IN THE FLORIDA SUPREME COURT

GEORGE FIRESTONE, et al

Appellants,

vs. CASE NO. 72,789

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

Appellee.

_____/

ON APPEAL FROM THE SECOND DISTRICT
COURT OF APPEAL

INITIAL BRIEF OF APPELLANT FIRESTONE

ROBERT A. BUTTERWORTH
Attorney General

JASON VAIL
Assistant Attorney General

DEPARTMENT OF LEGAL AFFAIRS
The Capitol - Suite 1501
Tallahassee, FL 32399-1050
(904) 488-1573
Counsel for Appellant Firestone

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PRELIMINARY STATEMENT

Appellant George Firestone was the defendant in the trial court and the appellee in the District Court of Appeal. At the beginning of this action he was the Secretary of State, but he no longer serves in that capacity, and has been replaced by Jim Smith. The Office of the Attorney General appears on behalf of the real parties in interest, the current Secretary of State and the State of Florida.

News-Press Publishing Co., the appellee in this court, was the plaintiff in the trial court and the appellant in the District Court of Appeal. We will refer to the appellee as the plaintiff or by name.

STATEMENT OF THE CASE

This is an action by the News-Press Publishing Co., publisher of the daily newspaper the Ft. Myers News-Press, to declare unconstitutional and enjoin enforcement of s. 101.121, Fla. Stat. (1985). That section restricted access by the general public to all polling places and a 50-foot buffer zone surrounding the polling place. Apart from authorized poll workers and poll watchers, only those actually voting or in line to vote were permitted within the protected zone.[1]/

News-Press, the plaintiff in the trial court, filed its amended complaint in October 1986, alleging that the statute was constitutionally overboard and vague. (r-70). The defendants were then Secretary of State George Firestone and then Lee County Supervisor of Elections Enid Earle.[2]/

Shortly afterward, on October 24, 1986, the trial court held an evidentiary hearing on the plaintiff's request for a

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[1]/A polling place is defined as the building housing the polling room, the room in which ballots are actually case. Sections 97.021(18) and (19).

In 1987, while this action was pending, the Legislature amended s. 101.121 to change the protected zone's perimeter. It no longer stretches from the walls of the polling place, but from the walls of the polling room. See s. 2. Chap. 87-184, Laws of Florida, s. 101.121, Fla.Stat. (1987).

[2]/Neither Mr. Firestone nor Ms. Earle presently hold public office, and have not for some time. However, the plaintiff has not moved to replace them with the current office holders. The Office of the Attorney General appears on behalf of the named party, Mr. Firestone, but in reality, undersigned counsel represents the State of Florida and the Office of the Secretary of State.

temporary injunction. (State-wide elections were scheduled for November 4, 1986.) At the hearing the plaintiff introduced an affidavit in support of its challenge (r-77), testimony of a reporter (r-6-21), and its exective editor (r-21-29) and documentary evidence (r-111-127B; 131-144).

Defendant Enid Earle, offered the testimony of three witnesses. (r-30-48).

The trial court issued a temporary injunction permitting journalists to photograph or videotape within polling places during the November 1986 general election. (r-128).

Only after the hearing did the defendants file their answers to the amended complaint. (r-145, 149, 150).

Subsequently, all three parties filed cross motions for summary judgment. (r-153, 154).

On February 9, 1987, the trial court held a hearing on the motions, and on March 25, 1987, issued its Order on Cross Motions for Summary Judgment, finding the statute constitutional and granting the defendants' motions. (r-306). The trial court issued its final order on April 20, 1987 (r-307), and the plaintiff filed a timely notice of appeal to the District Court of Appeal on May 19, 1987. (r-308).

On May 6, 1988, the District Court of Appeal reversed the trial court and held that s. 101.121 as amended by s. 2, Ch. 87-184, Laws of Florida, was facially unconstitutional. (Appendix 1).

The court applied the compelling state interest test. (Appendix 1, pp. 5-6). The plaintiff conceded and the court recognized that the state had a compelling state interest in protecting ballot secrecy and the orderly process of voting. (Appendix 1, p. 5). And the court said that the statute safeguarded "acknowledged compelling governmental interests." (Appendix 1, p. 6).

However, the court said that the statute, regardless of the reduction in the perimeter caused by the fact it was now defined by the walls of the polling room, was substantially overbroad. First, the court said, the statute was overbroad because "undoubtedly, in many cases" it would fall on traditional public fora such as sidewalks. Second, the statute interfered with the rights of citizens who had lawful business in buildings where polls were often established (such as schools, churches and community halls, which the court said were commonly used for free expression) to pass through the protected zone. The court in particular noted that the statute prohibited nonvoters from assisting voters. And the court said that the mere presence of nonvoters in the zone did not interfere with state interests, finding that the defendants' reasons for enforcing the protected zone were supported only by unsubstantiated fears.

One panel member, Judge Schoonover, dissented with an opinion. See Appendix 1, pp. 10-14. He argued that because the restriction on first amendment rights was content-neutral, a lesser degree of scrutiny was required than that used by the majority. Judge Schoonover argued that the test to be applied was essentially the same as that used for time, place and manner restrictions. He said that because the state had a legitimate interest in protecting ballot secrecy and preventing the distraction, interruption and harassment of voters, the prohibition against general public access inside the polls and within 50 feet of them was reasonable and constitutional. Judge Schoonover disagreed with the majority's position that the statute was constitutionally defective because it would prohibit nonvoters from assisting voters. The judge said that such a conclusion led to an irrational result.

Defendant Firestone filed a motion for rehearing on May 26, 1988, which was denied on June 27, 1988.

Defendant Firestone then filed a notice of appeal on July 20, 1988.

As a result of the filing of the notice of appeal by the Secretary of State, the affect of the district court's order was stayed by Rule 9.310, Fla.R.App.P. The plaintiff filed an emergency motion to lift the stay on July 25, 1988. The motion was denied on August 1, 1988.

STATEMENTS OF FACTS

Section 101.121, Fla. Stat. (1985), stated:

> Persons allowed in polling places. - 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 businesses or privately owned homes and property which are within 50 feet of the polling place.

[3]/

During the September 30, 1986, state-wide primary elections s. 101.121 was enforced against a Ft. Myers News-Press photographer, Joe Burbank, and other journalists in Lee County. (r-77-79) The News-Press photographer had taken the picture of Frank Mann, Democratic candidate for lieutenant governor, entering the polling place at precinct 48, but was unable to take Mr. Mann's picture inside the polling place because he was barred from entering. (r-77-79). At the photographer's last attempt to

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[3]/Before its amendment in 1985, the section had provided for a more limited protected zone, which extended 15, and not 50, feet from the polling place. See Chap. 85-205, Laws of Florida.

enter the polling place, he was escorted out and told that the Lee County Sheriff's Department would be called if he persisted. (r-77-79).

As a result of Mr. Burbank's inability to gain access to the polling place to take photographs during the primary, the plaintiff, News-Press, filed this action.

At the hearing on the plaintiff's request for temporary injunctive relief, the plaintiff offered photographs taken during the primary outside polling places (r-120-126), and copies of photos taken inside polling places during previous elections. (r-132-144).

Mr. Burbank testified that he was on assignment on September 30, 1986, to take photos of various polling places to show voters exercising their right to vote. (r-8). He said that he was unable to do this from outside the 50-foot protected zone. (r-8-9). Mr. Burbank further testified that when he tried to enter the polling place he did not create a disturbance or interfere with any citizen's right to vote. (r-9). Mr. Burbank said that he had been a news photographer for five years and had covered other elections in which he was allowed into the polls and that he believed it was customary for journalists to take pictures of citizens and candidates casting their ballots. (r-9-10).

The plaintiff's executive editor, Keith Moyer, testified that he had worked as a reporter and editor for 11 years, and

during that time had covered approximately five elections during the 1970s. (r-22). He said that he had heard of no complaints about his presence inside any polling place, and that he was not aware of any such complaints against other journalists. He also said that he believed it was "traditional" to allow photographers into polling places during elections. (r-25).

Mr. Moyer said that the purpose of photographing inside the polls was to show the human side of the process and to illustrate voter turnout, to cover and to report any improprieties and unusual events connected with the election. (r-27). He said that accomplishing this purpose was defeated by the 50-foot protected zone. (r.27).

Defendant Enid Earle, former Lee County supervisor of elections, testified that she gave these instructions to poll workers:

> I have instructed all my clerks to be very cautious about the news media because they have a tendency to go into the polling places and snap pictures during the televising and caused chaos in the polling places. What worries us is we are charged with the security of the polling place as well as the election and what would prevent somebody, all these news media milling around if they were allowed in this polling place, somebody picks up a pack of ballots and walks out with them and we wouldn's know what in God's name happened to them. So for that reason we think they shouldn't be allowed in the polling place. There is enough confusion on election day that we don't need it. (r-33)

Ms. Earle testified that she told poll workers to enforce the boundaries of the protected zone because of the potential for disruption. (r-33,35). However, she was not optimistic about the ability of workers to do so because of the aggressiveness of some journalists: "I would say a lot of these boys would go out and go within the polls whether they had permission or not." (r-35).

Mrs. Sally Freis, a volunteer precinct worker at Lee County precinct 48, testified for the defendants. She said her job was to provide voters with ballots and to ensure that voting went in an orderly and efficient manner. (r-43). She testified about the incident that led to the barring of Mr. Burbank from access to the polls. She said that at precinct 48 the voting booths were next to a large window. Outside the window when Mr. Mann was voting a crowd of press and television reporters had assembled and were taking photographs. (r-16, 43). Mrs. Freis called the scene "disruptive":

> Q. How was it disruptive?
>
> A. It takes your attention off what you're doing. In this particular precinct we have a very large turnout of elderly people. We have people with canes, walkers, wheelchairs and sight impaired that come in and you have to watch them as well as register your voters and make sure they make it to a voting booth. So the less people that we have in there, the less confusion and the more efficiently we can do our job. (r-44)

SUMMARY OF THE ARGUMENT

Section 101.121, Fla. Stat., prohibiting access to the polling room and a 50-foot protected zone around it to all but voters and those in line to vote, is not constitutionally overbroad on its face and unreasonable.

The statute may constitutionally be applied to the plaintiff, a publisher of a daily newspaper.

The statute implicitly creates three protected zones: within the polling room itself, a protected zone inside the polling place (the building housing the polling room), and that part of the protected zone that happens to fall outside the polling place.

When the protected zone, because of the configuration of the polling place, falls outside the building and on a traditional public forum such as a sidewalk or a park, the statute creates a reasonable time, place and manner restriction on the exercise of first amendment rights.

The restriction is content neutral. It does not purport to regulate speech or to promote or suppress a viewpoint. It only regulates access to a particular forum at a particular time.

It is not unreasonable. It supports a substantial, even compelling state interest in protecting the voting process from disorder and voting fraud, and it secures individual rights to the secret ballot and to privacy. The state policy embodied by the statute reflects lengthy historical experience in this

country with voting fraud, which was once widespread when polling places were open to the general public.

The plaintiff and others seeking to exercise first amendment rights have reasonable alternative channels of communication. The plaintiff may still gather news and report on the election by talking with voters and officials outside the zone, which is narrowly drawn in that it extends only 50 feet (or 16.66 yards from the polling room.

Because of the slight chance that the protected zone might fall on a public forum, if the court determines that the statute is not a reasonable time, place and manner restriction, it should provide a limiting, saving construction and not declare the entire statute unconstitutional. It should hold that the statute is unconstitutional only as applied to traditional public forums.

The U.S. Supreme Court recognizes three types of public forums: the traditional public forum such as the sidewalk and city street; the designated public forum, public property opened for unlimited expression; and the nonpublic forum, public property either restricted to the public or opened only for specific purposes. The public and the plaintiff do not have a first amendment right of access to state property simply because it is owned by the state on behalf of the public.

Inside the polling place, and in particular inside the polling room, the protected zone is a nonpublic forum. Access to this forum, whether on government or private property, may be

strictly limited to serve the purpose of the forum -- that is, the conduct of voting.

The statute may constitutionally be applied to the plaintiff. The plaintiff has no first amendment right of access to any nonpublic forum that is greater than the general public's. Since the general public has no right of access to the nonpublic forum of the polling room and its surrounding prtected zone, the plaintiff also has no right of access.

The decision of the district court of appeal should be reversed and the constitutionality of s. 101.121 upheld.

ARGUMENT

Introduction

This case arises from an attempt by a photographer for the plaintiff's newspaper, the Ft. Myers News-Press, to enter a polling place at precinct 48 in Lee County, Florida, during the September 1986 primary election. The photographer was not a voter at this polling place, and he did not seek admission to vote. Rather, he wanted to photograph Frank Mann, then a candidate for lieutenant governor, in the act of voting. He also wanted to photograph other voters at the polls.

Acting pursuant to s. 101.121, Fla.Stat., poll workers refused the photographer admission, and when he declined to depart, he was ejected.

Section 101.121 is the most important statute in limiting public access to the polls. No other statute limits public access to the polls to the same degree.[4]/ At the time the plaintiff filed its lawsuit, the statute permitted only specific authorized officials and those voting or in line to vote to be inside or within 50 feet of the polling place, the building housing the room where ballots are cast. The statute read:

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[4]/Section 103.031(3), Fla. Stat., limited public activity around the polls but did not address the question of actual physical access. This section prohibited solicitation within 150-feet of the polls. The section, however, has been held unconstitutional. Florida Committee for Liability Reform v. McMillan, 682 F.Supp. 1536 (M.D. Fla. 1988)

> Persons allowed in polling places. - As many electors may be admitted to vote as there are booths available, and no person who is not in line to vote may cone 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 businesses or privately owned homes and property which are within 50 feet of the polling place.

However during the course of litigation, the Legislature significantly amended the section. See s. 2, Ch. 87-184, Laws of Florida, codified as s. 101.121, Fla.Stat. (1987), set out below.[5]/ Now the 50-foot protected zone projects not from the walls of the polling place, as before, but from the walls of the polling room. This is a major reduction in the reach of the statute, and should have substantially altered the district court's analysis.

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[5]/101.121 Persons allowed in polling rooms ~~places~~.--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 room ~~place~~ from the opening ot 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 room ~~place~~ with permission from he clerk or a majority of the inspectors. Such restrictions shall not apply to commercial businesses or privately owned homes and property which are within 50 feet of the polling room ~~place~~.

It did not, however, and the court held that the statute violated the first amendment to the U.S. Constitution and article I, section 4 of the Florida Constitution. Specifically, the court held that the statute was void for substantial overbreadth. In addition, the court held that it was unreasonable.

The district court found overbreadth based on a number of factors. First, it said that the statute was overbroad because "undoubtedly, in many cases" the protected zone would fall on traditional public forums such as sidewalks, where first amendment rights are customarily exercised. Appendix 1, p. 4. Second, the court said that the protected zone impermissibly swept into its orbit areas inside buildings such as schools, churches and community halls (where polling places often are established) which are "commonly used for free expression." Id., pp. 4-5. People passing through the protected zone on lawful business in these apparently public places would thus find their first amendment rights curtailed. Third, the court said that the statute impermissibly and unreasonably would exclude from the polling place nonvoters who have come to assist the elderly or infirm voter and the children of voters. Id., p. 7.

The court held that the statute was unreasonable because it was not based on actual experience but on "unsubstantiated fears." Id., p. 6.

The district court was badly mistaken and its analysis seriously flawed. With the retraction of the 50-foot protected zone to an area surrounding the polling room which would be located inside the polling place, in most cases that zone was extremely unlikely to fall on a traditional public forum such as a sidewalk.

In any event, the court failed to make the proper public forum analysis, and even if the statute had not been amended and if part of the protected zone fell on a public forum, the regulation was a constitutionally permissible time, place and manner restriction.

A different regime applied inside the polling place, however. The court was wrong in concluding that people entering public or private buildings where polls are set up have a constitutional right to free access to the protected zone. Polling places are not public forums freely open to the public.

Furthermore, the court erred in concluding that public schools, churches and community halls -- or any public building in which a poll is established -- are public forums open to unrestricted first amendment activity.

The court also was mistaken in thinking that s. 101.121 forbade people from assisting the helpless or infirm voter. Other sections of the elections code take care of that eventuality. See ss. 97.061, 101.051, and 104.031, Fla.Stat.

Finally, the court apparently has forgotten much of our American historical experience with elections fraud, which provided the reasons for the challenged statute's enactment.

Thus, the statute is not overbroad and is supported by more than unsubstantiated fears, and it is constitutional.

I.

THE DISTRICT COURT ERRED BY FAILING TO CONDUCT AN APPROPRIATE PUBLIC FORUM ANALYSIS. THE PROTECTED ZONE FALLING ON PUBLIC FORUMS CREATES A REASONABLE TIME, PLACE AND MANNER RESTRICTION.

It is important to note that s. 101.121 implicitly creates three protected zones. The first is the sanctuary inside the polling room itself. The second is the part of the zone affecting the interior of the polling place outside the polling room. The third is that part of the 50-foot zone that by happenstance falls outside the polling place and may overlap a public forum. The constitutional principles governing the protected zone in each area are different, depending on whether it falls inside or outside a building, as will soon be apparent. However, the district court failed to recognized these critical distinctions.

The district court assumed without analysis or citation that public and private buildings that are used to hold polling places during elections are public forums in which citizens have nearly unrestricted access to exercise speech rights. Because the court perceived that s. 101.121 broadly affected the rights

of nonvoters in such public and private buildings, it held the statute overly broad and unconstitutional.

Second, the district court mistakenly concluded that because the protected zone "will undoubtedly, in many cases" overlap traditional public forums such as sidewalks, city streets and public parks [6]/ the statute constitutionally overreached. In making this determination, again, the district court should have, but did not, conduct the standard public forum analysis used by the U.S. Supreme Court in such circumstances.

This case is about the limits on the right of public access to state-owned or controlled property to exercise first amendment freedoms. In such cases, the U.S. Supreme Court analyzes the issues in terms of the type of public forum that is involved. See e.g. Perry Education Association v. Perry Local Educators'Association, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983); Cornelius v. NAACP legal Defense and Education Fund, 473

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[6]/The court assumed that this would happen without any evidence in the record. Even when the zone projected from the walls of the polling place, this conclusion was logically suspect. Fifty feet is only 16.66 yards, about 17 paces. It is doubtful that the protected zone would overlap a public park or a city street at that distance. It is equally doubtful that "in many cases" the zone would overlap a city sidewalk, although the possibility does exist. It is simply not as certain as the district court would have us believe. With the retreat of the boundary of the protected zone to a 50-foot belt around the polling room -- inside the building -- the court's conclusion becomes even more shaky. However, the court rejected arguments that the smaller zone affected its decision, possibly because of the zone's impact on citizens inside the polling place.

U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985); Hazelwood School District v. Kuhlmeier, ___ U.S. ___, 108 S.Ct. 562 (1988). [7]/

A forum is any property or channel of communication on or through which a citizen seeks to exercise first amendment rights. Cornelius, 473 U.S. at 800, 105 S.Ct. at 43448.

The U.S. Supreme Court recognizes three types of public forums: the traditional public forum, the "created" or "designated" public forum, and the nonpublic forum. See Perry 460 U.S. at 45-46, 103 S.Ct at 955; Cornelius 473 U.S. at 800, 105 S.Ct. at 3448.

Traditional public forums are those places which by long tradition or by government fiat have been devoted to assembly and debate, places immemorably held in public trust for public use. Perry, 460 U.S. at 45, 103 S.Ct. 954-955. The principle purpose of traditional public forums, and the means by which they are identified, is as a traditional place to exchange ideas and to conduct public discourse. Cornelius, 473 U.S. at 800, 105 S.Ct. at 3448.

Places that have been recognized as traditional public forums include:

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[7]/We will discuss primarily federal first amendment law in arguing this case, since this court has held that the Florida Constitution provides rights of free expression that are at least as extensive as those protected by the federal constitution. Department of Education v. Lewis, 406 So.2d 455, 461 (Fla. 1982).

-- streets and sidewalks. Perry, Supra; Greer v. Spock, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505; U.S. v. Grace, 461 U.S. 1781, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (government owned sidewalks abutting city streets); Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972) (sidewalks along street outside a public school); Carey v. Brown, 447 U.S. 455, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980).

-- parks. Perry, supra; U.S. v. Grace, supra; Niemotko v. State of Maryland, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed.2d 280 (1951).

-- the lobby of a public airport. Board of Airport Commissioners of Los Angeles v. Jews for Jesus, 107 S.Ct. 2568 (1987).

-- courtrooms during trial. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) ("[S]treets, sidewalks, and parks are places traditionally open, where First Amendment rights may be exercised . . . a trial courtroom is also a public place where the people generally -- and representatives of the media -- have a right to be present . . ." Id., 448 U.S. at 578).

Areas the courts have held are not public forums include:

-- privately owned shopping centers and shopping malls. Lloyd Corp. Ltd. v. Tanner, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972); Hudgens v. NLRB, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976); Jacobs v. Major, 407 N.W.2d 832 (Wisc. 1987).

-- private parking lots. Right to Life Advocates, Inc. v. Aaron Women's Clinic, 737 S.W.2d 564 (Tex. App. 1987).

-- churches. Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971). The conclusion of the Eighth Circuit Court of Appeals appears to conflict directly with the conclusion reached by the district court in this case. Here, the district court apparently found that churches were public forums because they are "commonly used for free expression." (Appendix, p.4-5). This may be true, but they are also private property not dedicated for general public use.

We submit that private property may be dedicated for a limited public purpose. Such a dedication does not turn it into a public forum to which citizens have an unrestricted right of access.

The right of free expression in a traditional public forum may be restricted only under limited circumstances. Perry, 460 U.S. at 45, 103 S.Ct. at 954.

Content based restrictions are particularly suspect, and are presumptively unconstitutional. City of Renton v. Playtime Theatres Inc., 106 S.Ct. 925, 928 (1986). "In a public forum, by definition, all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers, a single view point, or a single subject . . . . " Id., 460 U.S. at 55, 103 S.Ct. at 960. Thus, a content-based restriction on free expression in a

traditional public forum may be regulated only upon a showing of compelling state interest, and the regulation must be narrowly drawn to achieve that interest. Perry, 460 U.S. at 45, 103 S.Ct. 955.

However, a different test applies if the regulation is content-neutral. Content-neutral means that the regulation is silent concerning the speaker's viewpoint. Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). For regulations of this type to be constitutional as applied to traditional public forums, they must be reasonable as to time, place and manner; be narrowly drawn to serve a legitimate governmental interest; and leave open alternative channels of communication. Perry, supra.

Thus, the district court erroneously stated the test when it said that a compelling state interest was needed to justify time, place and manner restrictions affecting first amendment rights. Appendix 1, p. 5. Having proceeded from an erroneous premise and faulty assumptions, the district court's entire analysis was flawed.

Reasonable time, place and manner restrictions also apply to conduct meant to be communicative, as the plaintiff contends was the behavior of its photographer in attempting to take pictures inside the polling place. See Clark v. Community for Creative Non-violence, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984), upholding a National Park Service ban on sleeping in

national parks. Demonstrators seeking to bring attention to the plight of the homeless tried to stage a sleep-in in the park across from the White House. Cf. U.S. v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), upholding a conviction for draft card burning; and Members of the City Council v. Taxpayers for Vincent, supra, in which the court observed that there was little substantive difference between the O'Brien test for regulations affecting communicative behavior and the test for reasonable time, place and manner regulations.

While a regulation must be narrowly drawn to serve a legitimate state interest, the U.S. Supreme Court has expressly rejected the idea that it must be the least restrictive means of achieving that interest. Clark v. Community for Creative Non-violence, 468 U.S. 288, 299, 104 S.Ct. 3065, 3072, 82 L.Ed.2d 221 (1984).

A reasonable content-neutral regulation may prohibit all first amendment activity. U.S. Postal Service v. Council of Greenburgh, 453 U.S. 114, 131-132, 101 S.Ct. 2656, 69 L.Ed.2d 517 (1981).

"The nature of the place, the pattern of normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 2304, 33 L.Ed.2d 222 (1972).

In addition, the U.S. Supreme Court has said that time, place and manner regulations will be reasonable if they "do not

unreasonably limit alternative avenues of communication." City of Renton v. Playtime Theaters, Inc., 106 S.Ct. at 978. Thus, an alternative that allowed the exercise of the right of anti-abortionists to picket a private medical center on a site not on the public sidewalk directly in front of the building but nearby was constitutional as a reasonable time, place and manner restriction. Bering v. Share, 721 P.2d 918 (Wash. 1986).

In particular, the state may regulate expressive behavior when it poses a reasonable threat of disruption. "[E]xpressive activity [on a public sidewalk outside a school] may be prohibited if it materially disrupts classwork or involves substantial disorder or invasion of the rights of others." Grayned v. City of Rockford, 408 U.S. at 118, 92 S.Ct. at 2304. See also Heffron v. Society for Krishna Consciousness, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981), (first amendment behavior, here face-to-face solicitation in a public fairground, that impedes traffic flow may be restricted to a designated place); Bering v. Share, supra.

Other examples of reasonable time, place and manner restrictions cited by the U.S. Supreme Court and other courts include:

-- permitting only one parade at a time on public streets. Grayned v. City of Rockford, supra.

-- prohibiting parades or demonstrations during rush hour traffic. Id.

-- requiring that loudspeakers used in demonstrations be turned down. Id.

-- the banning of parading or assembling on the grounds of the U.S. Supreme Court complex. U.S. v. Wall, 521 A.2d 12140 (D.C. App. 1987). Cf. U.S. v. Grace, supra, in which the U.S. Supreme Court held that government-owned sidewalks running along city streets must be considered public forums, a status which the government could not nullify by legislative edict (and upholding the right to picket on those sidewalks).

Let us assume, for the moment, that the entire protected zone, regardless of whether it falls inside or outside a building, embraces a traditional public forum. Even then, the statute is a reasonable time, place and manner restriction.

The statute before and after its amendment was clearly content neutral. In fact, it does not address the issue of expression at all, but simply limits access to the polls to a specific class of people. Voters and those in line to vote are not prohibited by the statute from exercising their first amendment rights.

The majority of the district court panel, however, concluded without analysis that the statute was not content neutral because its operation affected first amendment rights. Judge Schoonover, writing in dissent, recognized this mistake and

rightly urged the majority to adopt a time, place and manner analysis. Appendix 1, p. 10-11. Under this analysis he found, as we argue, that the statute is constitutional.

The statute certainly serves at least a legitimate state interest. See Brown v. Hartlage, 1 456 U.S. 45, 102 S.Ct 1523, 71 L.Ed.2d 732 (1982); Clean-up 84 v. Heinrich, 759 F.2d 1511 (11th Cir. 1985). And the plaintiff conceded -- and the district court so found -- that the state had a compelling interest in "protection of the orderly process of voting and the secrecy of the ballot". Appendix 1, p. 5.

The statute clearly also is limited as to time, place and manner. It concerns only specifically designated places, the polls; at a particular time, election day; and in a particular manner.

It is narrowly tailored in that its reach is minimal. Fifty feet is in reality a slight distance to be excluded from the polling room (or the polling place, as the statute previously read). It is only 16.66 feet, or about 17 steps. Other, greater distances around the polls affecting the exercise of first amendment rights have been held unconstitutional. See Florida Committee for Liability Reform v. McMillan, 682 F.Supp. 1536 (M.D. Fla. 1988), invalidating s. 103.031(3), Fla.Stat., prohibiting the solicitation of voters within 150 feet of the polling place. However, 50 feet is reasonable in light of the purpose to be served: the prevention of disruption of the voting

process, preventing vote fraud and the protection of the secrecy of the ballot. One court has opined that a similar distance -- 25 feet -- in a Georgia statute enacted for the same purpose is constitutional. See NBC v. Cleland, case no. 1:88-Civ-320-RHH (N.D. Ga. March 2, 1988), opinion attached as appendix 2.

The district court, however, found that the limitations in the statute were supported only by "unsubstantiated fears" and that therefore the statute was unreasonable. The only testimony the district court had to rely on came from the plaintiff's photographer, the plaintiff's executive editor, defendant Earle and a pollworker. The photographer testified that he wasn't disruptive. The editor testified that he had been inside polling rooms during elections and that he hadn't been disruptive, either.

The pollworker testified that several media representatives on that September 1986 election day had crowded against the windows to take pictures of Frank Mann, Democratic candidate for lieutenant governor. She testified that they were disruptive. She also expressed concern, as did Ms. Earle, about nonvoters having free access to the polling room, that she would not be able to do her job properly and that confusion might result.

Admittedly, this is not as substantial a record as one might ask for to support the constitutionality of a statute. However, there is ample factual support for the statute in the American historical experience with elections and vote fraud.

A version of the statute at issue has been in effect since 1895. See ss. 39, 42, Ch. 4328, Laws of Florida, 1895. See appendix 3 for text. The ills it was intended to remedy were more prevalent in that day. In the 19th century, elections had frequently been voided for fraud partly because free public access was allowed to the polls:

> For example, in Corode v. Foster, 2 Bart. 600, a return was rejected upon proof that a hat and cigar box were placed in or near the window, through which the votes were received; that persons other than members of the board were permitted in the room where the votes were received, and were near the boxes, and were passing in and out at pleasure during the day, that there was great noise and confusion in the room; and the members of the board drank to intoxication; that challenges were disregarded; and when the votes were counted there were six ballots in the box over and above the number of manes on the tally list.

George W. McCrary, McCrary On Elections (3d ed. 1887), s. 540, p. 362, emphasis added. McCrary wrote that the admission of persons other than pollworkers was not of itself enough to invalidate an election, absent proof of misconduct, "but the admission of such persons is decidedly improper, especially if the persons admitted being the partisans of any particular candidate or ticket", and the fact they had been admitted was circumstantial evidence to invalidate the return. McCrary, McCrary On Elections, (4th Ed. 1897) s. 580.

Vote fraud has been so extensive in American history that it has tainted presidential elections. The 1876 race between victorious Republican Rutherford B. Hayes and losing Democrat Samuel Tilden was marred by widespread allegations of vote fraud. Lloyd Robinson, The Stolen Election - Hayes versus Tilden 1876 (1968). In Florida, accusatory fingers were leveled mainly at the county and state canvassing committees. However, in Baker County, returns were invalidated because a voter charged he had been intimidated, and there were rumors of voter intimidation at the polls throughout the county. Proceedings of the Electoral Commission and of Congress Relative to the Presidential Electoral Votes Cast December 6, 1876, (1877), pp. 35-39; Elbert Ewing, History and Law of the Hayes-Tilden Contest Before the Electoral Commission: The Florida Case (1910), pp. 172-174.

In fact, in our past it was not unknown for partisans of one candidate to stand in the door of the polling place and refuse admittance to voters seeking to vote for a rival. See McCrary (4th ed.), ss. 553, 555, pp. 409-410. McCrary reports one case in which the brother of one of the candidates was the local militia commander. On election day, the commander called out his troops, who surrounded the courthouse, where the election was being held. "Three soldiers stood at the door of the court-house, and refused to admit a voter because he declared he would vote for contestant." Id., at 410. See also Robinson, p. 124, concerning the 1876 Hayes-Tilden race: "[L]ocal bosses stood by

the ballot boxes to dictate the choice of candidates; votes for the wrong man were torn up and thrown away."

The potential for fraud has also been found in the admission to the polls of those who ostensibly wish to help voters but "who render illegal assistance by accompanying the voter into the polling booth and pulling the levers." Illegal Election Practices in Philadelphia, 106 U.Penn.L.Rev. 279 (Dec. 1956). See also C. Smith, Voting and Elections Laws (1960), pp.42-45.

Vote fraud and disruption at the polls is not something out of our ancient past but also has a more recent history. In 1926 the Chicago Bar Association monitored local elections and reported widespread abuse:

> . . . in many places the precinct election officials were brow beaten and intimidated, sometimes even with the show of firearms; also that open soliciting of votes took place in the immediate neighborhood of the polling places and frequently inside the polling place itself; that in several instances the lawyer on duty saw money passed in the polling place from precinct politicians to voters; and that in general the amount of intimidation and unlawful influencing of voters, a well as the amount of corrupt and flagrantly unlawful counting of ballots, is much beyond what is generally known by the public.

Service at the Front by Bar Association, 13 A.B.A. Journal 92, 95 (Feb. 1927).

Thus, the historical specter of vote fraud and disruption at the polls fully justifies restrictions on general access to their proximity. The fact that we have shown no recent examples of these abuses does not undermine the compelling historical rationale for strict control. If anything, it indicates that the controls have done their job by reducing or eliminating the possibility of fraud and enhancing respect for the impartiality of the conduct of elections in the bargain. Elections fraud is just another species of cheating, and we connot say that human nature has changed so much in the last 50-100 years that we are immune to its temptations.

In addition, the private rights of individuals to cast their ballots in secrecy is at stake. In this sense, two types of private rights are in collision: the rights of some people to free expression and the rights of others to ballot secrecy and to privacy.

> No judicial task is more difficult than balancing the constitutional rights and freedoms of citizens and freedoms of their fellow citizens. In accepting this delicate task, we recognize that there can be few absolutes under the constitutions of a state or country boasting diverse people.

Bering v. Share, 721 P.2d at 928. Thus, there can be no absolute right of access to the polling room or its protected zone. The Legislature can reasonably limit such access only to those seeking to cast their ballots in secrecy.

Finally, the statute is reasonable because it does "not unreasonably limit alternative avenues of communication." City of Renton v. Playtime Theatres, Inc, 106 S.Ct. at 978. The plaintiff's reporters may still interview and photograph voters from outside the protected zone. Information from poll workers and other officials is available by personal interview outside the zone or by telephone. Indeed, the plaintiff is not significantly limited in its ability to report the news, the progress of the election. It is not essential for reporters to be on the scene of events as they cover. In fact that is hardly ever the case.

Therefore, as urged by Judge Schoonover in his dissent, the district court should have found the statute constitutional as a reasonable time, place and manner restriction -- as it affects a public forum.

We urge this court to adopt the same conclusion.

II.

THE POLLING ROOM AND PROTECTED ZONE SURROUNDING IT INSIDE PUBLIC OR PRIVATE BUILDINGS IS NOT A PUBLIC FORUM, AND THE RIGHT OF PUBLIC ACCESS TO EXERCISE FIRST AMENDMENT RIGHTS MAY BE LIMITED.

As we mentioned above, the U.S. Supreme Court recognizes three types of first amendment forums, the traditional public forum, the created or designated public forum, and the nonpublic forum.

The interior of the polling room and the 50-foot protected zone surrounding it within a building is a nonpublic forum, and the state may limit access to it even to those wishing to exercise first amendment rights.

The state may designate a public forum on government property where no traditional public forum for unlimited expression existed before. Perry Education Association v. Perry Local Educators' Association, 460 U.S. at 45-46, 103 S.Ct. 955. When the state so designates an open public forum on government property, the same rules apply to it as to traditional public forums. Id.

Furthermore, just as the state may designate a forum on government property, it may equally undesignate the forum. Id. 460 U.S. at 45, 103 S.Ct. at 955. [8]/

This is so because the first amendment does not guarantee access to property simply because it is owned by government. Id., 460 U.S. at 46, 103 S.Ct. 955. The state, like any private owner, "has power to preserve the property under its control for the use for which it is lawfully dedicated." Ibid. See also Greer v. Spock, supra; Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (a university does not have to grant free access to all its grounds and buildings, although for

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[8]/Compare U.S. v. Grace, supra, in which the Supreme Court said that a traditional public forum may not be converted into a nonpublic forum by government edict.

students it has characteristics of a public forum); Hazelwood School District v. Kuhlmeier, supra.

Moreover, allowing selected access to government property does not create a public forum. U.S. v. Bjerke, 796 F.2d 643 (3d Cir. 1986). And an open forum is not created on public property merely by governmental inaction or acquiescence. Hazelwood School District v. Kuhlmeier, 108 S.Ct. at 568; Cornelius v. NAACP Legal Defense and Education Fund, 473 U.S. at 802, 105 S.Ct. at 3449. Rather, such public forums are created only by a specific policy or practice of government. Ibid. The state must abandon any claim of special interest in restricting speech in the forum. Greer v. Spock, 424 U.S. at 837, 96 S.Ct. at 1217.

Thus, the government has the right to control access to the federal workplace, and federal buildings are not public forums even if the public is allowed some access to them. Cornelius, supra. See also U.S. v. Bjerke, supra. (the sidewalks adjacent to postal buildings and away from public streets were not public forums); Monterey County Dem. Central Com. v. U.S. Postal Service, 812 F.2d 1194 (9th Cir. 1987) (reaching the same conclusion as the court in Bjerke); Hale v. Dept. of Energy, 806 F.2d 910 (9th Cir. 1986) (a road leading across government property to the main gate at a nuclear testing facility was not a public forum although the general public was allowed access along it from the main road to the gate); Grattan v. Board of school

Com'rs of Baltimore City, 805 F.2d 1160 (4th cir. 1986) (a school parking lot was not a public forum).

The U.S. Supreme Court has thus identified a third type of forum, which it has called the nonpublic forum. This forum lies on public property that is not by tradition or designation a forum for public communication, and it is governed by different standards. Perry Education Association v. Perry Local Educators' Association, 460 U.S. at 46. 103 S.Ct. at 955.

> Even protected speech is not equally permissible in all places and at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or the disruption that might be caused by the speaker's activities.

Cornelius v. NAACP Legal Defense and Education fund, 473 U.S.at 799-800, 105 S.Ct. at 3447. Thus, the court said, the extent of government control depends on the nature of the relevant forum. Ibid.

Controls on access to a nonpublic forum need only to be reasonable in light of the purpose of the forum, as long as they are viewpoint neutral. Cornelius, 105 S.Ct. at 3451. As the court said in Perry, 460 U.S. at 46, 103 S.Ct. at 955:

> In addition to time, place and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.

Thus, for example, nonpublic forums may be limited on the basis of subject matter, speaker identity or the nature of the communication. Perry, 460 U.S. at 49, 103 S.Ct. 959. Distinctions may be impermissible in public forums but are inherent and inescapable in limiting a nonpublic forum to activities compatible with the intended purpose of the property, and are constitutionally acceptable if reasonable in light of the purpose to be served. Ibid.

In determining whether a regulation is reasonable, the court must look to the purpose for which the property is dedicated. Greer v. Spock, 424 U.S. at 838, 96 S.Ct. at 1217.

We have found no case authority addressing the issue whether polling places are public of nonpublic forums.

However, the opinion of the Maine Supreme Court in State v. Chiapetta, 513 A.2d 831 (Maine 1986), is instructive. In this case, Chiapetta was prosecuted for disrupting a voter registration office. On election day, Chiapetta, a motel owner, accompanied one of his tenants to the voter registration office to assist the tenant in registering to vote. At the office Chiapetta refused to cooperate with registration officials, became disruptive and harangued the registrar in a loud voice. His outburst brought registration to a standstill. He was repeatedly asked to leave and when he refused, he was arrested.

The court upheld Chiapetta's trespass conviction and held that the voter registration office was a nonpublic forum. The

court said that the overriding governmental interest in maintaining an orderly setting for prompt and efficient screening and registration of voters during the hours polls were open outweighed any constitutional right Chiapetta may have had to express his displeasure with the registration process.

Under the principles set out in the discussion above, the Chiapetta court's conclusion was correct. The voter registration office was a nonpublic forum. It was government property open for a specific purpose: the registration of voters. It was not a public forum simply because access was granted to the public. Rather, access was granted for limited purposes. First amendment activities that disrupted the intended governmental activities could be prohibited, even punished.

In the same way, polling places in public buildings are also nonpublic forums, open for the limited purpose of casting ballots in an election. As discussed in point I, the restriction of access only to voters or those waiting to vote is reasonable because permitting the public freely to wander or loiter at the polls invites disruption, creates the potential for fraud and threatens voters' rights to privacy and the secrecy of the ballot.[9]/

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[9]/In cases where the principle function of the property would be disrupted by expressive activity, the Supreme Court is particularly reluctant to hold that the government intended to designate a public forum. Cornelius, 473 U.S. at 804, 105 S.Ct. 3449.

If the public building where a polling place is established has been opened as a designated public forum, its designation as a polling place acts to withdraw that open forum status for the duration of election day.

Polling places inside private buildings also are nonpublic forums. As previously discussed, private property is not generally regarded as a public forum. However, it can be a public forum under limited circumstances when it takes on attributes of government. Marsh v.Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946); and Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603 (1968). It would appear that the designation of private property as a polling place would constitute a sufficient attribute of government to convert at least portions of private property like a church, community hall or condominium lobby into a nonpublic forum on election day.

Thus, that part of the protected zone falling inside a building -- either public or private -- creates a special nonpublic forum that reasonably can be limited only to voters and those waiting in line to vote. The district court erred in assuming that the statute was overbroad because it affects the first amendment rights of people inside the building on otherwise lawful business who pass through the zone. In fact, those access rights can constitutionally be limited.

The statute is constitutional.

III.

THE DISTRICT COURT SHOULD HAVE GIVEN A LIMITING, SAVING INTERPRETATION TO THE STATUTE.

Assuming that s. 101.121 is unconstitutional as it applies to public forums outside polling places, the district court should have provided a limiting interpretation of the statute to save it from being held totally unconstitutional.

The district court should have held the statute unconstitutional only as it applied to traditional public forums.

The district court was too quick to assume that the protected zone would fall on a traditional public forum such as a sidewalk, a street or a park. There was no evidence in the record that this would happen with great frequency. In fact, because of the wide variation in the types of buildings holding polling places, see Clean-up '84 v. Heinrich, 582 F.Supp. 125 (M.D. Fla. 1984), such a conclusion can only be made after examining each premises one at a time. The threat of an overbroad effect of the statute thus is substantially reduced, making it much less susceptible to facial attack. See e.g. Board of Airport Commissioners of Los Angeles v. Jew for Jesus, supra.

The U.S. Supreme Court has held that limiting, saving constructions such as we propose are within the interpretive powers of the courts. See Boos v. Barry, 108 S.Ct. 1157, 1169 (1988).

Such a limiting construction was appropriate here because of the varied geography of polling places and the fact (especially in light of the amendment withdrawing the protected zone close around the polling room) that the main part of the zone will lie within a building, a nonpublic forum.

IV.

THE STATUTE IS CONSTITUTIONAL AS APPLIED TO THE PLAINTIFF.

As far as we are aware, this is the first attempt by representatives of the press to assert a constitutional right of access to the polling room during an election.

The plaintiff, the publisher of a daily newspaper, argued in the trial and district courts that it (through its reporters and photographers) has a constitutional right to access to the polling room to gather news. The trial court held that it did not have such a right. The district court did not address the issue, instead holding the statute to be facially unconstitutional.

We believe that the plaintiff has the burden of persuasion on this issue, and therefore we will not address it in depth at this time. We reserve the right to discuss the question more fully in our reply brief, if the plaintiff chooses to raise it.

We simply note that the U.S. Supreme Court has held that the media has no constitutional, special right of access

different than that afforded the general public. Branzburg v. Hayes, 408 U.S. 665, 684, 92 S.Ct. 2646, 2658, 33 L.Ed.2d 626 (1972). See also Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). In this case the court was unable to agree on a majority opinion. However, six justices agreed that a criminal trial must be open to the public. And see Pell v. Procunier, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974), in which the court held that journalists may be barred from direct fact-to-face contact with prison inmates.

Here, since the general public has no constitutional right of access under the first amendment to the nonpublic forum of the polling room and surrounding protected zone, neither do journalists of the plaintiff.

CONCLUSION

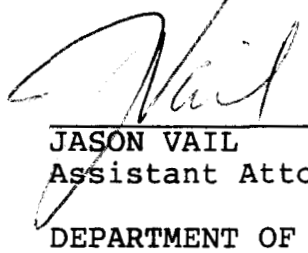
We submit that s. 101.121, limiting access to a protected zone around the polling room, is a reasonable time, place and manner regulation of first amendment rights on election day. When the zone falls inside a building, it constitutes a nonpublic forum that may be reserved for its special purposes, and from which the general public may be barred.

Since the general public has no right of access, the plaintiff has none either.

Therefore, we request this court to reverse the decision of the district court of appeal and find s. 101.121, as amended, to be constitutional.

Respectfully submitted:

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



JASON VAIL
Assistant Attorney General

DEPARTMENT OF LEGAL AFFAIRS
The Capitol, Suite 1501
Tallahassee, Florida 32399-1050
(904) 488-1573

COUNSEL FOR APPELLANT FIRESTONE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **INITIAL BRIEF OF APPELLANT FIRESTONE** has been furnished to **STEVEN CARTA, ESQUIRE**, Simpson, Henderson, Savage & Carta, Post Office Box 1906, Fort Myers, Florida 33902, Counsel for Appellee; **TERRENCE P. LENICK, ESQUIRE**, Post Office Box 1480, Fort Myers, Florida 33902, Counsel for Appellee Earle; and to **BARRY RICHARD, ESQUIRE**, Post Office Drawer 1838, Tallahassee, Florida 32302, Counsel for Appellee Wanicka; **FLORENCE SNYDER RIVAS, ESQUIRE**, Post Office Box 3403, Palm Beach, Florida 33480; **GREGG THOMAS, ESQUIRE**, Post Office Box 1288, Tampa, Florida 33601; **WILSON W. WRIGHT, ESQUIRE**, 217 S. Adams Street, Tallahassee, Florida 32301; by U. S. Mail this 9th day of August 1988.

JASON VAIL
Assistant Attorney General