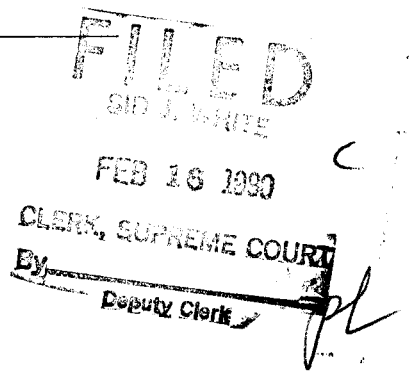
O/a 3-9-90

IN THE SUPREME COURT OF FLORIDA

Case No. 75,201



STATE OF FLORIDA
DEPARTMENT OF REVENUE,

Appellant,

v.

MAGAZINE PUBLISHERS OF
AMERICA, INC., et al.,

Appellees.

On Discretionary Review From The First
District Court of Appeal of Florida

ANSWER BRIEF OF APPELLEE THE MIAMI HERALD PUBLISHING COMPANY

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INTRODUCTION

The Miami Herald Publishing Company (the "Miami Herald") submits this brief in support of the validity of the newspaper exemption from the Florida sales and use tax, section 212.08(7)(w), Florida Statutes.

STATEMENT OF THE CASE AND FACTS

On or about July 6, 1988, the Magazine Publishers of America, Inc., The Hearst Corporation, Time, Inc., Golf Digest/Tennis, Inc., and Meredith Corporation (the "Magazines") filed a complaint for declaratory and injunctive relief against the State of Florida Department of Revenue (the "Department") challenging the constitutionality of the Florida sales and use tax as imposed on magazines. §212.05(1)(i), Fla. Stat. (the "magazine tax").[1/] A.8-14 The Magazines asserted that the magazine tax violated the First Amendment to the United States Constitution and the

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1/ Section 212.05(1)(i), Florida Statues provides:

> [A] tax is levied on each taxable transaction or incident which tax is due and payable as follows:
>
> . . . .
>
> (i) At the rate of 6 percent on the retail price of magazines sold or used in Florida.

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Equal Protection Clause of the Fourteenth Amendment[2/] by "singling out" magazines for discriminatory treatment. The Magazines' complaint was premised on the fact that, unlike magazines, both newspapers and religious publications are statutorily exempted from the Florida sales and use tax. §212.08(7)(w), Fla. Stat. (the "newspaper exemption");[3/] §212.06(9), Fla. Stat. (the "religious publication exemption").[4/] The Magazines urged the court to invalidate the magazine tax and enjoin its collection.

The Department's response was two-fold. First, the Department defended the constitutionality of the magazine tax as a permissible exercise of legislative discretion. Second, and in the alternative, the Department argued that if the

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2/ The Magazines also asserted that the Magazine tax violated the equivalent provisions of the Florida Constitution.

3/ Section 212.08(7)(w), Florida Statutes, provides:

> (w) Newspapers. -- Likewise exempt are newspapers.

4/ Section 212.06(9), Florida Statutes, provides:

> The taxes imposed by this chapter do not apply to the use, sale, or distribution of religious publications, bibles, hymn books, prayer books, vestments, altar paraphernalia, sacramental chalices, and like church service and ceremonial raiments and equipment.

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magazine tax were held to discriminate unconstitutionally, the remedy prescribed by Florida law would be to extend the sales and use tax to newspapers and religious publications, and invalidate the newspaper and religious publication exemptions. A.16-18, 20-31.

The First Summary Judgment Hearing

Cross motions for summary judgment were filed and a hearing was scheduled for July 12, 1989. A.16-18, 20-31, 33-46, 54-68, 70-75. After argument by the Magazines and the Department, the court announced that it was disposed (i) to hold the magazine tax unconstitutional and (ii) to remedy the unconstitutionality by extending the scope of the sales and use tax and invalidating the exemptions at issue. Recognizing that its preliminary holding, if sustained, would substantially affect both newspapers and religious publications who were not then before the court, the court declined to finally rule. A.297-340. Instead, the court continued the summary judgment hearing to permit all interested parties an opportunity to participate in the proceedings. A.77-78. The court certified the following questions for further briefing:

> 1. If the Court believes that the law in its present state offends the general applicability rule, what is the court compelled to do under the provisions of Section 212.21, Florida Statutes?

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Does the Court declare the exemption granted to newspapers to be unconstitutional, or does the Court declare the law as it applies to magazines to be unconstitutional?

2. Must the Court look to the exemption for religious periodicals in answering the question of the constitutionality of the statute, and should the Court also strike the exemption for religious periodicals if it is going to strike the exemption for newspapers, thereby making the tax applicable to religious periodicals, newspapers and magazines?

A.77-78.

The Intervention of the Newspapers and the Religious Publications

After the first summary judgment hearing, four parties accepted the court's invitation and sought and were granted leave to intervene in the action. Of the four, two represented the interests of the newspapers -- The Miami Herald and a group led by the Florida Press Association -- and two represented the interests of the religious publications -- one group led by the Florida Catholic Conference and another led by the Florida Baptist Witness. A.539-40, 542, 544-46, 548 550-52, 554, 563-65, 567. All parties submitted comprehensive initial and reply memoranda on the issues certified by the court. A.80-93, 95-108, 110-123, 125-142, 585-99, 604-613, 615-51, 653-60, 662-66, 668-75, 677-83. In addition, both the Miami Herald and the

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Florida Press Association filed motions for summary judgment asking that the newspaper exemption be upheld. A.569-72, 582-83.

The Second Summary Judgment Hearing And The Order Of The Trial Court

The summary judgment hearing continued on October 5, 1989, with the court setting aside the entire day for argument. A.77-78, 232-537. The court first heard argument directed to the constitutionality of the magazine tax. After extensive argument by the Magazines and the Department, the court determined to adhere to its preliminary holding. The court ruled that the magazine tax was not a tax of general applicability inasmuch as magazines were subject to the tax and newspapers were not. The magazine tax, the court concluded, was unconstitutional.

Having held that the magazine tax unconstitutionally discriminated between magazines and newspapers, the court turned to the question of remedy: should the discrimination by rectified by extending the tax to all publications or by striking the tax on magazines? Again, the Department argued that Florida law, particularly section 212.21, Florida Statutes, mandated that the court invalidate the newspaper exemption, and not the magazine tax, in order to cure the differential tax treatment. On this issue, the court departed from its preliminary holding, however. Based on the

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arguments adduced at the second summary judgment hearing, the court held that the First Amendment, rather than Florida law, controlled the court's choice of remedy. The court concluded that the First Amendment mandated that the magazine tax, and not the newspaper exemption, be invalidated.

By Order dated November 8, 1989, the court entered final summary judgment in favor of the Magazines, The Miami Herald and The Florida Press Association, invalidating the magazine tax and enjoining its collection. A.1-6.

In light of its holding that the existence of the newspaper exemption alone compelled the invalidation of the magazine tax, the court found it unnecessary to address the validity of the religious publication exemption. A.1-6, 147-48.

The Department filed a notice of appeal on November 16, 1989. A. 150. By its own terms, the effect of the court's Order was stayed pending appeal. A.6.

The Certification By The First District Court Of Appeal

On or about November 22, 1989, the Magazines, The Miami Herald and The Florida Press Association filed a suggestion of great public importance in the First District Court of Appeal. Invoking Rule 9.125, Fla.R.App.P., they argued that the issue decided by the trial court was one of great public importance requiring immediate resolution by

this Court. Accordingly, they asked the First District to refrain from considering the merits of the appeal and instead to certify the judgment directly to this Court for immediate review. By Order dated December 19, 1989, the First District granted the request, and on January 5, 1990, this Court accepted jurisdiction.

SUMMARY OF ARGUMENT

The newspaper exemption is proper and constitutional and the judgment of the court below upholding the exemption should be affirmed. There are several reasons.[5/]

First, having held that the magazine tax was unconstitutionally discriminatory, the court below correctly held that the appropriate remedy was to invalidate the magazine tax, and not to extend the sales and use tax to newspapers. Pursuant to controlling United States Supreme Court precedent, the Court should analyze the magazine tax under the First Amendment. Under the First Amendment, once the magazine tax is held to improperly "single out" magazines for discriminatory treatment, the constitutionally-mandated remedy is to invalidate the tax. Alternatively, the Court may analyze the magazine tax under the Equal Protection

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5/ The Miami Herald hereby adopts and incorporates by reference the arguments set forth in the Answer Brief of Appellees The Magazine Publishers of America, Inc., et al.

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Clause of the Fourteenth Amendment. In that case, the Court should examine the language of Chapter 212, Fla.Stat., as well as the history of the newspaper exemption and the policies underlying the exemption, in order to determine whether the exemption or the tax should be extended to remedy the unequal treatment. As demonstrated herein, the language of the statute, and the history of and policies underlying the newspaper exemption, all suggest that the court below properly extended the newspaper exemption to magazines and invalidated the magazine tax.

Alternatively, if the Court holds that the discriminatory magazine tax should be remedied by invalidating the newspaper exemption, the Court must also invalidate the religious publication exemption. Under controlling United States Supreme Court precedent, neither the Establishment Clause nor the Free Exercise Clause of the First Amendment entitle religious publications to tax-exempt status. Lacking any such constitutional justification, the preferential treatment of religious publications for tax purposes would create an impermissible content discrimination in violation of the Free Press Clause of the First Amendment. In addition, a tax exemption limited solely to religious publications would violate the Establishment Clause.

Finally, the Court may find it unnecessary to address the remedy issue created by the trial court's holding

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that the magazine tax is unconstitutionally discriminatory. As this Court has previously held, the co-existence of the magazine tax and the newspaper exemption may be viewed as a proper exercise of legislative discretion. In that case, both the magazine tax and the newspaper exemption may be upheld.

ARGUMENT

I. Having Held That The Magazine Tax Was Unconstitutional, The Trial Court Correctly Invalidated The Magazine Tax And Upheld The Newspaper Exemption

In their complaint, the Magazines challenged the magazine tax on two constitutional grounds: the First Amendment[6/] and the Equal Protection Clause of the Fourteenth Amendment. Although the analysis differs depending on the constitutional rationale employed, the proper remedy if the magazine tax is held unconstitutional is the invalidation of the tax, and not, as the Department argues, the invalidation of the newspaper exemption. Each ground is addressed separately below.

6/ Unless otherwise specified, all references to the First Amendment herein are to the Free Press Clause of the amendment.

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A. If The Magazine Tax Violates The First Amendment, The Magazine Tax Must Be Invalidated

The first ground asserted by the Magazines and the first this Court must address is the First Amendment. When the United States Supreme Court has addressed similar claims of discriminatory taxation involving the press, it has routinely conducted a First Amendment analysis, finding it unnecessary to reach the Equal Protection Clause. Thus, in Arkansas Writers' Project, Inc. v. Ragland, 107 S.Ct. 1722 (1987), the Court stated:

> Appellant's First Amendment claims are obviously intertwined with interests arising under the Equal Protection Clause . . . . However, since Arkansas' sales-tax system directly implicates freedom of the press, we analyze it primarily in First Amendment terms.

Id. at 1726 n.3 (citations omitted); see also Grosjean v. American Press Co., 297 U.S. 233, 251 (1936) (analyzing discriminatory tax under the First Amendment and not reaching the Equal Protection Clause).

The Supreme Court explained the priority of the First Amendment analysis in Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983), another case involving the discriminatory taxation of the press. Rejecting the dissent's equal protection analysis, Justice O'Connor, writing for the Court, explained:

> We, however, view the problem as one arising directly under the First Amendment, for, as our discussion shows, the Framers perceived singling out the press for taxation as a means of abridging the freedom of the press.

Id. at 585 n.7 (citation omitted).

Where, as here, a tax or other regulation has been held to violate the First Amendment, the remedy is clear and it is always the same: the tax or regulation falls. As Justice O'Connor explained in Minneapolis Star:

> The appropriate method of analysis thus is to balance the burden implicit in singling out the press against the interest asserted by the State. Under a long line of precedents the regulation can survive only if the governmental interest outweighs the burden and cannot be achieved by means that do not infringe First Amendment rights as significantly.

Id. (emphasis added). Thus, in every one of the United States Supreme Court cases to address the issue of discriminatory taxation of the press, the Court has invalidated the tax because it is the tax, and not the exemption from tax, that burdens the First Amendment right. See Arkansas Writers, 107 S.Ct. at 1730 (holding "the tax . . . invalid under the First Amendment") (emphasis added); Minneapolis Star, 460 U.S. at 593 (holding "the tax violates the First Amendment") (emphasis added); Grosjean,

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297 U.S. at 251 (concluding that "the act imposing the tax . . . is unconstitutional") (emphasis added).[7/]

That the First Amendment mandates the invalidation of the tax (and not the exemption) is evident from the analysis undertaken by the United States Supreme Court. Although state taxing statutes were at issue in Arkansas Writers, Minneapolis Star and Grosjean, the Court struck down the offending tax in each case based solely on the controlling federal authority of the First Amendment. The Court did not analyze the state law aspects of the remedy question, as the Department would urge this Court to do in this case, nor did the Court remand the remedy question to the appropriate state court for determination.

The purely federal analysis undertaken in Arkansas Writers, Minneapolis Star and Grosjean stands in stark

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7/ In recent years, state courts as well as federal courts have followed the First Amendment analysis set forth in Arkansas Writers, Minneapolis Star and Grosjean. See Dow Jones & Co., Inc. v. State of Oklahoma ex rel. Oklahoma Tax Commission, 1989 Okla. LEXIS 114, 16 Media L.R. 2049 (Okla. 1989); Louisiana Life, Ltd. v. McNamara, 504 So.2d 900 (La. 1st Ct.App. 1987). In Dow Jones, the Oklahoma court held that a sales tax imposed on publications based on price and method of delivery violated the First Amendment prohibition against differential taxation of the press. The court therefore invalidated the tax and ordered that a refund be paid. Similarly, in Louisiana Life, the Louisiana court invalidated a sales tax imposed on magazines but not on newspapers. Holding that the discriminatory tax violated the First Amendment, the court ordered that a refund be paid. This Court should do the same.

contrast to the analysis undertaken in cases decided under the Equal Protection Clause rather than the First Amendment. Where state statutes have been invalidated on equal protection grounds, the Court has inevitably remanded the remedy question to the appropriate state court for a determination of legislative intent and consequent choice of remedy. See, e.g., Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142, 152-53 (1980) ("Because state legislation is at issue and because a remedial outcome consonant with the state legislature's overall purpose is preferable, we believe that state judges are better positioned to choose an appropriate method of remedying the constitutional violation."); Stanton v. Stanton, 421 U.S. 7, 17-18 (1975) (same); Skinner v. State, 316 U.S. 535, 542-43 (1942) (same). The remedy analysis mandated by the Equal Protection Clause is set forth in Section I.B., infra.

Nor is Texas Monthly, Inc. v. Bullock, 109 S.Ct. 890 (1989), an exception to this rule, as the Department contends. Department's Br. at 11-13. In Texas Monthly, the United States Supreme Court held that a sales and use tax exemption for religious publications was unconstitutional. The Court declined to mandate a particular remedy, however, holding that Texas must determine how to cure the invalidity of its statute. Based on this holding, the Department argues that the court below erred in holding that the First Amendment mandated the invalidation of the magazine tax in this case.

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The Department is in error. In Texas Monthly, the Court invalidated the religious publication exemption on Establishment Clause grounds, not -- as here and as in Arkansas Writers, Minneapolis Star and Grosjean -- on Free Press Clause grounds. This difference is crucial. The Establishment Clause analysis undertaken by the Court in Texas Monthly did not mandate a particular remedy. Texas could, consistent with the Court's analysis, either expand the religious publication exemption or eliminate it altogether in order to solve the constitutional problem. In contrast, only one remedy is consistent with the Free Press Clause analysis of Arkansas Writers, Minneapolis Star and Grosjean. As the Court held in Minneapolis Star, it is the "regulation" that "infringes First Amendment rights" and therefore the regulation that must be struck down. Id. at 585 n.7.

The Department's attempt to distinguish Arkansas Writers, Minneapolis Star, and Grosjean according to the tax at issue is likewise unavailing. See Department's Br. at 13-16. In Arkansas Writers, Minneapolis Star and Grosjean, the United States Supreme Court invalidated taxes which had been discriminatorily imposed on the press or particular members of the press. Similarly, in this case, the court below invalidated the magazine tax because it was imposed on magazines, but not on newspapers. A fundamental antipathy to

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differential taxation of the press, firmly grounded in the history of the First Amendment, is at the heart of each of these decisions.

The Department also contends that the court below improperly "fashioned a new exemption" when it invalidated the magazine tax. This semantic attempt to distinguish this case from Arkansas Writers, Minneapolis Star and Grosjean also fails. In those cases, just as in the case at bar, striking the unconstitutional tax effectively created a tax exemption for the publications at issue since other goods remained subject to taxation. Arkansas Writers, Minneapolis Star and Grosjean are thus indistinguishable from the case before this Court.[8/]

The court below properly analyzed the magazine tax under the First Amendment and, having concluded that the tax violated the First Amendment, chose the remedy required by the First Amendment -- the invalidation of the magazine tax, not the newspaper and religious publication exemptions. Accordingly, the judgment should be affirmed.

8/ Nor does the trial court's invalidation of the magazine tax "force differential treatment into new, broadened patterns," as the Department contends. Department's Br. at 14. Rather, the invalidation of the magazine tax equalizes the tax treatment of newspapers, magazines and religious publications by uniformly exempting all such expression from the sales and use tax. The Department's suggestion that the invalidation of the magazine tax creates more problems than it solves is simply incorrect.

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B. If The Magazine Tax Violates The Equal Protection Clause Of The Fourteenth Amendment, The Magazine Tax Must Be Invalidated

The remedy analysis mandated by the Equal Protection Clause of the Fourteenth Amendment is different from the analysis required by the First Amendment. Thus, if the Court holds that the magazine tax is unconstitutional because it violates the Equal Protection Clause, its remedy analysis will be different than if it holds that the tax violates the First Amendment. The result, however, is the same: the magazine tax must be invalidated.

The United States Supreme Court has recognized that whenever an equal protection challenge to an underinclusive statute is successful, the question of remedy necessarily arises:

> Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion.

Welsh v. United States, 398 U.S. 333, 361 (1970) (Harlan, J., concurring). In contrast to the First Amendment, the choice of remedy under the Equal Protection Clause is essentially a function of legislative intent. See, e.g., Wengler v. Druggists Mutual Insurance Co., 446 U.S. at 152-53; Stanton

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v. Stanton, 421 U.S. at 17-18; Skinner v. State, 316 U.S. at 542-43. Moreover, where as here, a state statute is at issue, the state court must usually make the choice. Id. The courts have identified several factors which enter into the determination of legislative intent and the consequent choice of remedy.

1. Tax statutes. The United States Supreme Court addressed the very remedy question now before this Court in Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239 (1931). In Bennett, the Court explained that the proper remedy in the event of unequal tax treatment is a refund to the overpaying taxpayer:

> The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid.
>
> * * * *
>
> The petitioners are entitled to obtain in these suits refund of the excess of taxes exacted from them.

Id. at 247. Accord Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, 109 S.Ct. 633, 639 (1989) ("The [Equal Protection Clause] is not satisfied if a State does not itself remove the discrimination but imposes on him

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against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class.") (citing cases).

In Bennett, the petitioners sought, and the Court granted, a refund. In this case, the Magazines have asked only for prospective relief.[9/] The comparable remedy in this case would therefore be the invalidation of the magazine tax. Under Bennett, the remedy which this Court must order is clear. The magazine tax must be invalidated.

2. Severability. A second aspect of assessing legislative intent is determining whether and to what degree the purportedly unconstitutional provision is "severable" from the remainder of the statute. See Welsh, 398 U.S. at 364; Skinner, 316 U.S. at 542-43. As a matter of Florida law, an unconstitutional provision of a general law is considered severable "if the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void; and the good and bad features are not inseparable and the Legislature would have passed one without the other." Presbyterian Homes of the Synod of Florida v.

9/ Because the Magazines have sought only prospective relief, this Court need not reach the question of whether a refund should be ordered or the sales tax retroactively applied. This aspect of the remedy question is presently pending before the United States Supreme Court in McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Department of Business Regulation of Florida, 109 S.Ct. 3238 (1989).

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Wood, 297 So.2d 556, 559 (Fla. 1974). When a severability clause is included in a statute, "the expressed legislative intent should be carried out unless to do so would produce an unreasonable, unconstitutional or absurd result." Small v. Sun Oil Co., 222 So.2d 196, 199 (Fla. 1969).

In this case, the Department contends that the newspaper exemption, rather than the magazine tax, should be severed in order to cure the existing discrimination in the sales and use tax. Chapter 212 provides little, if any, support for this proposition, however.

In fact, the magazine tax and the newspaper exemption both appear to be severable. Both provisions satisfy the standard set forth in Presbyterian Home; the "legislative purpose" of Chapter 212 may be accomplished without either the magazine tax or the newspaper exemption. Moreover, the multiple severability clauses of Chapter 212, set forth in section 212.21, Florida Statutes, provide a basis for severing both the magazine tax and the newspaper exemption. See §212.21(1), Fla.Stat. (permitting severance of any "section"); §212.21(4), Fla.Stat. (permitting severance of any "exemption").

Accordingly, severability, although often a useful barometer of legislative intent, does not meaningfully advance the analysis the Court must undertake in this case.

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3. History and policy. The severability clauses of Chapter 212, although not outcome-determinative, confer discretion on the Court to fashion a remedy. Welsh, 398 U.S. at 365. In exercising this discretion, the Court should "measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension [of the exemption] as opposed to abrogation." Welsh, 398 U.S. at 365. Thus, in Welsh, the exemption from the draft for religious conscientious objectors was at issue. Justice Harlan determined that both the long history of the exemption and the policies underlying it suggested that the appropriate remedy was to extend the exemption to non-religious objectors rather than to curtail its availability. Id. at 365-67.

These same factors counsel this Court to extend the exemption at issue in this case to magazines and invalidate the magazine tax. Both newspapers and religious publications have historically been exempt from sales tax in Florida. In fact, in Florida, religious publications have been exempt from the sales tax since its inception in 1949. Newspapers have likewise been exempt since 1949, with the sole exception of a six (6) month period in 1987 when the tax was briefly imposed and then repealed. See Laws 1987, c.87-548, §26.

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This policy of exempting newspapers from the sales tax has deep historical roots. Taxation of the press was clearly disfavored by the framers of the First Amendment. As explained in some detail in Grosjean, 297 U.S. at 245-50, the framers were familiar with the English and early colonial experience with the infamous "taxes on knowledge" and were clearly opposed to such taxes. They recognized that these taxes "had the effect of curtailing the circulation of newspapers, and particularly the cheaper ones whose readers were generally found among the masses of the people." Id. at 246. The Grosjean Court, after analyzing this history, concluded that "it was impossible to believe that [the First Amendment] was not intended" to restrict such taxation. Id. at 248.[10/] The historical roots of the religious publication exemption are equally deep. See Texas Monthly, 109 S.Ct. at 907-08 (Scalia, J., dissenting).

"When a policy has roots so deeply embedded in history, there is a compelling reason for a court to hazard the necessary statutory repairs if they can been made within the administrative framework of the statute." Welsh, 398

10/ The Miami Herald has previously argued, and continues to maintain, that the First Amendment, construed in light of the framers' intent, prohibits the state from imposing the sales tax on newspapers. The historical argument is set forth in detail in the Amicus Curiae Brief of The Miami Herald Publishing Company in Arkansas Writers. A copy of that brief has been attached to the Answer Brief of the Florida Press Association and is incorporated herein by reference.

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U.S. at 366. That sentiment is as applicable in this case as it was in Welsh. The newspaper exemption, like the conscientious objector exemption upheld in Welsh, has historical antecedents rooted in our most fundamental beliefs and values.[11/] This Court should not invalidate it.

II. If The Court Reverses The Judgment Of The Trial Court And Holds That The Newspaper Exemption Should Be Invalidated, The Religious Publication Exemption Must Likewise Be Invalidated

The trial court did not address the validity of the religious publication exemption and, if it affirms the judgment of the trial court, this Court need not consider the issue either. However, if the Court holds that the newspaper exemption should be invalidated, it must address the religious publication exemption. As explained below, if the Court strikes the newspaper exemption, the religious publication exemption must also fall.

The First Amendment consists of three coordinate clauses: the Free Press Clause, the Free Exercise Clause and the Establishment Clause. The clauses are co-equal; no clause confers a greater right than either of the others and,

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11/ The history of the newspaper exemption is important for two reasons -- both because "the Constitution carries the gloss of history" and because the "tradition . . . implies the favorable judgment of experience." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 589 (1980) (Brennan, J., concurring).

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concomitantly, no right conferred by one clause overrides a right conferred by another. In this regard, the United States Supreme Court has held that "'conduct protected by the Free Exercise Clause,' . . . is entitled to no greater protection than other forms of expression protected by the First Amendment." Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 659 n.3 (1981) (Brennan, J., concurring in part) (interpreting the opinion of the Court); accord id. at 652-53 (opinion of the Court).

In two recent decisions, the United States Supreme Court has reaffirmed the principle that religious speech is entitled to no greater respect than any other subject of expression. Last Term in Texas Monthly and this Term in Jimmy Swaggart Ministries v. Board of Equalization, 58 U.S.L.W. 4135 (January 17, 1990), the Court held that neither the Establishment Clause nor the Free Exercise Clause mandates a tax exemption for religious speech. Indeed, in Texas Monthly, the Court struck down a tax exemption for religious publications on the grounds that the exemption violated the Establishment Clause.

Religious speech and secular speech thus enjoy equal constitutional protection and must be treated equally. The only difference between religious publications and secular publications is their content, and it is constitutionally impermissible to differentiate between them on this basis.

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"Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." Regan v. Time, Inc., 468 U.S. 641, 648-49 (1984). Thus, in Arkansas Writers, the United States Supreme Court expressly rejected a tax scheme which differentiated between "religious, professional, trade and sports" publications on the one hand and all other publications on the other. The Court concluded:

> Such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press.

Id. at 1728.

The protection afforded religion by the First Amendment is no greater than the protection afforded any other form or subject of speech. There is thus no constitutional justification for taxing secular publications, such as newspapers and magazines, and granting a content-based tax exemption to religious publications. Thus, if the Court holds that the magazine tax is unconstitutionally discriminatory but that the proper remedy is the invalidation of the newspaper exemption, the Court must likewise invalidate the religious publication exemption.

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III. The Newspaper Exemption May Also Be Upheld As A Constitutional Exercise of Legislative Discretion

The court below held that the magazine tax was unconstitutional because magazines were subject to the tax while newspapers were not. The court then properly concluded that the magazine tax should be invalidated and the newspaper exemption upheld. An alternative basis exists for upholding the newspaper exemption, however. As explained below, the Court may hold that both the magazine tax and the newspaper exemption are constitutional, as the Department urges.

The United States Supreme Court has "long held that '[w]here taxation is concerned and no specific federal right, apart from equal protection, is imperilled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.'" Kahn v. Shevin, 416 U.S. 351, 355 (1974) (citation omitted). This Court has likewise recognized the broad discretion permitted the legislature in drawing classifications in the field of taxation:

> When the state legislature, acting within the scope of its authority, undertakes to exert the taxing power, every presumption in favor of the validity of its action is indulged. Only clear and demonstrated usurpation of power will authorize judicial interference with legislative

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> action. . . . . In the field of taxation particularly, the legislature possesses great freedom in classification.

Eastern Air Lines, Inc. v. Department of Revenue, 455 So.2d 311, 314 (Fla. 1984) (citations omitted); accord State v. City of Pensacola, 126 So.2d 566, 569-70 (Fla. 1961).

The burden is on the party attacking the classification "to negate every conceivable basis which might support it." Eastern, 455 So.2d at 314. "The fact that the legislature may not have chosen the best possible means to eradicate the evils perceived is of no consequence to the courts provided that the means selected are not wholly unrelated to the achievement of the legislative purpose." Fraternal Order of Police, Metropolitan Dade County, Lodge No. 6 v. Department of State, 392 So.2d 1296, 1302 (Fla. 1980). The court "may not substitute [its] judgment for that of the legislature as to the wisdom or policy of a legislative act." State v. Yu, 400 So.2d 762, 765 (Fla. 1981); Fraternal Order, 392 So.2d at 1302.

The legislative decision to tax magazines and to exempt newspapers may be viewed as a proper exercise of the legislature's "great freedom in classification." 455 So.2d at 314. Under this analysis, the distinction between magazines and newspapers must be upheld unless the magazines can "negate every conceivable basis" for the classification. Id.

The Magazines do not, and cannot, carry this burden. Indeed, this Court expressly upheld this very classification shortly after the sales and use tax was first enacted. Gasson v. Gay, 49 So.2d 525, 526-27 (Fla. 1950). Instead, the Magazines contend that the tax is subject to a higher level of scrutiny because it "singles out" a segment of the press for discriminatory treatment in violation of the First Amendment. As demonstrated below, this argument also fails.

"It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulation without creating constitutional problems." Minneapolis Star, 460 U.S. at 581 (citing cases). Thus, the only question is whether the sales tax is such a "generally applicable economic regulation." North American Publishers, Inc. v. Department of Revenue, 436 So.2d 954 (Fla. 1st DCA 1983), suggests that it is.

In North American, the publisher of a flyer which was subject to the sales tax challenged the sales tax exemption granted newspapers, claiming that the flyer was unconstitutionally singled out for discriminatory treatment. The First District upheld the classification on the grounds that the Florida sales tax was a generally applicable regulation that did not offend the First Amendment. The First District concluded:

> In the present case, in contrast to Minneapolis Star, appellant is subject to a sales tax which is widely applicable to businesses of all kinds as part of the general scheme of sales and use taxes prescribed in Chapter 212, Florida Statutes. In no way does the tax imposed in the present case resemble a penalty directed only at a few publications.

Id. at 955-56.

The court below held that the sales and use tax was not "generally applicable" because some publications (magazines) were taxed, while others (newspapers and religious publications) were not. As North American demonstrates, the trial court's interpretation of the "generally applicable" requirement may not be correct. A tax or other regulation may be "generally applicable" for purposes of the First Amendment yet not tax or regulate all publications in an identical fashion. See, e.g., Oklahoma Press Co. v. Walling, 327 U.S. 186 (1946); Mabee v. White 3lains Publishing Co., 327 U.S. 178 (1946); North American Publishers, Inc. v. Department of Revenue, supra.

The Florida sales and use tax is a "generally applicable economic regulation." Consequently, the Court may disturb the legislature's classification of magazines and newspapers only if it is "palpably arbitrary." 455 So.2d at 314. It is not. The newspaper exemption must be upheld.

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CONCLUSION

The judgment of the trial court should be affirmed. Alternatively, the newspaper exemption should be upheld.

Respectfully submitted,

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