O/a 3-9-90

IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF REVENUE,

Appellant

v.

Case No. 75,201

MAGAZINE PUBLISHERS OF AMERICA, INC., THE HEARST CORPORATION, TIME, INC., GOLD DIGEST/TENNIS, INC., MEREDITH CORPORATION, MIAMI HERALD PUBLISHING COMPANY, THE FLORIDA PRESS ASSOCIATION, THE TALLAHASSEE DEMOCRAT, INC., FLORIDA PUBLISHING COMPANY, CITRUS PUBLISHING COMPANY, INC., FLORIDA CATHOLIC CONFERENCE, INC., THE VOICE PUBLISHING COMPANY, INC., THE DAUGHTERS OF ST. PAUL, INC. AND FLORIDA BAPTIST WITNESS, INC.

Appellees.

ANSWER BRIEF OF APPELLEES THE FLORIDA PRESS ASSOCIATION, THE TALLAHASSEE DEMOCRAT, INC., FLORIDA PUBLISHING COMPANY AND CITRUS PUBLISHING COMPANY, INC.

ROBERTS, BAGGETT, LAFACE & RICHARD
101 East College Avenue
Tallahassee, Florida 322302
(904) 222-6891

WILLIAM L. HYDE, ESQUIRE
Florida Bar No. 265500
Attorneys for Appellees,
The Florida Press Association,
The Tallahassee Democrat, Inc.
Florida Publishing Company, and
Citrus Publishing, Inc.

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PRELIMINARY STATEMENT

Appellant, Florida Department of Revenue, shall be referred to throughout this brief as "the Department". Appellees, Magazine Publishers of America, Inc., The Hearst Corporation, Time, Inc., Golf Digest/Tennis, Inc., and Meredith Corporation, shall be referred to collectively as "the Magazines."

Appellee, The Miami Herald Publishing Company, shall be referred to as "The Miami Herald." Appellees, The Florida Press Association, The Tallahassee Democrat, Inc., Florida Publishing Company, Inc. and Citrus Publishing Company, shall be referred to collectively as "the Newspaper Publishers."

Appellees, Florida Catholic Conference, Inc., The Voice Publishing Company, Inc., The Daughters of St. Paul, and Florida Baptist Witness, Inc., shall be referred to collectively as "the Religious Publishers."

References to the record, which is included in its entirety in the Appendix filed by The Department, shall be designated as follows: "[App. _____]."

STATEMENT OF THE CASE AND FACTS

The Newspaper Publishers accept the Statement of the Case and Facts set forth in the Initial Brief of the Department served January 24, 1990.

SUMMARY OF ARGUMENT

ISSUE I

The trial court's conclusion that Florida's current statutory distinction between magazines and newspapers for purposes of its sales and use tax violates the Press Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment ignores or misapprehends applicable case law.

First, this Court has previously ruled that such a legislative classification does not offend either the state or federal constitutions. Gasson v. Gay, 49 So.2d 525 (Fla. 1950). Furthermore, this statutory classification is consistent with Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983), Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1983), and Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987).

Unlike the tax in Minneapolis Star the Florida statutes at issue do not single out the press for a special tax burden, nor do they treat the press differently from any non-press business enterprises. See North American Publishers, Inc. v. Department of Revenue, 436 So.2d 954 (Fla. 1st DCA 1983).

The discrimination afforded by Florida's statutory classification is founded not in a special burden upon the press, or a small portion thereof, but rather upon an exemption for a discrete portion of the press. This legislative decision to not subsidize the magazines through a tax exemption, while extending such an exemption to newspapers, only incidentally affects First Amendment freedoms and does not impermissibly interfere with or burden those rights. Regan v. Taxation with Representation of Washington, supra.

Moreover, unlike the tax in Arkansas Writers', Florida's sales and use tax does not target a small group within the press for a special burden, nor is it content-based. See

Fla. Admin. Code Rule 12A-1.008(1)(b-e) (definition of "newspaper"); and Rule 12A-1.008(3) (definition of "magazine"). To the extent that Rule 12A-1.008 may be impermissibly content-based, however, the appropriate remedy is not to strike the statutory exemption for newspapers but to eliminate the invalid portions of the rule. See Dade County v. Keyes, 141 So.2d 819, 822 (Fla. 3d DCA 1962).

Furthermore, while it may occasionally be difficult to determine whether a given publication is a "newspaper," that difficulty is not of constitutional dimension, and Florida law provides to the aggrieved taxpayer an impressive and varied arsenal of administrative remedies to an allegedly improper determination. See Cross Key Waterways v. Askew, 351 So.2d 1062, 1069 (Fla. 1st DCA 1977), aff'd., 372 So.2d 913 (1978).

For all these reasons, the trial court erred in concluding that the appropriate standard by which to judge Florida's statutory distinction between newspapers and magazines is a "strict scrutiny" test. The appropriate test is a "rational basis" test, and the Magazine Publishers failed "to negative every conceivable basis which might support it." Regan, 461 U.S. at 547-548. This Court should therefore reverse the trial court's holding that this statutory distinction is constitutionally invalid.

ISSUE II

Assuming that there is a constitutional infirmity in Florida's distinguishing between newspapers and magazines for sales and use tax purposes, the appropriate statutory remedy is to make the newspapers' exemption more inclusive and to strike the tax on magazines.

First, whenever a tax has been held to violate the First Amendment, the remedy has always been to strike the tax, not the exemption. See Arkansas Writers', supra;

Minneapolis Star, supra; Grosjean v. American Press Company, 297 U.S. 233 (1936); Louisiana Life, Ltd. v. McNamara, 504 So.2d 900 (La. App. 1987); Dow Jones & Company v. Oklahoma, 16 Med.L.Rptr. 2049 (Ok. 1989).

Second, Section 212.21(1), Florida Statutes, essentially expresses the legislative intent that any section or subsection declared unconstitutional be severed. The magazine tax, which is specifically set forth in Section 212.05(1)(i), should therefore be severed pursuant to this expression of legislative intent.

Furthermore, while Section 212.21(4) does express the legislative intent that any exemption declared unconstitutional be severed, it is not the Legislature's decision to exempt newspapers from the sales and use tax that is unconstitutional but its tax on magazines. Accordingly, Section 212.21(4) does not mandate that the newspapers' exemption be stricken.

However, even if one accepts the Department's construction of Section 212.21(4), the Court is faced with an equipoise: on the one hand, pursuant to Section 212.21(4), it can strike the newspaper exemption, §212.08(7)(w), but on the other hand, pursuant to Section 212.21(1), it can strike the magazine tax, §212.05(1)(i). At the very least, therefore, the legislative intent expressed in Section 212.21 is unclear. Accordingly, this Court should look to Welsh v. United States, 398 U.S. 331 (1970), which provides useful guidance.

> In exercising the broad discretion conferred by a severability clause, it is, of course, necessary to measure the intensity of the commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation.

398 U.S. at 365.

The history of Florida's sales and use tax, coupled with this country's historical suspicion of "taxes on knowledge" indicates that Florida's exemption for newspapers "has

roots so deeply embedded in history (that) there is a compelling reason for a court to hazard the necessary statutory repairs if they can be made within the administrative framework of the statute." 398 U.S. at 366. Since this is a taxing statute, and since the legislative intent expressed in Section 212.21 is, at the very least, unclear, the statute must be construed most strongly against the government and liberally in favor of the taxpayer. See, e.g., Harbor Ventures, Inc. v. Hutches, 366 So.2d 1173 (Fla. 1979). This end is accomplished by preserving intact the newspapers' exemption, §212.08(7)(w), and striking the tax on magazines, §212.05(1)(i).

ISSUE I: FLORIDA'S STATUTORY DISTINCTION BETWEEN MAGAZINES AND NEWSPAPERS FOR PURPOSES OF THE FLORIDA SALES AND USE TAX IS CONSTITUTIONALLY PERMISSIBLE

The trial court concluded that Florida's current statutory distinction between magazines and newspapers for purposes of its sales and use tax, see §§212.05(1)(i) and 212.08(7)(w), Fla. Stat., violates the Press Clause of First Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution [App. 4-5]. In doing so, it misunderstood the import of two particular cases, to be discussed below, and ignored the teachings of several other, equally important decisions of the United States Supreme Court and Florida Supreme Court. When these decisions are properly analyzed and given due weight, this Court will find that the current statutory distinction does not have the constitutional infirmities found by the trial court.

It should first be pointed out that this Court has previously ruled that a legislative classification which exempts newspapers while taxing magazines does not offend either the state or federal constitutions. Gasson v. Gay, 49 So.2d 525 (Fla. 1950); accord Eddings v. Davidson, 302 So.2d 155 (Fla. 1st DCA 1974). Since this Court had already spoken to the exact issue, the trial court lacked the power to overrule that decision, which can only be overturned by the Florida Supreme Court. See William v. Stuart, 291 So.2d 593 (Fla. 1974). In fact, even a district court of appeal cannot legitimately circumvent a decision of the Florida Supreme Court. The proper course is to rule in accordance with the Florida Supreme Court precedent and then certify that question to the Florida Supreme Court. Continental Assurance Company v. Carroll, 485 So.2d 406 (Fla. 1986).

Be that as it may, the issue is now squarely before this Court. It must therefore examine the United States Supreme Court decisions upon which the trial court relied and makes its own determination as to whether there are any compelling reasons found in

these decisions or elsewhere to overrule or recede from Gasson v. Gay, supra. The Newspaper Publishers believe that a better view of the decisions relied upon the trial court as well as several other recent United States Supreme Court and other court decisions still mandates that this legislative classification be upheld.

It should also be preliminarily noted that none of these cases squarely addresses this issue; in fact, in Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) ("Arkansas Writers"), the United States Supreme Court expressly refused to "decide whether a distinction between different types of periodicals presents an additional basis for invalidating the sales tax, as applied to the press." Id., at 232-233. Therefore, in the absence of any definitive United States Supreme Court precedent to the contrary, this Court should be especially careful in deciding whether to depart from Gasson v. Gay, supra.

This Court's analysis must necessarily focus upon a trio of relatively recent United States Supreme Court decisions: Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983) ("Minneapolis Star"), Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983) ("Regan"), and Arkansas Writers', supra. A brief discussion of these cases is necessary to place them in their proper context and to fully appreciate their respective holdings.

Minneapolis Star involved a Minnesota use tax specifically imposed upon the cost of paper and ink used in the production of publications. Ink and paper used in publications were the only items subject to that use tax that were components to goods to be sold later at retail. Further, the Minnesota tax scheme provided an exemption for the first $100,000 worth of ink and paper used by publication in a given year. That exemption in practical effect limited the tax to a small number of newspapers. Thus, some newspapers were taxed and some were not. 460 U.S. at 577-580.

As noted by the Court in Arkansas Writers', the discrimination found in the Minnesota use tax took two distinct forms.

> First, in contrast to generally applicable economic regulations to which the press can legitimately be subject, the Minnesota use tax treats the press differently from other enterprises. 460 U.S., at 581 (the tax "singl[es] out publications for treatment that is. . . unique in Minnesota tax law"). Second, the tax targeted a small group of newspapers. This was due to the fact that the first $100,000 of paper and ink were exempt from the tax; thus "only a handful of publishers pay any tax at all, and even fewer pay any significant amount of tax." Id., at 591.

Arkansas Writers', 481 U.S. at 228.

The Florida statutes at issue, however, do not single out the press for a special tax burden; Florida's sales and use tax scheme does not treat the press differently from any non-press enterprises. Therefore, it does not fall within the first form of discrimination which Minneapolis Star found constitutionally invalid. In other words, Florida does not impose sales or use taxes upon the press which are not generally applicable to other businesses. Moreover, since Florida's sales and use tax is a generally applicable tax, it does not target a small group of publishers, thus offending the second form of discrimination noted by Minneapolis Star.

This interpretation of Minneapolis Star is confirmed by North American Publishers, Inc. v. Department of Revenue, 436 So.2d 954 (Fla. 1st DCA 1983). There, the publisher of a flyer subjected to Florida's sales tax challenged the newspaper exemption on the ground that it was being unfairly singled out for discriminatory treatment. The First District, however, concluded that Florida's sales tax was a generally applicable tax.

> 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 955-956. Thus, as North American teaches, a tax may still be "generally applicable" for First Amendment purposes yet not tax all publications in a like fashion.

The Magazine Publishers, of course, will argue that the constitutional infirmity lies in the fact that the Florida Legislature extended an exemption to newspapers which it did not extend to magazines. That is indeed the heart of this case. However, it is important to focus upon one particularly crucial point: the discrimination afforded by Florida's sales and use tax is founded not in a special burden upon the press, or a small portion thereof, but rather upon an exemption from the sales and use tax for discrete portion of the press.

This distinction becomes important in light of the Court's subsequent decision in Regan. In that case, the taxpayer argued that Congress' decision not to subsidize its lobbying by affording it tax-exempt status under §501(c)(3) of the Internal Revenue Code, 26 U.S.C. §501(c)(3), violated its rights under the First Amendment. 461 U.S. at 544-545. The United States Supreme Court observed:

> Generally, statutory classifications are valid if they bear a rational relation to a legitimate governmental purpose. Statutes are subjected to a higher level of scrutiny if they interfere with the exercise of a fundamental right, such as freedom of speech, or employ a suspect classification such as race.

461 U.S. at 547. The Court of Appeals, however, had held that "strict scrutiny" was required because the statute affected First Amendment Rights. The United States Supreme Court rejected that rationale:

> [The Court of Appeals'] opinion suggests that strict scrutiny applies whenever Congress (i.e., the legislative branch) subsidizes some speech, but not all speech. This is not the law.

461 U.S. at 548. The Court went on to observe that it had "held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right (e.g., by providing a tax exemption) does not infringe the right, and thus is not subject to strict

scrutiny." 461 U.S. at 549. Indeed, it has repeatedly rejected First Amendment and Equal Protection challenges without applying strict scrutiny. Id., citing Buckley v. Valeo, 424 U.S. 1, 93-108 (1976); Harris v. McRae, 448 U.S. 297, 322 (1980); Maher v. Roe, 432 U.S. 464 (1977). The Court explained:

> The reasoning of these decisions is simple: "although government may not place obstacles in the path of a [person's] exercise of. . . freedom of [speech], it need not remove those not of its own creation.". . . Where governmental provision of subsidies is not "aimed at the suppression of dangerous ideas," its "power to encourage actions deemed to be in the public interest is necessarily far broader."

461 U.S. at 549-550 (citations omitted). This conclusion was echoed in Justice Blackmun's concurrence:

> "I also agree that the First Amendment does not require the Government to subsidize protected activity, and that this principle controls disposition of (the taxpayer's) First Amendment claim.

461 U.S. at 551-552.

The Regan decision, recognizing that tax exemptions and deductions are akin to subsidies, held that the decision of Congress not to subsidize the taxpayer's lobbying did not impermissibly burden or interfere with its First Amendment right to engage in lobbying. The taxpayer was still free to lobby for its causes; the Congress, however, need not promote such an activity by providing it with a tax exemption. The sine qua non of this decision is a recognition that statutes, such as Florida's sales and use tax scheme, which incidentally affect First Amendment freedoms by withholding a tax deduction or preference, do not necessarily interfere with or burden those rights.

The third in this trio of United States Supreme Court decisions is Arkansas Writers' Project, Inc. v. Ragland. The Arkansas tax under consideration in that case imposed a tax on receipts from sales of tangible personal property, but exempted numerous items, including newspapers and religious, professional, trade and sports journals and/or

publications printed and published within Arkansas. The taxpayer, relying primarily on Minneapolis Star, asserted that the magazine exemption must be construed to include its magazine and that subjecting its magazine to the sales tax, while sales of newspapers and other magazines were exempt, violated the First and Fourteenth Amendments. 481 U.S. at 225.

The Arkansas Writers' Court found that because the Arkansas sales tax scheme treated some magazines less favorably than others, it suffered from the second form of discrimination identified in Minneapolis Star. 481 U.S. at 229; Minneapolis Star 460 U.S. at 581, 591. As noted earlier, it expressly refused to decide whether a distinction between different types of periodicals was invalid. 481 U.S. at 232-233. Furthermore, the Arkansas tax was deemed particularly troublesome because it discriminated on the basis of its content. 481 U.S. at 429. Thus, the Court concluded, Arkansas had a heavy burden to justify its content-based approach to taxation of magazines:

> In order to justify such differential taxation, the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.

481 U.S. at 231, citing Minneapolis Star, 460 U.S. at 591-592.

Florida's sales and use tax, being generally applicable, does not target a small group within the press for a special burden not shared by businesses generally and thus does not fall within the second form of discrimination found impermissible by Minneapolis Star. 460 U.S. at 581, 591; Arkansas Writers', 481 U.S. at 228-229; North American, 436 So.2d at 955-956. What it does do is favor newspapers with an exemption from the sales and use tax, which brings it within the rationale of Regan and renders it constitutionally sound.

Just as importantly, Florida's statutory distinction between newspapers and magazines is not based upon content but is instead content-neutral. Nothing in the

statute expressly or even by fair implication sets forth a test that is based upon a publication's contents. This statutory language has been further refined and implemented in Florida Administrative Code Rule 12A-1.008(1)(b-e), which defines a newspaper as follows:

> (b) In order to constitute a newspaper, the principal purpose of the publication must be to disseminate news and contain at least the following elements:
>
> 1. It must be published at stated short intervals (usually daily or weekly).
>
> 2. It must not, when successive issues are put together, constitute a book.
>
> 3. It must be intended for circulation among the general public.
>
> 4. It must not be a magazine, as defined in subsection (3).[1]

---

[1] Rule 12A-1.008(3) provides:

> (a) For purposes of this rule, the term, "magazine," being a word of common usage, is to be construed in a plain and ordinary signification and not in a technical sense.
>
> (b) Among other characteristics distinguishing a magazine from a newspaper, magazines usually:
>
> 1. are sold by subscription for longer periods of time than newspapers;
>
> 2. are published at longer intervals than newspapers, such as weekly, monthly, or longer;
>
> 3. are delivered by mail or sold over the counter, but copies may be delivered to the ultimate consumer by other means; and
>
> 4. cannot qualify as newspapers in which notices and process may be published pursuant to s. 50.031, F.S.

5. It must routinely contain reports of current events and matters of general interest which appeal to a wide spectrum of the general public. If the publication is intended for general circulation to the public and is devoted primarily to matters of specialized interest such as legal, mercantile, political, religious or sporting matters, and it contains in addition thereto general news of the day, information of current events, and news of importance and of current interest to the general public, it is entitled to be classed as a newspaper.

(c) A newspaper is normally eligible to carry legal notices or notices of process and normally meets the requirments of a publication pursuant to s. 50.031.

(d) A newspaper is customarily printed on newsprint.

(e) A newspaper is usually delivered to the ultimate consumer by delivery to his home or place of business by employees of the publisher or by independent contractors under an arrangement with the publisher, or sold at retail by vending machines, but copies may also be delivered by mail or sold at retail over the counter.

To the extent that Rule 12A-1.008 may be impermissibly content-based, moreover, the appropriate remedy is not to strike the statutory exemption for newspapers but to eliminate the invalid portions of the rule. See, e.g., Dade County v. Keyes, 141 So.2d 819, 822 (Fla. 3rd DCA 1962). see also Miami Dolphins, Ltd. v. Metropolitan Dade County, 394 So.2d 981 (Fla. 1981).

Furthermore, while there may be instances where it is difficult to make a determination as to whether a given publication is, or is not, a "newspaper," that difficulty is not of constitutional dimension. Rather, it involves rulemaking and the implementation of the statute, and there is adequate opportunity for subsequent review. For example, a taxpayer aggrieved by a particular rule may file a rule challenge pursuant to Sections 120.54(4) and 120.56, Florida Statutes. A taxpayer aggrieved by the implementation of an otherwise valid rule may seek administrative relief by means of a Section 120.57(1) or (2), Florida Statutes proceeding. Appellate review, even of

constitutional issues, may then be had pursuant to Section 120.68, Florida Statutes. See Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 427 So.2d 153 (Fla. 1982). This impressive and varied arsenal of administrative remedies provides adequate relief for any taxpayer who has been aggrieved by the Department's implementation of this newspaper exemption. See Cross Key Waterways v. Askew, 351 So.2d 1062, 1069 (Fla. 1st DCA 1977), aff'd., 372 So.2d 913 (1978).

The validity of a statutory distinction between newspapers and other media was recognized in Burnett v. National Enquirer, 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983), app. dismissed, 465 U.S. 1014 (1984), albeit in a somewhat different context. In Burnett, well known entertainer Carol Burnett sued the National Enquirer for libel and was awarded both compensatory and punitive damages. A California statute, however, limited the damages recoverable for libel by a newspaper or slander by a radio in some circumstances. The National Enquirer contended that it was a newspaper and qualified for the protection of the statute. The California courts, however, rejected that argument and, in so ruling, identified certain important attributes of newspapers.

Burnett expressly observed that newspapers and radio broadcasters (defined by statute to include television) were engaged in the business of "publishing news while it is new." 193 Cal. Rptr. at 211. Thus, although there is a public interest in the free dissemination of news generally, there is an even more important public interest which justifies special protection for those, such as newspapers and radio broadcasters but not magazines, "who engage in the immediate dissemination of news." 193 Cal. Rptr at 213.

Burnett further noted the characterization of a publication as a newspaper depends not upon content or format but upon the constraints of time as a function of

requirements associated with the production of the publication. Id. Accordingly, since the period between the completion of an article and its actual date of publication was normally one to three weeks, and the National Enquirer did not generate stories day-to-day, it lacked the timeliness and immediacy of a newspaper. 193 Cal. Rptr. at 210. This characterization has nothing whatsoever to do with the contents of a publication, be it a newspaper or magazine, but rather with the immediacy by which it is transmitted to the public. Florida's statutory distinction, too, is content-neutral and thus does not impermissibly burden the magazine press, especially since what we are dealing with here is not even a burden but rather a newspaper exemption from an otherwise generally applicable sales and use tax. See North American, 436 So.2d at 955-956.

The Magazine Publishers likewise can find no solace in Dow Jones & Company v. Oklahoma, 16 Med. L. Rptr. 2049 (Ok. 1989), where the issue was whether a use tax levy on some but not all publications, based on sales price or mode of delivery, was an impermissible burden on the First Amendment. The Oklahoma statute at issue targeted only certain publications, i.e., those costing more than $.75 or those disseminated to readers by mail, and exempted all others, i.e., those marketed for less than $.75 or delivered directly by carrier. As such, it was not evenly applied to all like publications, in that case newspapers, thus offending Arkansas Writers, 481 U.S. at 229, and Minneapolis Star, 460 U.S. at 581, 591.

By contrast, Florida's sales and use tax, in particular its tax on magazines, does not target a small group within the press for a special burden, and it is evenly applied to all like publications. See North American, supra. What it does do is distinguish newspapers from magazines, but that form of discrimination, as we have seen for purposes of tax exemptions generally, is permissible. Regan, 461 U.S. at 449, 551-552.

In other words, all newspapers, as defined in Rule 12A-1.008, are exempt from

Florida's sales and use tax. There is no discrimination based upon the sales price of the newspaper, as in Dow Jones. Furthermore, Rule 12-1.008(1)(e) expressly provides that there is no distinction based upon mode of delivery, as the Oklahoma statute provided. Accordingly, for all these reasons, Dow Jones is of little, if any, precedential value to this case.

There is but one appellate court decision which squarely rejects any distinction between newspapers and magazines. Louisiana Ltd. v. McNamara, 504 So.2d 900 (La. App. 1987). That decision by an intermediate Louisiana appellate court, however, relies on an overly expansive reading of Minneapolis Star, much as the trial court did in this cause, and ignores the United States Supreme Court's subsequent decision in Regan, which expressly rejected the notion that non-content based differentiation between forms of speech is subject to strict scrutiny. 461 U.S. at 547. Moreover, it failed to recognize the Regan Court's distinction between special tax burdens imposed upon the press, or a portion thereof, as in Minneapolis Star and Arkansas Writers', and permissible subsidizing of protected activity through an exemption from taxation. Finally, Louisiana Ltd. v. McNamara is expressly in conflict with a definitive Florida Supreme Court decision, Gasson v. Gay, supra, which is controlling. See State ex rel Landis v. Williams, 112 Fla. 734, 151 So. 284 (1983). For all these reasons its precedential value is inherently suspect.

In conclusion, the Newspaper Publishers would urge that this Court carefully read and analyze Minneapolis Star, Regan, and Arkansas Writers'. If it does so, it will necessarily conclude that the appropriate standard by which to judge Florida's statutory distinction between newspapers and magazines is not a "strict scrutiny" standard but rather a "rational basis" test, in which case it is the Magazine Publishers' burden "to negative every conceivable basis which might support it." Regan, 461 U.S. at 547-548,

citing Madden v. Kentucky, 309 U.S. 83, 87-88 (1940) (footnotes omitted); also see Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 526-527 (1959):

> The States have a very wide discretion in the laying of their taxes . . . . The State may impose different specific taxes on different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value.

Neither the Magazine Publishers' arguments nor the trial court's rationale can pass muster under these tests. Therefore, this Court should reverse the trial court's holding that the current statutory distinction between magazines and newspapers for sales and use tax purposes is constitutionally invalid.

ISSUE II: ASSUMING THAT FLORIDA'S STATUTORY DISTINCTION BETWEEN MAGAZINES AND NEWSPAPERS FOR PURPOSES OF THE FLORIDA SALES AND USE TAX IS CONSTITUTIONALLY DEFECTIVE, THE APPROPRIATE REMEDY IS TO STRIKE THE TAX ON MAGAZINES.

In Issue I the Newspaper Publishers contend that there is no constitutional infirmity in Florida's distinguishing between newspapers and magazines for purposes of its sales and use tax. In that respect, the Newspaper Publishers agree with the Department. Assuming, however, that this statutory distinction is constitutionally suspect, the appropriate remedy is not, as the Department urges, to strike the exemption for newspapers but instead to make that exemption more inclusive by extending it to magazines. In this respect the Newspaper Publishers agree with the Magazine Publishers for the following reasons.

Obviously, whenever a challenge to an allegedly underinclusive statute is successful, the Court has two alternative remedies: (1) to strike the statute in order that its benefits not extend to the class that the legislature intended to benefit; or (2) to extend the coverage of the statute. Welsh v. United States, 398 U.S. 333, 361 (1970). Accordingly, in this case the Court's two remedies are either to strike the newspaper exemption, §212.08(7)(w), Fla. Stat., in order that its benefits not extend to the class that the Florida Legislature expressly intended to benefit, or to extend the scope of the exemption and strike the magazine tax, §212.05(1)(i), Fla. Stat. The solution to this dilemma involves both First Amendment considerations as well as more conventional issues of statutory construction.

As The Miami Herald Publishing Company ably demonstrated to the trial court, any analysis of this issue must begin with 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. For example, in Arkansas

Writers', the Court expressly noted:

> [S]ince Arkansas' sales tax system directly implicates freedom of the press, we analyze it primarily in First Amendment terms.

481 U.S. at 227-228 n. 3; see also Minnesota Star, 460 U.S. at 585 n. 7; Grosjean v. American Press Company, 297 U.S. 233, 251 (1936).

Furthermore, whenever a tax has been held to violate the First Amendment, the remedy has always been the same: the tax is stricken. Thus, in each of the United States Supreme Court decisions which addresses this issue of discriminatory taxation of the press under the First Amendment, it has always been the tax that has been invalidated. See Arkansas Writers', 481 U.S. at 233; Minneapolis Star, 460 at U.S. at 593; Grosjean, 297 U.S. at 251.

Moreover, other courts which have recently addressed this issue of whether a differentiation between various types of media for sales and use tax purposes violates the Free Press Clause of the First Amendment have held that it is the tax that is invalid, not the exemption. See Louisiana Life, Ltd. v. McNamara, supra; Dow Jones & Company, Inc. v. Oklahoma, supra. To like effect is City of Alameda v. Premier Communications Network, Inc., 156 Cal. App. 3d. 148, 202 Cal. Rptr. 684 (Cal. Sup. Ct.), cert. den., 469 U.S. 1073 (1984) (involving a discriminatory license tax on cable television businesses) and McGraw-Hill, Inc. v. State Tax Commission, 146 Ad. 2d 371, 541 N.Y.S. 2d 252 (N.Y. App. 1989) (involving tax-related discrimination between the publishing business and the broadcasting business). These cases uniformly establish that the proper remedy, where a tax violates the Free Press Clause of the First Amendment, is for the court to strike the discriminatory tax.

The Department, however, seems to find great comfort in the severability provisions of Section 212.21, Fla. Stat. One such provision, §212.21(4), expresses the

legislative intent that any exemption declared unconstitutional be severed. The Department therefore concludes that the newspaper exemption, §212.08(7)(w), and for that matter the religious publication exemption, §212.06(9), should be severed.[2]

The Department, however, draws far too much meaning from the language of Section 212.21(4). Even if one assumes that Florida's distinction between newspapers and magazines is invalid, it is not the Legislature's decision to exempt newspapers from the sales and use tax that is unconstitutional, but its tax on magazines.

Furthermore, Section 212.21(1) essentially expresses the legislative intent that any section or subsection declared unconstitional be severed. The magazine tax, which is specifically set forth in Section 212.05(1)(i), Florida Statutes, should therefore be severed under this section. Indeed, since the intent of Section 212.21(1) admits of no other construction, and since the Legislature's decision to grant an exemption to newspapers is not per se unconstitional, the provisions of Section 212.21, Florida Statutes, if anything, dictate that the tax on magazines be stricken.

Even if one accepts the Department's construction of Section 212.21(4), the Court is faced with an equipoise: on the one hand, pursuant to Section 212.21(4), it can strike the newspaper exemption, §212.08(7)(w), but on the other hand, pursuant to Section 212.21(1), it can strike the magazine tax, §212.05(1)(i). The Court is therefore confronted with the statutory equivalent of a Mexican standoff.

At the very least, therefore, the legislative intent expressed in Section 212.21 is

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2. The Department's apparent contention that the exemption for religious publications, §212.06(9), Fla. Stat., should likewise be stricken may not be properly before this Court. By order dated October 18, 1989, the trial court "concluded that the issue of the constitutionality and application of Section 212.06(9), Florida Statutes is not properly placed in issue by the pleadings in this action" and therefore granted the Religious Publisher's motion to strike. [App. 147-148.] The final summary judgment likewise does not contain any ruling on this separate exemption. [App.1-6.]

unclear as to what the Florida Legislature would have intended under these circumstances. Welsh v. United States, supra, however, provides useful guidance:

> In exercising the broad discretion conferred by a severability clause, it is, of course, necessary to measure the intensity of the commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation

398 U.S. at 365. In Welsh, the matter at issue involved the exemption from the military draft for religious conscientious objectors. A draft registrant's application for an exemption as a conscientious objector had been rejected because his beliefs were not "religious" in the traditional sense but were based upon his conscientious scruples against participating in any war and on his personal belief that killing was morally wrong. The registrant was subsequently convicted of refusing to submit to induction into the armed forces. Five members of the Court, although not agreeing on an opinion, did agree that the exemption should be extended to this other breed of conscientious objector rather than invalidating the exemption. Justice Harlan, in his concurring opinion, specifically observed:

> The policy of exempting religious conscientious objectors is one of longstanding tradition in this country and accords recognition to what is, in a diverse and "open" society, the important value of reconciling individuality of belief with practical exigencies whenever possible. It dates back to colonial times and has been perpetuated in state and federal conscription statutes.

398 U.S. at 365-366. By analogy, these factors strongly suggest that the appropriate remedy here is to extend the exemption to magazines rather than to strike the exemption for newspapers.

Historically speaking, newspapers have been exempt from the sales tax in Florida since its inception in 1949, with the sole exception of a six-month period in 1987 when a tax on newspapers was briefly imposed during the services tax fiasco and then repealed.

See Ch. 86-166, §5 Laws of Fla.; Ch. 87-101, §12, Laws of Fla.; Ch. 87-548, §§8, 26, Laws of Fla. Indeed, by repealing the services tax and specifically repealing the tax on newspapers, the Florida Legislature in the clearest possible terms evidenced a clear intent to not tax newspapers. Accordingly, to invalidate that tax exemption would be an affront to this clear legislative intent and should not be done on problematic interpretations of Sections 212.21(1) and (4), Florida Statutes.

The Court's historical inquiry need not cease with the original enactment of Florida's sales tax in 1949. There has been a longstanding and deeply embedded antipathy in this country since its very beginning, indeed predating its beginning, to taxes on newspapers. As noted in Grosjean v. American Press Company, supra, the framers of the United States Constitution were familiar with the English and early colonial experience with the "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." 297 U.S. at 246. Thus, the Grosjean Court stated, "it was impossible to believe that (the First Amendment) was not intended" to restrict such taxation. Id. at 248.[3]

Just as the conscientious objector exemption in Welsh, the newspaper exemption from taxation "has roots so deeply embedded in history (that) there is a compelling reason for a court to hazard the necessary statutory repairs if they can be made within the administrative framework of the statute." 398 U.S. at 366. The appropriate "statutory repair" here is to preserve the tax exemption for newspapers and to strike the

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3. The Newspaper Publishers have included in the Appendix to this Answer Brief a true and accurate copy of the Brief of Amici Curiae The Miami Herald Publishing Company and The American Newspaper Publishers Association in Arkansas Writers' Project Inc. v. Ragland. This brief contains an excellent exposition on the history of and the relationship between the First Amendment and taxes on newspapers.

tax on magazines.

After all, when all is said and done, this is a taxation case, and it is axiomatic that taxing statutes must be strictly construed. See, e.g., State ex rel Weinberg v. Green, 132 So.2d 761 (Fla. 1961). This means that where a taxing statute has been so drawn that the legislative intent is in doubt, as here, compare § 212.21(1) with §212.21(4), the statute must be construed most strongly against the government and liberally in favor of the taxpayer. See, e.g., Harbor Ventures, Inc. v. Hutches, 366 So.2d 1173 (Fla. 1979); State ex rel Wedgworth Farms, Inc. v. Thompson, 101 So.2d 381 (Fla. 1958). Accordingly, since the severability provisions of Section 212.21, Florida Statutes, are doubtful in their intent, that doubt must be resolved in favor of the taxpayers, which in this case are the newspapers and the magazine publishers, by preserving intact the newspapers' exemption, § 212.08(7)(w), and striking the tax on magazines, § 212.05(1)(i). See §212.21(1), Fla. Stat.

REQUEST FOR RELIEF

Based on the foregoing authorities and argument, Appellees, The Florida Press Association, The Tallahassee Democrat, Inc., Florida Publishing Company, and Citrus Publishing Company, Inc., respectfully request the following relief:

(1) That this Court reverse the trial court's holding that Florida's statutory distinction between newspapers and magazines for purposes of its sales and use tax is constitutionally invalid on First Amendment and/or Equal Protection Grounds; or, in the alternative

(2) That, assuming that the current statutory distinction is constitutionally invalid, this Court affirm the trial court's alternative holding that the appropriate remedy is to strike the tax on magazines, §212.05(1)(i), not the newspaper exemption, §212.08(7)(w).

ROBERTS, BAGGETT, LAFACE & RICHARD
101 East College Avenue
Tallahassee, Florida 32302
(904) 222-6891

William L Hyde

WILLIAM L. HYDE
Florida Bar No. 265500

Attorneys for Appellees
The Florida Press Association,
The Tallahassee Democrat, Inc.,
Florida Publishing Company, and
Citrus Publishing Company, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing brief was delivered by U.S. Mail to Robert A. Feagin, III, and James M. Irvin, Jr., Holland & Knight, P.O. Drawer 810, Tallahassee, Florida 32302; Kevin J. O'Donnell, Assistant Attorney General, Department of Legal Affairs, Tax Section, The Capitol, Tallhassee, Florida 32399-1050; Timothy J. Warfel, P.O. Box 1876, Tallahassee, Florida 32302-1876; Cecil L. Davis, Jr., 119 East Park Avenue, P.O. Box 10316, Tallahassee, Florida 32302 and Laura Besvinick, 100 S.E. 2nd Street, Suite 3400, Miami, Florida 33131 this 13th day of February, 1990.

William L. Hyde
WILLIAM L. HYDE

WLH:BRIEF