins decisions, the U.S. Supreme Court expressly held that the media does in fact have a qualified right of access to places traditionally open to the public, distinguishing the prison facility cases as not being "'open' or public places". Richmond Newspapers, Inc. v. Virginia, 488 U.S. 555, 576-577, 65 L. Ed. 2d 973, 989-990, 100 S. Ct. 2814 (1980). Writing for a 7-1 majority, Chief Justice Burger, in holding that the public and media have a right to access to criminal trials, stated:

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[13]Both the U.S. Supreme Court and this Court have repeatedly recognized the media's role as surrogate of the public and watchdog over governmental activities. See, e.g., Richmond Newspapers, Inc. v. Virginia, 488 U.S. 555, 65 L.Ed 2d 973, 100 S.Ct. 2814, 2815 (1980); State Ex Rel. Miami Pub. v. McIntosh, 340 So.2d 904, 908 (Fla. 1976). The State of Florida as well is committed to a policy of open government, as evidenced by the Public Records Law (Chapter 119, Fla. Stats.) and the Sunshine Law (Section 286.011, Fla. Stats.).

> The right to access to places traditionally open to the public...may be seen as assured by the amalgam of the First Amendment guarantees of speech and the press; and their affinity to the right of assembly is not without relevance.

Id. In his concurring opinion, Justice Stevens recognized the significance of this holding in stating:

> This is a watershed case. Until today, the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever.

Id. 66 L. Ed. 2d at 993 (e.s). Justice Stevens then explained that a majority of the Court had never subscribed to the proposition that the media had no right to access to information greater than the public, as implied in the prison facility cases, adding that:

> Today, however, for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedom of speech and of the press protected by the First Amendment.
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> +++
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> ...I agree that the First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch...

Id., 66 L. Ed. 2d at 993-994 (e.s.).

Even though this decision and many of the cases following it on this point deal with the right of access to some aspect

of judicial proceedings,[14] it is clear from the above-quoted language that the Supreme Court's ruling was intended to apply to virtually all governmental operations, and not just judicial proceedings. In point of fact, other subsequent court decisions have recognized the applicability of this right of access to a variety of governmental activities, even where conditions were not conducive to general public access. For example, in Westinghouse Broadcasting Co. v. Nat. Trans. Safety Board, 8 Med. L. Rptr. 1177 (D.C. Mass 1981) (A-18), a federal district court held that the safety board, a federal agency, could not unreasonably limit media access to an airplane crash site, even though the public at large may be barred. In Cable News Network v. ABC, 518 F. Supp. 1238 (D.C. Ga. 1981), the court, holding that the exclusion of all television representatives from White House events violated their right of access to White House activities, found that the First Amendment includes "... a right of access to news or information concerning the operations and activities of government...", and that the media acts as a representative of the public when exercising this right. See also, Daily Herald

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[14] See, e.g., Globe Newspaper Co. v. Superior Court, Etc., 457 U.S. 596, 73 L. Ed. 2d 248, 102 S. Ct. 2613 (1982) (closure of criminal trials involving sexual offenses against minors); Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501, 78 L. Ed. 2d 629, 104 S. Ct. 819 (1984) (voir dire examinations); Press-Enterprises Co. v. Superior Court of Cal., 478 U.S. ____, 92 L. Ed. 2d 1, 106 S. Ct. 2375 (1986) (preliminary hearings); Journal Pub. Co. v. Mechem, 801 F. 2d 1233 (10th Cir. 1986) (press interviews with jurors) and In Re Washington Post, 807 F. 2d 383, 389 (4th Cir. 1986) (sentencing hearing).

Co. v. Munro, 758 F. 2d 350 (9th Cir. 1984) (right of access to voters leaving polling place); League of Women Voters v. Adams, 13 Med. L. Rptr. 1422 (Alas. Superior Ct. 1986) (right of access to meetings of state legislature), (A-27); and North Broward Hospital District v. ABC, 20 Fla. Supp.2d 18 (17th Cir. Ct. 1986) (right of access to public health facilities).[15] Cf., Soc. of Professional Journalists v. Sec. of Labor, 616 F. Supp. 569, 572-579 (D.C. Utah 1985).

In determining whether access rights exist in any particular circumstance, the Supreme Court has adopted a two-part test, as succinctly described in Press-Enterprise Co. v. Superior Court of Cal., supra, 478 U.S. ____, 92 L. Ed. 2d 1, 106 S. Ct. 2375 (1986):

> First because a "'tradition of accessibility implies the favorable judgment of experience'" (citation omitted),...we have considered whether the place and process has historically been open to the press and general public.
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> Second, in this setting the Court has traditionally considered whether public access plays a significant positive role

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[15]Citing a number of Florida decisions, the trial court in the North Broward Hospital held that the media's right of access "...cannot be abridged by a state agency...in the absence of compelling interest which justify the restriction...narrowly tailored to serve those interests." Id., at 19. Other related examples of recognized media access rights are the judicially created right to have cameras in the courtroom, and the legislatively created right to be present during the testimony of a minor sex abuse victim when the public at large is excluded. See, Section 927.18, Fla. Stats. In all these situations, the media is by and large acting as the public's representative.

> in the functioning of the particular process in question. (citation omitted).
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> +++
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> If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches.

Id., 92 L. Ed. 2d at 10.

As stated above, the federal district court in Cable News Network v. ABC, supra, applied this test to White House events, a nonjudicial, but otherwise governmental activity. After a thorough analysis of the cases dealing with public and press access rights, the court found:

> ...that the rights guaranteed and protected by the First Amendment include a right of access to news or information concerning the operations and activities of government. This right is held by both the general public and the press, with the press acting as a representative or agent of the public as well as on its own behalf. Without such a right, the goals and purposes of the First Amendment would be meaningless.

Id., 518 F. Supp. at 1244 (e.s.).

Having found a right of media access to exist generally, the court then ascertained if the right existed in the case before it by applying the "experience and logic" tests discussed above. Id. In doing so, the court observed that there was a "...history of pool coverage of presidential activities going back through several past Administrations...," and that "... public insight (to such activities) is...necessary for a determination by the public of the adequacy of the President's performance." Id. The

court then balanced this right of access "...against the interest served by the government restraint," and found that the public had a "significant interest" in continued coverage, while the government failed to demonstrate any reasons, such a security or space limitations, for denying coverage. Id., at 1245. The court then concluded that the total denial of access to the television media violated the public's and press' right of access. Id.

Applying the test to the case at bar, the uncontradicted evidence in the record is that the media has long been granted access to polling rooms on election day, despite the existence of any statutory ban on access to the public generally (R-22-25; 35-36).[16] This evidence satisfies the first prong of the test.

The uncontradicted evidence also shows that press coverage within the polling room plays a "significant positive role" in the functioning of the electoral process, since publishing photographs and reports of citizens exercising their right to vote encourages others to vote and register to vote. It also allows the media to fully function as the "watchdog" of the public during this process - a process which is the lifeblood of a democratic society (R-26-27). This evidence satisfies the second prong of the test.

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[16]The News-Press has been publishing photographs of persons voting in national and local elections at least as early as 1948, i.e., at least 40 years without incident or complaint (A-7).

Balancing this public interest against the state interest - peace and decorum at the polls - the record falls silent as to any demonstrable proof that the media's presence ipso facto or in practice disrupts the voting process.[17]

Thus, it is abundantly clear from the foregoing that the media has a constitutional, albeit qualified, right of access to governmental proceedings, activities and places in order to gather the news, which right may not be unreasonably or arbitrarily restricted or denied. Given this right, the absolute prohibition from coming within 50 feet of a polling room, including going within the polling room itself, imposed on the media by Section 101.121, is clearly an unreasonable time, place and manner restriction, rendering the statute unconstitutal as applied to the News-Press and other members of the media.

In this regard, one should again pause to consider both the logic and necessity for the existence of such a right in the media when government activities are not conducive to the presence of large numbers of persons in a certain locale, such as polling rooms. Under such circumstances, media access

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[17]The only evidence of "disruption" in the record is the testimony of a poll worker, who subjectively described the very presence of the media within the polling place as being disruptive to her (R-44); but the record contains no testimony of any actual overt disruption. As the Supreme Court noted in Martin v. Struthers, 319 U.S. 141, 87 L. Ed. 1942 (1943), the fact that some persons are disturbed or displeased by persons exercising First Amendment rights is not a sufficiently serious state interest to warrant curtailment of such rights.

serves both the interests of government and the media, without denying total access to the subject information to the public.

Yet, the State is certain to assert that there is no tradition of public access to polling rooms, citing the many years the statutory prohibition on general public access to polling rooms has been in effect. To the contrary, the media, as the public surrogate, has had free and open access to polling rooms for many years, in spite of the statute's general prohibitions. This fact is evidenced by the uncontradicted testimony and the many photographs in the record taken over a significant span of time. Moreover, no showing was made by the State in the trial court that the presence of the media in polling rooms over the years has ever impaired orderly elections, or that the secrecy of the vote has been even remotely compromised thereby.

The State will also surely question how the presence of the media in the polling room plays a "significant, positive role" in the functioning of the electoral process. It is indeed unfortunate that this lack of vision is so commonplace among governmental agencies and its representatives. Perhaps Justice Brennan's concurring remarks in Richmond Newspapers, Inc. v. Virginia, supra, will shed some light on this question. In explaining the Court's opinion, Justice Brennan stated:

> The Court's approach in right-of-access cases simply reflects the special nature of a claim of First Amendment right to gather information.

> +++
> ...the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sake; it is a structural (court's emphasis) role to play in securing and fostering our republican system of self-government. (citations omitted.) Implicit in this structural role is not only "the principle that debate on public issues should be uninhibited, robust, and wide-open," (citation omitted), but also the antecedent assumption that valuable public debate - as well as other civic behavior - must be informed. (emphasis supplied).

Id., at 448 U.S. at 586-588. The record clearly reflects that the publication of photographs of both well-known and ordinary citizens exercising their right to vote has the positive effect of encouraging other citizens to vote or register to vote and educates the public about the voting process first hand. These results may only be achieved by allowing the media access to the polling room, so that such media coverage may be complete and meaningful.

Considering the efforts local supervisors of elections exert throughout the state to encourage citizens to vote and register to vote, it is quite amazing that anyone could question the positive effects of media coverage on the voting process.

Therefore, regardless of whether the statute is facially unconstitutional, it is unconstitutional as applied to the media in that it absolutely abridges the constitutional right to gather the news and to access to information concerning governmental activities and operations.

III. SECTION 101.121, FLA. STAT. IS UNCONSTITUTIONAL ON ITS FACE SINCE THE STATUTE IS IMPERMISSIBLY VAGUE UNDER THE DUE PROCESS CLAUSE OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION AND UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 4 OF THE FLORIDA CONSTITUTION.

The News-Press also attacks the constitutionality of the statute on Fourth Amendment due process grounds and other First Amendment grounds, i.e., that the statute is impermissibly vague. More specifically, the News-Press contends that the wording of the statute exempting commercial businesses, private houses and property from the application of the 50 foot restriction[18] is so vague that it is not possible for a person of common and ordinary intellect to ascertain its meaning, and, consequently, the application of the restriction itself.

As stated by the the Court in State v. Gray, supra:

> Vagueness, of course, is the term given to that ground of constitutional infirmity of a statute that is based on its failure to convey sufficiently definite notice of what conduct is proscribed.

Id, 435 So. 2d at 819. The test of vagueness of a statute is "...whether the language conveys a sufficiently definite

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[18]This portion of Section 101.121 states:
> Such restrictions shall not apply to commercial businesses or privately-owned homes or property which are within 50 feet of the polling room.

warning of the proscribed conduct when measured by common understanding and practice." State v. Wershow, 343 So. 2d 605, 608 (Fla. 1977).

Quoting from one of its earlier decisions, the Florida Supreme Court in Wershow observed:

> "The vice of vagueness in statutes is the treachery they conceal in determining what persons are included or what acts are prohibited...No matter how laudable a piece of legislation may be in the minds of its sponsors, objective guidelines and standards must appear expressly in the law or be within the realm of reasonable inference from the language of the law."

Id., at 609, See also, Bertens v. Stewart, 453 So. 2d 92, 93 (Fla. 2nd DCA 1984); Grayned v. City of Rockford, supra, 33 L. Ed. 2d at 227-228.

Turning to the language of the statute, after prohibiting all persons not in line to vote from coming within 50 feet of a polling room while it is open, the statute exempts from the restriction "commercial businesses or privately-owned homes or property" within the 50 foot zone.

Regardless of the intention of the 1985 Legislature when initially creating this exemption,[19] it is impossible from a reading of it to determine to what persons and under what

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[19] It is evident that the reason for the exemption was to overcome the criticism of the federal appeals court in Clean-Up '84 v. Heinrich, 759 F.d 1511 (11th Cir. 1985), that the 100 yard zone in the Florida exit polling statute (former Section 104.36) included private homes and business and was therefore overbroad. Id., at 1513-1514.

circumstances it applies. Consequently it is impossible for a person to determine if he is in violation of the statute. The vagueness of the statute is established by a number of obvious reasons and examples:

(1) While the statute attempts to describe the exempt property within the zone, it does not define what persons, if any, fall within the exemption. Thus, one cannot reasonably determine if it exempts all persons while on such property or only the owners of such property, or their guests, invitees or licensees.

(2) Since, as the record amply demonstrates (R-112; A-6), many polling rooms are actually within privately-owned buildings, such as banks, churches, and residential buildings, it is totally unclear from a reading of the statute whether the exemption pertains to such private property when it is used as a polling place, and, if so, to what persons under such circumstances. In other words, it cannot reasonably be determined whether privately-owned buildings serving as polling places are covered by the 50 foot restriction.

(3) If the statute is read as not exempting privately-owned buildings housing polling rooms, but only adjacent privately-owned properties, one cannot determine if, for example, employees and business invitees of banks are violating the statute when they come within 50 feet of a polling room located within the bank or on bank property. In other words, it cannot be reasonably determined if persons

using privately-owned buildings (the polling place) housing polling rooms on election day must still maintain a 50 foot distance from the polling room.

(4) By like token, by only exempting commercial businesses and private property from the restriction, when polling rooms are located in public facilities, such as schools, it is equally unclear whether students, parents of students, and teachers are violating the statute if they come within 50 feet of the polling room during school hours or when otherwise lawfully on school property.

Certainly, other questions as to the meaning of the statute could be raised; but the above questions make it crystal clear that no person of common and ordinary intellect could determine if he or she were in violation of the statute in a variety of circumstances, regardless of whether the polling room is situated on public or private property.

Given the fact that violation of the statute is a crime, any doubt as to its meaning should be resolved against its constitutionality. As stated in State v. Wershow, supra:

> When construing a penal statute against an attack of vagueness, where there is doubt, the doubt should be resolved in favor of the citizen and against the state. Criminal statutes are to be strictly construed according to the letter thereof.

Id., at 608.

The State argued in the District Court that the statute must be given a common sense interpretation, and that the statute should be interpreted to allow any person who has a

right to enter a commercial business or upon private property to enter the 50 foot zone. With all due respect to the State, this simplistic approach carries with it its own absurdities since, under that construction, polling places on private property [of which there are many (R-113; A-1)] would be virtually open to the public, thus defeating the argued purpose of the ban at most polling rooms, i.e., orderly elections by prohibiting public access to the 50 foot zone.

Moreover, courts are not permitted to judicially amend impermissibly vague statutes in order to render them constitutional. Citing from one of its earlier decisions, the Florida Supreme Court stated in State v. Wershow, supra:

> "The court cannot, in order to bring a statute within the fundamental law, amend it by construction."
>
> "A statute which requires the doing of an act so indefinitely described that men must guess at its meaning violates due process of law."
>
> "A statute cannot in order to make it conform to constitutional requirements, be given an indefinite mandatory construction in lieu of the broad prohibiting meaning indicated by its language."
>
> "Generally, inclusive terms in a criminal statute cannot be reduced by construction so as to limit its application only to that class of cases which it was within the power of the legislature to enact, and thus save the statute from invalidity."

Id., 353 So. 2d at 607-608 (court's emphasis).

Since the wording of the statute is totally unclear as to

its exemptions, it is necessarily unconstitutionally vague as to who and where its restrictions apply.[20]

In addition, given the fact that, regardless of whether a polling place is located on public or private property, the 50 foot zone, in many instances encompasses public streets, sidewalks and parks, the vagueness of the statute offends the First Amendment. As stated in Grayned v. City of Rockford, supra:

> ...where a vague statute "abut[s] upon sensitive First Amendment freedoms, 'it' operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone'...than if the boundaries of the forbidden areas were clearly marked."

Id., 33 L. Ed. 2d at 228. See also, United States v. A Single Family Residence, 803 F. 2d 625, 630 (11th Cir. 1986).

The "uncertain meanings" of the language of the statute chosen by the legislature must certainly produces such a chilling effect. Therefore, the statute is unconstitutional under both

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[20]The exemption language of the statute cannot be judicially excised therefrom without adversely affecting the legislative purpose of the remaining provisions of the statute, since the legislative purpose (extending the restricted zone while exempting private property and persons thereon from its purview) cannot be constitutionally accomplished independently of the invalid provisions, as suggested in the Clean-Up '84 decision, supra. Furthermore, the invalid provisions (the exemption) and remaining portions of the statute are "...so inseparable that the legislature would not have enacted the one without the other...," thus barring the excising any part of the statute. High Ridge Management Corp. v. State, 354 So. 2d 377, 380 (Fla. 1978); Beckwith v. Webb's Fabulous Pharmacies, Inc., 394 So. 2d 1009, 1010 (Fla. 1981).

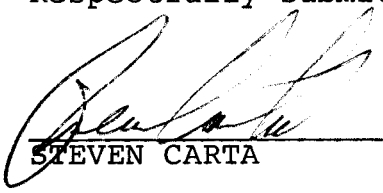
the First and Fourth Amendment to the United States Constitution and Article I, Sections 4 and 9 of the Florida Constitution.

CONCLUSION

Based upon the facts of this case and the law applicable thereto, Section 101.121, Fla. Stat., is unconstitutional on its face in regard to the 50 foot zone, unconstitutional as applied to the News-Press' right to gather the news within the polling room, and unconstitutionally vague as to which persons fall within the private property exemption contained in the statute, thereby rendering the entire statute ambiguous.

For these reasons, the Court is respectfully requested to affirm the decision of the District Court holding the statute unconstitutional.

Respectfully submitted,



STEVEN CARTA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee and Appendix thereto has been furnished by regular course of United States Mail to Terrance P. Lenick, Esq., P. O. Box 1480, Fort Myers, Florida, 33902; Florence Snyder Rivas, Esq., P. O. Box 3403, Palm Beach, FL 33480; Barry Hillmyer, Esq., P. O. Drawer 1000, Fort Myers, FL 33902; Jason Vail, Esq., Assistant Attorney General, c/o Department of Legal Affairs, The Capitol, Suite 1501, Tallahassee, Florida 32399-1050; Gregg Thomas, Esq., P.O. Box 1288, Tampa, FL 33601; Wilson W. Wright, Esq., 217 S. Adams Street, Tallahassee, FL 32301, this 26 day of August, 1988.

By: _____
STEVEN CARTA