IN THE FLORIDA SUPREME COURT

GEORGE FIRESTONE, etc.,

Appellant,

vs.

CASE NO. 72,785

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

Appellee.

ENID EARLE, etc.,

Appellant,

vs.

CASE NO. 72,814

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

Appellee.

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL

INITIAL BRIEF OF APPELLANT, ENID EARLE, SUPERVISOR OF ELECTIONS FOR LEE COUNTY, FLORIDA

Respectfully submitted,

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PRELIMINARY STATEMENT

Appellant, ENID EARLE, was the Defendant in the trial court and the Appellee in the District Court of Appeal. At the beginning of this action, she was the Supervisor of Elections in and for Lee County, but she no longer serves in that capacity. B. J. Nuckolls now serves as the Supervisor of Elections.

News-Press Publishing Co., the Appellee in this court, was the Plaintiff in the trial court and the Appellant in this District Court of Appeal.

STATEMENT OF THE CASE

The Statement of the Case submitted by the Appellant FIRESTONE in Case No. 72,789 is incorporated by reference and accepted by this Appellant as the Statement of the Case herein.

The statute which the Second District Court of Appeals found unconstitutional was Section 101.121, Florida Statutes (1985) because this was the statute in effect at the time of the initial trial decision. The statute was amended effective January 1, 1988 by substituting the word "polling room" for "polling place". However, the Second District Court of Appeals opined that "this latest change does not affect the issues raised herein". News-Press Publishing Company, Inc., et al v. George Firestone, et al, Case No. 87-1504, p.3, footnote 1 (1987).

1985 Version of §101.121, Florida Statutes	Current Version of §101.121 Florida Statutes
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**.	Persons allowed in **polling rooms**. - 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** 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 room** 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 room**.

STATEMENT OF THE FACTS

The Statement of the Case submitted by the Appellant FIRESTONE in Case No. 72,789 is incorporated by reference and accepted by this Appellant as the Statement of the Case herein.

SUMMARY OF ARGUMENTS

The Second District Court of Appeals' decision turned upon the overbreadth issue. Appellant FIRESTONE's first three (3) arguments extensively address this issue and, for briefness, this Appellant would ask this Court to incorporate that Appellant's arguments as her own. Additionally, this Appellant agrees with the analysis submitted by the dissent, Judge Schoonover, that "Section 101.121 regulates conduct and does not attempt to restrict First Amendment rights." News-Press Publishing Company, Inc. v. George Firestone, et al, Case No. 87-1504 (Fla. 2nd DCA, May 6, 1988). Under such circumstances, "the constitutionality of the statute must be considered with less scrutiny than would be applied to a statute specifically directed at First Amendment rights." Id. The first argument will address the overbreadth issue.

The second argument is one which this attorney believes precedes the first but unfortunately appears to have been overlooked. What right of access does the public and, therefore, the press, have to the polling room or within fifty (50) feet of it? If the public has no right to be in the polling room, does the press now have a special right? After all, this whole case arose because a News-Press photographer could not take a picture of a lieutenant-governor candidate voting in the polling room. Was this truly to inform the public or was it really to sell newspapers?

The second argument will address the issue of the newspaper photographer's right to have access into a polling room. If the newspaper's photographer has no right of access to the polling room, then he has no right to take pictures, regardless of whether or not the statute is content-neutral.

FIRST ARGUMENT

THE DISTRICT COURT OF APPEALS ERRED BY DECIDING THAT A CONTENT-NEUTRAL/CONDUCT REGULATING STATUTE, TO-WIT: SECTION 101.121, FLA.STAT. (1985), IS UNCONSTITUTIONALLY OVERBROAD.

WHERE A STATUTE WHICH HAS EXISTED SINCE 1895 RESTRICTS ACCESS TO THE POLLING ROOM AND A SMALL AREA AROUND IT AND DOES NOT EXPRESSLY REGULATE A FIRST AMENDMENT ACTIVITY AS DID THE SOLICITATION STATUTE IN CLEAN-UP 84 V. HEINRICH, INFRA, THEN SUCH A STATUTE IS CONDUCT REGULATING AND CONTENT-NEUTRAL. IN SUCH INSTANCE, THE FOUR-PRONG TEST OF UNITED STATES V. O'BRIEN, INFRA, IS APPLIED AND AS STATED IN BROADWICK V. OKLAHOMA, INFRA, THE OVERBREADTH MUST BE REAL AND SUBSTANTIAL. SUCH A CONTENT-NEUTRAL/CONDUCT REGULATING STATUTE IS VIEWED WITH LESS SCRUTINY FOR ITS INCIDENTAL EFFECT UPON FIRST AMENDMENT RIGHTS AS COMPARED TO A CONTENT-BASED REGULATION WHICH DIRECTLY AFFECTS THE FIRST AMENDMENT RIGHTS. IN THE INSTANCE CASE, THE INCIDENTAL EFFECT THAT SUCH A STATUTE HAS ON NEWS GATHERING IS MINIMAL AND THE PROTECTION OF THE SECRECY OF THE BALLOT, PREVENTION OF VOTER FRAUD, AND MAINTENANCE OF DECORUM IN THE VOTING PLACE FAR OUTWEIGH ANY INCIDENTAL EFFECT.

I. THE LEGISLATIVE HISTORY OF SECTION 101.121, FLORIDA STATUTES (1985).

Section 101.121, Fla.Stat. (1985) has a legislative history which dates back to 1895. Section 39, Ch. 4328, Laws of Florida (1895) states as follows:

> Sec. 39. No person shall be permitted under any pretext whatever to come within fifteen (15) feet of any door or window of any polling room from the opening of the polls until completion of the count of the ballots and certificates of the returns, except as herein provided.

The most recent precursor to the challenged statute was Section 101.121, Fla.Stat. (1977), which states the following:

> 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 15 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.

In 1984, the Florida Legislature adopted a corollary statute, Section 104.36, Fla.Stat. (1984), which strictly prohibited any **solicitation** within one hundred (100) yards, i.e. 300 feet, of a polling place. Note that such a statute is **not** content-neutral. In Clean-Up 84 v. Heinrich, 759 F.2d 1511, 1514 (9th Circuit, 1984), the 11th Circuit Court of Appeals found that Section 104.36, Fla.Stat. (1984) violated Plaintiff's freedom of speech because it not only explicitly regulated, it prohibited, his right to solicit signatures on a petition, a First Amendment right.

In 1985, and as a direct result of the 11th Circuit Court of Appeals finding that Section 104.36, Fla.Stat. (1984) was unconstitutional, the Florida Legislature did not amend Section 104.36 but rather, following the guidelines of Clean-Up 84 v. Heinrich, supra, amended Section 101.121, Fla.Stat. (1985) as follows:

> Section 101.121 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 or 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.** (Emphasis added).

The emphasized portions are the legislative changes. The added sentence is the direct result of the 11th Circuit Court of Appeals opinion that the 100-yard radius rule "encompasses some sites, including private homes and businesses, where the gathering of signatures could impose no threat to the voting process". Id. at 1513.

In 1987, the restricted area of conduct was reduced even further by replacing the term "polling place" with the term "polling room". Therefore,

the zone which completely restricted any access became 50 feet from the polling room.

The result of Clean-Up 84 v. Heinrich, supra, was the creation of a three-zone system:

1. FIRST ZONE (100 feet or more).

   There are no restrictions or regulations.

2. SECOND ZONE (50 feet to 100 feet) - §182.031, Fla.Stat. (1985).

   Section 102.031, as amended in 1985, created a "notice" zone. Essentially, so long as notice is given to the Supervisor of Elections, any solicitation may occur.

3. THIRD ZONE (Within 50 feet of the polling room and the polling room itself) - §101.121, Fla.Stat. (1987).

   Within this zone, **as has occurred since 1895**, only the following people are explicitly allowed:

   INSPECTORS,
   CLERKS,
   SUPERVISOR OF ELECTIONS OR HIS DEPUTY,
   POLL WATCHERS, and
   SHERIFF (only with permission).

   The only true change since 1895 has been the extension of the area from fifteen (15) feet to fifty (50) feet and the reduction of the area from the "polling place" to "polling room".

The Appellee is attacking this third zone claiming that the zone is overbroad.

II. THE STATUTE REGULATING CONDUCT.

The basic distinction between the Clean-Up 84 case and this case is that the former case involved the regulation of First Amendment rights, to-wit: it prohibited any solicitation within 100 yards of a polling place. This statute, Section 104.36, Fla.Stat. (1984), was ruled unconstitutional both at the district court level and at the appellate level because of its overbreadth. The statute at issue herein does not directly regulate a First Amendment right.

It never has. What is interesting to note is that the Federal District Court in ruling the solicitation statute unconstitutional noted that Section 101.121 was an example of a statute designed to keep order at the polls and noted that the plaintiff in that case did not challenge it. Clean-Up 84 v. Heinrich, 590 F.Supp. 928, 931 (M. D. Florida, 1984).

In City Council v. Taxpayers for Vincent, 466 U.S. 789, 80 L.Ed.2d 772, 104 S.Ct. 2118 (1984), the Supreme Court of the United States cited with authority United States v. O'Brien, 391 U.S. 367, 20 L.Ed.2d 672, 88 S.Ct. 1673 (1968), for the test in "reviewing a viewpoint neutral regulation" as follows:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the government, if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.
>
> Id. at 787.

Additionally, the United States Supreme Court has stated that "overbreadth scrutiny has generally been somewhat less rigid in the context of statutes regulating conduct in the shadow of the First Amendment, but doing so in a neutral, non-censorial manner". Broadrick v. Oklahoma, 413 U.S. 601, 614, 37 L.Ed.2d 830, 841, 93 S.Ct. 2908 (1973). Hence, where the statute regulates conduct and only incidentally burdens the First Amendment right, then the statute will be considered with less scrutiny than one which directly affects a First Amendment right. This is the basic distinction between the solicitation statute (§104.36, Fla.Stat.) ruled unconstitutional in Clean-Up 84 v. Heinrich, and the statute (§101.121, Fla.Stat.) at bar.

Here, unlike the solicitation statute in the Clean-Up 84 case, this statute, which has been in existence since 1895, was regulating the activity in the polling room and a small area outside the polling room so as to maintain

the decorum and orderliness of the polling room, prevent fraud, and maintain the secrecy of the ballot. Thus, the four-prong test of O'Brien is the appropriate test to apply and not the content-based statute test of Clean-Up 84.

III. APPLYING O'BRIEN.

The four-prong test of O'Brien is as follows:

1. The government regulation is within the constitutional power of the government;

2. The government regulation furthers an important or substantial government interest;

3. The government interest is unrelated to the suppression of free expression; and

4. The incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

As to the first factor, there is no question that regulation of the polling room and a small area outside of the polling room is within the constitutional power of the government.

As to whether or not the regulation "furthers an important or substantial government interest", the following points need to be made about the polling room:

1. The State's interest involves the right to vote. Such right has been enshrined in the Constitution.[1]

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[1] **See U.S. Const. art. I, §2,** cl. I (providing that the House of Representatives be chosen "by the People"); id. art. II, §I, cl. 3 (electoral college); **id. art. I, §4, cl. I (providing for regulation of time, place, and manner of holding elections);** id. amend. XV ("The right of citizens . . . to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude."); id. amend. XVII (popular election of senators); id. amend. XIX (women's suffrage); id. amend. XXIV (prohibition of poll taxes); id. amend. XXVI (voting age).

2. The right to vote is a fundamental right.[2]

3. The State has an interest in protecting this right by providing voting places that are safe and accessible.[3]

4. The State has an interest in maintaining the secrecy of the ballot. Feld v. Prewitt, 118 S.W.2d 700 (KY 1938). Additionally, the right to a secret ballot is a constitutional privilege. McDonald v. Miller, 90 So.2d 124 (Fla. 1956).

5. The State has a significant interest in protecting the orderly function of the election process and ensure its voters that they may exercise their franchise without distraction, interruption or harassment. Clean-Up 84 v. Heinrich, 759 F.2d 1511, 1514 (9th Circuit, 1984).

6. The State has a legitimate interest in preserving the integrity of the electoral process. Brown v. Hartlage, 456 U.S. 45, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982).

Finally, it should be noted that the majority opinion has stated that **all parties, including the Appellee herein,** agreed "that protection of the orderly process of voting and the secrecy of the ballot is a compelling governmental interest". News-Press Publishing Company, Inc., et al v. George Firestone, et al, Case No. 87-1504, p.5. Therefore, it cannot be doubted that the government's regulation of access furthers an important or substantial interest.

The next factor in the four-prong O'Brien test is whether or not this important or substantial governmental interest is unrelated to the suppression

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2 **See e.g., Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665, 670 (1966); Reynolds v. Sims, 377 U.S. 533, 562 (1964).**

3 **See**, e.g., Brown v. Hartlage, 456 U.S. 45, 52 (1982), Bell v. Southwell, 376 F.2d 659, 660-61, 665 (5th Cir. 1967) (setting aside state election and ordering a special election where election officials segregated voting lists and booths and where the police "allowed a large crowd of white males to gather near the polls thus intimidating Negroes from voting"); cf. NLRB v. Carroll Contracting & Ready-Mix, Inc., 636 F.2d 111, 113 (5th Cir. Feb. 1981) (Unit B) (setting aside union election because of electioneering).

of free expression, or in this instance, the First Amendment right to gather news. Unlike the solicitation statute in Clean-Up 84, which directly prohibited a First Amendment right, the governmental interest of maintaining the secrecy of the ballot, preventing fraud, and maintaining the decorum of the polling room and the immediate surrounding area is not only an important governmental interest, but a substantial governmental interest that is completely unrelated to the Appellee's right to gather news. The supposed suppression of the Appellee's right to gather news, which in this case involved the picture taking of a candidate, is merely incidental. It certainly was not the primary intent of the statute when adopted in 1895.

The fourth factor is that the incidental restriction on alleged First Amendment freedoms is "no greater than is essential to the furtherance of that interest". This involves the traditional time, place and manner of restrictions. As to this particular issue, we beg to differ with the majority's opinion as to the effect of this statute upon the public forums named by the majority, and would point out that "where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep". Broadrick v. Oklahoma, 413 U.S. 601, 615, 37 L.Ed.2d. 830, 842, 93 S.Ct 2908 (1973). So the inquiry revolves around the supposed real and substantial impediment to the Appellee's First Amendment right in the polling room or within fifty (50) feet of it. The District Court of Appeals stated that "this restriction necessary precludes the presence of many who in no way impede the orderly process of voting or the secrecy of the ballot". News-Press Publishing Company, Inc., et al v. George Firestone, et al, Case No. 87-1504, p.7. This is simply not the case.

As has been amply stated by Appellant FIRESTONE in his brief, one of the main purposes of prohibiting the public from access to the polls is to prevent the varieties of voter fraud which occurred in the 19th century. See Appellant FIRESTONE's brief, p.16-19. Hence, historically vote fraud and disruption at the polls are ample reasons for prohibiting the general public from coming into the polling room or within 50 feet of it. The privacy of the vote includes the right to be free from intimidation and harrassment. The regulation of such conduct, i.e. access to the polling room and within the immediate area surrounding it, justifies any incidental First Amendment right restrictions.

Additionally, the court stated that the aged or infirmed voters are prohibited. This simply is not true. See Section 97.061, Florida Statutes (1984) - Special Registration for Electors Requiring Assistance. The Court also pointed out that exit poll takers are prohibited by the statute. This is true, but unlike the solicitation statute, it is an incidental restriction to the regulation of nonsolicitation conduct and is reasonable considering the small 50 foot area involved. See Exit Polls and the First Amendment, 92 Harvard Law Review, 1927.

The Court seems to emphasize that a sidewalk is a public forum. However, sidewalks have always been "subject to reasonable time, place and manner restrictions". See United States v. Grace, 461 U.S. 171, 183, 75 L.Ed.2d. 736, 748 (1983). The Appellant FIRESTONE's brief has numerous citations wherein the use of public sidewalks or streets were subject to reasonable time, place or manner restrictions which may incidentally affect First Amendment rights. See Appellant FIRESTONE's brief, p.12-14.

Finally, to state that such a content-neutral/conduct regulating statute is a "real and substantial" threat to First Amendment rights because a sidewalk or public street could affect, is as Judge Schoonover implies, an

interpretation "in a manner that would lead to a ridiculous result". News-Press Publishing Company, Inc., et al v. George Firestone, et al, Case No. 87-1504, p.12; Drury v. Harding, 461 So.2d 104 (Fla. 1984). Stated differently, at what point in time, place, or manner does a constitutional conduct regulating of access begin? 50 feet? 25 feet? 10 feet? The polling room? or No restrictions at all?

IV. THE COMMONALITY OF 50-FOOT AND 100-FOOT ZONES IN OTHER STATES.

Prohibitions on some or all activity in the area immediately surrounding the polling places are **not** uncommon. Statutes in Florida and other states have imposed such restrictions and have been upheld.

A. 50 FOOT REGULATORY ZONES.

In particular, a fifty (50) foot regulatory zone around a polling place is **not** unusual. Arizona has had such a law since 1901. City of Phoenix v. Superior Court, 419 P.2d 49, 50 (Ariz. 1966). This law states the following:

> "A. The board of supervisors shall furnish with the ballots for each polling place, three notices, printed on muslin in letters not less than two inches high, reading: 'Fifty-foot limit' and underneath that heading the following:
>
> > 'No person shall be allowed to remain inside these limits while the polls are open except for the purpose of voting, and except the election officials, one representative of each political organization represented on the ballot, appointed by the chairman of the local committee of such political organization, and the challengers allowed by law. Voters having cast their ballots shall at once retire without the fifty-foot limit. A person violating any provision of this notice is guilty of a misdemeanor.'

B. Before opening the polls, the election marshall shall post three fifty-foot limit notices approximately fifty feet, in different directions, from the entrance of the place in which the election is being held.

C. Any person violating any provision of the fifty-foot limit notice is guilty of a misdemeanor."

Laws of 1962, as amended, Ch. 43, §1. Id.

In State v. Robles, 355 P.2d 895 (Ariz. 1960), the Arizona Supreme Court upheld its constitutionality and affirmed a criminal conviction under it.

Unlike Florida's Statute, this Statute did **not** have any exemptions such as businesses and private residences. Hence, in City of Phoenix v. Superior Court, an argument was made that a special election for the City of Phoenix could not be simultaneously held with the statewide general election. The Arizona Supreme Court rejected this argument and opined as follows:

> "The court is often not controlled by the literal language of the statute, but by its meaning when properly interpreted, though outside of such literal meaning". Carr v. Frohmiller, 47 Ariz. at 438, 56 P.2d at 647.
>
> If the language of the statute is taken literally that no person shall be allowed inside the fifty-foot limits except those persons named, then many absurdities result. In the event of a disturbance, police officers would not be permitted within the polling place of the specified fifty-foot limit. The same could be said if a fire occurred, and in case of illness or catastrophe doctors and others would not be permitted to enter the polling places. No food, drink or messages could be delivered to election board members without violating the statute. Other absurdities can be readily called to mind. If proper construction of the statute requires such absurdities, then we would have to agree with Mr. Bumble, in Oliver Twist, when he said: "if the law says that, the law is an ass".
>
> If ". . . a literal [interpretation] of the languages leads to a result which produces an absurdity, it is our duty to construe the act, if possible, so that it is a reasonable and workable law . . ." Garrison v. Luke, 52 Ariz. 50, 78 P.2d 1120. Id. at 51.

Here, the Appellee first attempts to prove the statute's overbreadth by creating unusual situations. For example, Appellee argues that people would not be allowed to walk on a sidewalk which is within fifty (50) feet of the poll. Following his argument, such situations should be statutorily exempt. However, Appellee inconsistently and additionally argues that the statutory exemptions, i.e. businesses and private residences, show that the statute is overbroad by allowing some persons into the polling area even though these exemptions were specifically placed into the statute in order to avoid this very argument of overbreadth and comply with Clean-Up 84 v. Heinrich, supra. Appellee's argument does not make sense and seems to fall within the class of "absurdities" enumerated in City of Phoenix v. Superior Court, supra. Additionally, a statute should not be interpreted in a manner that would cause a ridiculous result. Drury v. Harding, 461 So.2d 104 (Fla. 1984).

Another fifty (50) foot case of significant importance is Feld v. Prewitt, 118 S.W.2d 700 (KY 1938). Kentucky has an identical statute, "which provides that no person other than elections officers and challengers shall remain **within 50 feet** of the polls except when voting". Id. at 702. The purpose of such a statute was explored by the highest court of Kentucky as follows:

> The end sought to be accomplished by its provisions is the secrecy of the ballot.
>
> Id. at 703.

What is amazing to note is that the majority cites the case for the proposition that the secrecy of the ballot is "a compelling interest" but ignores the result! News-Press Publishing Company, Inc., et al v. George Firestone, et al, Case No. 87-1504, p.5. See also, Adams v. Wakefield, 190 S.W.2d 701 (KY 1945); Fuson v. Helton, 234 S.W.2d 496 (KY 1950). (All

of these cases affirmed the fifty (50) foot statute). The Court held that so long as the secrecy of the ballot was maintained, a minor violation would not vitiate the election.

B. 100 FOOT ZONES.

Even 100 foot zones have been upheld. In Piper v. Swan, 319 F.Supp. 908 (E. D. Tenn. 1970), a federal court **refused** to enjoin a statute which prohibited distribution of literature within one hundred (100) feet of the polls. Such a distribution of literature would be a First Amendment right which was affected by a content-neutral/conduct regulating statute. Other states which have upheld a 100-foot statute are the following:

Illinois

People v. Ellis, 384 N.E.2d 331 (IL 1979), (evidence not sufficient to convict Defendant);

California

Wilburn v. Wixson, 112 Cal.Rep. 620 (3rd DCA 1974), (violation will not vitiate election);

Maryland

Moxley v. Maryland, 129 A.2d 392 (Maryland 1957), (evidence not sufficient to convict Defendant).

Hence, such a statute even at the 100-foot distance is not uncommon.

V. CONCLUSION.

The District Court erred in ruling the statute overlybroad because unlike the solicitation statute in Clean-Up 84 v. Heinrich, supra, which was content-based, the statute at issue regulates conduct and is content-neutral. In such a case, the statute is reviewed with less scrutiny for any incidental effect it may have on First Amendment rights. Also, there must be a real and substantial threat on these rights. Such is not the case herein. The statute is constitutional.

SECOND ARGUMENT

THE DISTRICT COURT OF APPEALS ERRED IN HOLDING SECTION 101.121, FLA.STAT. (1985) UNCONSTITUTIONAL AS BEING OVERBROAD BECAUSE THE NEWSPAPER'S PHOTOGRAPHER HAS NO RIGHT OF ACCESS TO THE POLLING PLACE ITSELF.

TRADITIONALLY AND HISTORICALLY, CIVIL AND CRIMINAL TRIALS HAVE BEEN OPEN TO THE PUBLIC AND THE PUBLIC PLAYS A SIGNIFICANT ROLE IN THE FUNCTIONING OF THE TRIAL. CONVERSELY, POLLING PLACES HAVE TRADITIONALLY AND HISTORICALLY BEEN LIMITED TO A SMALL NUMBER OF PEOPLE, AND SUCH PLACES HAVE NOT BEEN OPEN TO THE PUBLIC, SAVE AND EXCEPT FOR THE PURPOSE OF VOTING. TRADITIONALLY, THE SECRECY OF THE BALLOT, THE ORDERLINESS OF THE VOTING PROCESS AND THE PREVENTION OF FRAUD HAS CAUSED THIS TO BE. HENCE, THE PUBLIC AND MEDIA, WHICH HAS NO GREATER RIGHT, HAVE NO RIGHT OF ACCESS TO OBSERVE OR GATHER NEWS WITHIN THE ACTUAL POLLING PLACE ITSELF. THE RIGHT TO GATHER NEWS IS NOT A LICENSE OR TICKET TO ACCESS WHICH HAS BEEN TRADITIONALLY CLOSED.

It has long been recognized that the First Amendment "does not guarantee the press a constitutional right of special access to information not available to the public generally". Branzburg v. Hayes, 408 U.S. 665, 684, 92 S.Ct. 2646, 2658 (1972). Houchins v. KQED, 438 U.S. 1, 16, 57 L.Ed.2d 553, 98 S.Ct. 2588, 2597 (1978). The United States Supreme Court, in discussing the right of access in the case of Pell v. Procunier, 417 U.S. 817, 834-835, 94 S.Ct. 2800, 2810 (1974), opined as follows:

> The First and Fourteenth Amendments bar government from interfering in any way with a free press. **The Constitution does not, however, require government to accord to the press special access to information not shared by members of the public generally.** It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public, . . . it is quite another thing to suggest that the constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally. That proposition finds no support in the words of the Constitution or in any decision of this Court.
>
> Id.

Hence, the inquiry begins by asking one's self when does the public generally have a right of access to the information. See Generally, Appendix 1 - Right and Liabilities of Publishers, Broadcasters and Reporters, Ch. 4 - Media Access and Appendix 2 - Network Early Calls of Elections, 14 S.W.Univ. Law Review 427 at 471 to 476, (1984).

The first true inquiry into this area of law is the case of Richmond Newspapers, Inc. v. Virginia, 448 U.S. 554 (1980). In that case, Defendant's counsel prior to the beginning of the fourth criminal trial of his client moved that the trial be closed to the public. He said that he was concerned that the spectators in the courtroom might relay information to the prospective witnesses. The prosecutor did not object and the Court precluded the reporters and closed the trial.

Chief Justice Berger, after reviewing the historical **aspects of openness inherent in the very nature of a criminal trial under our system of justice,** opined that under the First Amendment's right of assembly, a trial courtroom was also a public place "where people generally - and representatives of the media - have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place". Id. at 578. In so holding, the Court opined the following:

> People assemble in public places not only to speak or to take action, but also to listen, observe and learn; indeed, they may assemble for any lawful purpose. Haig v. C.I.O., 307 U.S. 496, 519, 59 S.Ct. 954, 965 (1939). **Subject to the traditional time, place and manner restrictions, . . . streets, sidewalks and parks** are places traditionally open where First Amendment rights may be exercised. A trial courtroom also is a public place where the people generally - and representatives of the media - have the right to be present . . .". Id.

The Court then concluded that "there was a guaranteed right of the public under the First and Fourteenth Amendments to attend the trial of Stevenson's case".

It should be noted that the Court explicitly distinguished the cases of Pell v. Procunier, 417 U.S. 817, 94 S.Ct. 2800 (1973), and Saxby v. Washington Post Court, 417 U.S. 843, 860, 94 S.Ct. 2811, 2819 (1974). In footnote 11, the Court opined as follows:

> Procunier and Saxby are distinguishable in the sense that they were concerned with penal institutions which, by definition, **are not "open" or public places.** Penal institutions do not share the long tradition of openness, although traditionally there has been visiting committees of citizens, and there is no doubt that legislative committees could exercise disciplinary oversight and "visiting rights". Saxby . . . noted that "limitations on visitations is justified by what the court of appeals acknowledged as the truism that prisons are institutions where public access is generally limited. Id.

Hence, the inquiry as to whether or not the media has a right of access to a source of information depends upon the public's access to that source of information. For example, traditionally criminal trials have been open to the public, whereas prisons have not been open to the public, that is, are not public places.

The media has access to the source of information because the public in general has access. It has no greater right than the public. Additionally, access can be restricted. Therein lies the traditional time, place and manner restrictions. However, one must first and foremost initially begin with the inquiry of whether or not such access historically exists. If this is found to be true, then and only then may the traditional time, place and manner restrictions as to this access be employed. Here, no such historical public right of access to a polling room exists.

Appellee wrongfully asserts Justice Stevens **concurring** opinion for the proposition that the Court has "unequivocally held that an arbitrary interference with access to important information is an abridgement to the freedom of speech and of the press protected by the First Amendment . . . and

that the First Amendment protects the public and the press from abridgement of their rights of access to information about the operation of their government, including the judicial branch." Id. at 993-994. This broad based approach of asserting that "if the matter is newsworthy then the media has a right of access" is **not** the majority opinion and has not been subsequently followed by the United States Supreme Court.

The most recent case to discuss the issue of press access is Press-Enterprise Company v. Superior Court of California for the County of Riverside, 478 U.S. 92 L.Ed.2d 1, 106 S.Ct.2d 2735 (1986). The issue in that case involves the scope of the public's First Amendment right of access to criminal proceedings. In other words, does this right of access apply to preliminary hearings as conducted in the State of California. In Press-Enterprise, the Defendant requested a closed preliminary hearing. Hence, the right asserted in that case was not the Defendant's Sixth Amendment right to a public trial. "Instead, the right asserted here is that of the public under the First Amendment." Id. at 2740. Once again, the United States Supreme Court opined as follows:

> In cases dealing with a claim of a First Amendment right of access to criminal proceedings, our decisions have emphasized two complimentary considerations. First, because a "tradition of accessability implies the favorable judgment of experience", . . . we have considered whether the place and process have **historically been open** to the press and the general public.
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> * * *
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> Second, in this setting the Court has traditionally considered whether **the public access plays a significant positive role in the functioning of the particular process in question.** Id. at 2740.

The Court opined that the considerations led it to conclude that the right of access applies to preliminary hearings as conducted in California. This is due to the fact that, traditionally, preliminary hearings in the State of

California have been **openly conducted** in the public before neutral and detached magistrates. Id. Additionally, the Court opined that "public access to preliminary hearings as they are conducted in California plays a particularly significant positive role in the actual functioning of the process". The Court opined that "because of its extensive scope, the preliminary hearing is often the final and most important step in the criminal proceeding" and thereby provides "the sole occasion for public observation of the criminal justice system". Id. at 2742-2743. Absent a jury, public access to a preliminary hearing is even more significant. Id. at 2743.

What must be observed throughout is the historic context which first the public right of access is developed followed by the media's right of access.

With regard to this historical analysis of the public's right of access to a polling place, this issue of access has only appeared in Florida in Joughin v. Parks, 147 So. 273 (Fla. 1933). See Appendix 3. In that case, several citizens in the Tampa Bay area sought to enjoin the Sheriff and the inspectors of the election from violating the election laws. These citizens sought to do this by having elisors appointed by the Court **"to observe the conduct of the election in each and every polling place and to report any and all violations of the election laws"**. Id. at 275. The duty of the said appointees were to **"observe at all times the general conduct of the election and make report to the Court of any violation"**. Hence, they were to be the watchdogs of the election, the public's right to know. The Supreme Court of Florida reviewed the election statutes which were very similar to today's statutes. Like today, inspectors, watchers, and the clerk were allowed in the polling place. Id. at 275. The Sheriff, however, was not allowed within the polling place unless summoned by majority of the inspectors. Additionally, "watchers" were appointed for the purpose of "insuring a fair election and proper count of the

votes". Id. In rejecting the injunctive petition, the Florida Supreme Court held as follows:

> We know of no authority for a chancellor appointing elisors or others to observe the conduct of the election in each precinct and report any violations of the election laws by the inspectors. Id.

Hence, there was no right, public or private, to observe the conduct of the election and thereby have access to the polls.

It should also be noted that the act of voting is one in which the State "has a significant interest in ensuring that it's voters exercise their franchise without distraction, interruption or harassment". Clean-Up 84 v. Heinrich, 759 F.2d 1511, 1514 (1985). Furthermore, there is a long tradition of secrecy of the ballot which must be protected. McDonald v. Miller, 90 So.2d 124 (Fla. 1956). In other words, in certain proceedings such as criminal trials, openness to the public is important for the functioning of the system, whereas in the franchise of voting, secrecy and privacy are the rule and the tradition. There is no precedent otherwise. The precedent has always been for secrecy. See, e.g. Feld v. Prewitt, 118 S.W.2d 700 (KY 1938).

SECOND ARGUMENT CONCLUSION

In summary, it is quite clear that the polling place or polling room itself has never been traditionally open to the public, and there is no right of public access to it. If there is no right of public access to it, then there is no right for any news gathering activity in it either. The right to gather news is not a license or ticket to enter an area which historically has been private and not open to the public.

As to the area surrounding the polling place such as public sidewalks or streets, these could be used for public forums. However, this use is subject to reasonable time, place and manner restrictions. As denoted in the first

argument, 50 foot zones have been upheld, and to a lesser extent 100 foot zones. All regulate conduct and only incidentally First Amendment expressions. At some point in time, this zone may become unreasonable, especially if the statute is content based, such as existed in Clean-Up 84 v. Heinrich, supra. However, considering the secrecy of the ballot and the prevention of voter fraud, a 50 foot content neutral statute is not a real and substantial threat on First Amendment rights. Such an effect where public streets or sidewalks may exist are only minor or incidental.

CONCLUSION

The Court erred in finding Section 101.121, Fla.Stat. (1985) as unconstitutionally overbroad because it failed to review this content-neutral/ conduct regulating statute which may incidentally infringe upon a First Amendment right with less scrutiny than a content-based statute. Since the polling place has never been traditionally or historically open to the public, but in fact closed, the media has absolutely no right of access to it. The public's only right of access has been to sidewalks or streets. Such a statutory conduct-regulating restriction on voting day is minor and incidental to the public's First Amendment right. Therefore, the statute is not overbroad and should be upheld as constitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Initial Brief of Appellant, ENID EARLE, has been furnished by U.S. Mail to STEVEN CARTA, ESQUIRE, Simpson, Henderson, Savage & Carta, Post Office Box 1906, Fort Myers, Florida 33902, Counsel for Appellee, NEWS-PRESS PUBLISHING COMPANY, INC.; to JASON VAIL, ESQUIRE, Assistant Attorney General, Department of Legal Affairs, The Capitol - Suite 1501, Tallahassee, Florida 32399-1050, Counsel for Appellant, FIRESTONE; to BARRY RICHARD, ESQUIRE, Post Office Drawer 1838, Tallahassee, Florida 32302, Counsel for Appellant WANICKA; to FLORENCE SNYDER RIVAS, ESQUIRE, Post Office Box 3403, Palm Beach, Florida 33480; to GREGG THOMAS, ESQUIRE, Post Office Box 1288, Tampa, Florida 33601; and to WILSON W. WRIGHT, ESQUIRE, 217 S. Adams Street, Tallahassee, Florida 32301, this 25th day of August, 1988.

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