IN THE SUPREME COURT OF FLORIDA

Case No. 75,201

On Appeal From A Final Order Of The
Leon County Circuit Court, By Certification
From The First District Court of Appeal

DEPARTMENT OF REVENUE,

Appellant,

v.

MAGAZINE PUBLISHERS OF AMERICA, INC.; THE HEARST CORPORATION; TIME, INC.; GOLF 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 MPA, HEARST, TIME, GOLF DIGEST, and MEREDITH

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INTRODUCTION

This case is before the Court for review of a Final Summary Judgment entered by the Leon County Circuit Court [A 1-6; R 645-50],[1] which was certified to this Court by the First District Court of Appeal as presenting a question of great public importance requiring immediate resolution. At issue here is the validity of the Florida Sales and Use Tax Law, Chapter 212, Florida Statutes (1989), as applied to magazines and like periodical publications.

This Answer Brief is filed on behalf of Appellees Magazine Publishers of America, Inc.; The Hearst Corporation; Time, Inc.; Golf Digest/Tennis, Inc.; and Meredith Corporation. Additional Appellees in this action (intervenors below) are The Miami Herald Publishing Company;, Florida Press Association; The Tallahassee Democrat, Inc.; Florida Publishing Company, Inc.; Citrus Publishing Company, Inc.; Florida Catholic Conference, Inc.; The Voice Publishing Company, Inc.; The Daughters of St. Paul, Inc.; and Florida Baptist Witness, Inc. Appellant here is the Florida Department of Revenue (DOR), which was the defendant below.

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[1]Pursuant to Florida Rule of Appellate Procedure 9.220, this brief is accompanied by an Appendix, which contains a copy of the Final Summary Judgment entered below. References to the Appendix are signified as [A____]. References to other parts of the record are signified as [R____].

STATEMENT OF THE CASE AND FACTS

The facts in this case are not in dispute, and are accurately recited in the trial court's Final Summary Judgment [A 1-6; R 645-50] and in the Statement of the Case and Facts set forth in Appellant's Initial Brief. Nor is there any dispute concerning the issues to be addressed in this case, which were summarized in the trial court's order:

> The issue before this Court is two-fold: (i) does Chapter 212, Florida Statutes, unconstitutionally differentiate between magazines (which are subject to the tax) and newspapers (which are exempt), and (ii) assuming Chapter 212 is unconstitutional, should the Court invalidate the tax on magazines or the exemption for newspapers.

[A 3; R 647]. The only modification of this statement of the issue is that DOR asserts on appeal that this Court should strike not only the newspaper exemption,[2] but also the religious publication exemption.[3] Except as otherwise clarified above, Appellant's Statement of the Case and Facts is accepted as accurate.

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[2]Section 212.08(7)(w), Florida Statutes (1989).

[3]Sections 212.06(9) and 212.08(7)(o), Florida Statutes (1989).

SUMMARY OF THE ARGUMENT

The Free Press Clause of the First Amendment to the United States Constitution protects the fundamental right of freedom of the press. Neither the Federal Government nor a state may abridge this right absent a compelling justification. On three occasions, the United States Supreme Court has considered whether differential taxation of the press--that is, targeting the press or particular segments of the press for more burdensome treatment -- abridges rights protected by the Free Press Clause. The Court has consistently concluded that differential taxation of the press poses a sufficient threat to First Amendment interests that such a tax can stand only if justified by a state interest of compelling importance that cannot be achieved without differential taxation.

Florida has not chosen to impose a tax of general applicability on the press; had it done so, this case would involve different issues. Instead, Florida has elected to enact a tax scheme that imposes tax on one segment of the press, magazines, while totally exempting another, newspapers. The justification offered by DOR -- encouraging the "dissemination of news while it is new" -- does not satisfy the heavy burden imposed on Florida to sustain this differential tax scheme. The preferential treatment of publications based on the purported "timeliness and im-

mediacy" of their content does not promote any compelling state interest that can be accomplished only through differential taxation.

The only proper remedy in this case is to invalidate the unconstitutional tax on magazines. Because it is the tax that abridges freedom of the press, it is the tax that must be stricken. The United States Supreme Court has required this remedy in every case where a state tax was found to violate the Free Press Clause. The same result would be required even under an equal protection analysis of the Florida tax scheme.

DOR's contention that this Court should instead strike the exemptions for newspaper and religious publications, because the legislature could have imposed a tax of general applicability on the press, is meritless. Even assuming that the legislature could impose a sales tax of general applicability on the press, that does not provide this Court the authority or justification for doing so. If the legislature desires to tax all segments of the press, or to exempt all segments of the press, that choice is exclusively one for the legislature. The only appropriate remedy available to this Court is to prohibit the application of Chapter 212 in a manner that impermissibly burdens freedom of the press -- i.e., strike the sales tax on magazines.

ARGUMENT

I. Florida's Discriminatory Tax on Magazines Is Constitutionally Invalid Because It Violates The Free Press Clause Of The First Amendment.

The Free Press Clause of the First Amendment to the United States Constitution provides: "Congress shall make no law . . . abridging the freedom . . . of the press. . . ."[4] Article I, Section 4 of the Florida Constitution provides in pertinent part: "No law shall be passed to restrain or abridge the liberty of speech or of the press."[5] These fundamental constitutional protections apply to "magazines"[6] and other periodical publications as well as to "newspapers." See Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) ("The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."). No party disputes that magazines

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[4]The Free Press Clause of the First Amendment operates as a restraint on the states through the due process clause of the Fourteenth Amendment to the United States Constitution. Grosjean v. American Press Co., 297 U.S. 233 (1936).

[5]Article I, Section 4 of the Florida Constitution is to be given the same scope as given to the First Amendment to the United States Constitution. Department of Education v. Lewis, 416 So.2d 455 (Fla. 1982).

[6]Members of Appellee Magazine Publishers of America, Inc. publish a wide variety of periodical publications, many of which are commonly considered to be magazines. For purposes of this brief, the term "magazine" shall be used to refer to these periodical publications.

published by members of Appellee Magazine Publishers of America, Inc. fall within the scope of these protections.

A specific protection that the First Amendment provides is the prohibition against differential or discriminatory taxation. United States Supreme Court decisions clearly establish that a differential, discriminatory tax on a particular type of publication burdens protected First Amendment rights. Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 227 (1987); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983); Grosjean v. American Press Co., 297 U.S. 233 (1936). Indeed, a differential tax poses such a serious threat to the protected rights of the press that a state bears a heavy burden to justify the tax:

> Differential taxation of the press . . . places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.

Minneapolis Star, 460 U.S. at 585 (emphasis added).

It is undisputed in this case that the sale of magazines and other periodical publications in Florida is subject to sales tax while the sale of newspapers is not. Yet DOR has not offered any compelling justification for this differential tax. Therefore, the tax on magazines violates the Free Press Clause and must be held invalid.

A. Differential Taxation Of The Press Can Be Justified Only By A Compelling State Interest.

The United States Supreme Court has addressed the issue of differential taxation of the press on three occasions. In each case, the Court analyzed the challenged tax under the Free Press Clause of the First Amendment even though the Court recognized that equal protection considerations were also implicated. See, e.g., Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 227 n.3 (1987) ("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.").

The first case, Grosjean v. American Press Co., 297 U.S. 233 (1936), involved a Louisiana gross receipts tax imposed on publications having a circulation of more than 20,000 per week. Analyzing the tax under the Free Press Clause, the Court held it to be an impermissible abridgement of the protections afforded by that provision. Central to the Court's decision was its analysis of the history and purpose of the First Amendment, which was adopted as a result of the odious stamp tax on newspapers and advertisements. According to the Court, the Free Press Clause was designed to proscribe all forms of prior restraint, including discriminatory taxation. Id. at 249. The Court explained:

> The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. . . . A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.

Id. at 250.

The Supreme Court decided the second case in the trilogy over forty years later. In Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983), the Court considered a Minnesota use tax imposed on the cost of paper and ink products consumed in the production of a publication. Under this statute, however, the first $100,000 worth of ink and paper consumed by a publication in any calendar year was exempted from the tax. The result was that publishers were subjected to a special use tax not imposed on other businesses. Moreover, only a limited class of publishers was subject to this special tax.

The Court first determined that Grosjean was not controlling because Grosjean was based, at least in part, on the improper censorial motives of the legislature in enacting the tax. Because the Minnesota legislature

exhibited no improper motives in passing the use tax at issue, the Court in Minneapolis Star concluded that it must "analyze the problem anew under the general principles of the First Amendment." Id. at 580.

In the course of its First Amendment analysis, the Court recognized the Framers' serious concerns with taxation of the press and agreed that this fear was particularly well founded with regard to differential taxation:

> A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency. . . . When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government.

Id. at 585 (citation omitted). Ultimately, the Court determined the dangers inherent in differential taxation of the press to be so great as to warrant imposing a heavy burden of justification on the State assessing such tax--the State must show a "counterbalancing interest of compelling importance that it cannot achieve without differential taxation." Id.

Applying this "interest of compelling importance" standard to the Minnesota tax, the Court determined that the tax was invalid. The Court found no interest of compelling importance nor even a satisfactory justification for the differential tax, and expressly rejected revenue-raising as a sufficient state interest. Id. at 586. The Court concluded:

> A tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action. Since Minnesota has offered no satisfactory justification for its tax on the use of ink and paper, the tax violates the First Amendment, and the judgment below is reversed.

Id. at 592-93.

Of the three cases, the most pertinent to the present controversy is also the most recent. In Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987), the Court considered the validity of an Arkansas sales and use tax that exempted sales of newspapers and also exempted subscription sales of religious, professional, trade, and sports journals published in Arkansas.[7] The appellant taxpayer published a general interest monthly magazine in Arkansas that was subject to the sales and use tax.

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[7]In its opinion, the Court noted that the result of the exemptions was to subject only a few Arkansas publishers to the tax. Id. at 229 n.4. While this may have been true as to Arkansas publishers, such as the taxpayer in that case, a substantial number of non-Arkansas publishers would also have been subject to the Arkansas sales and use tax that applied to receipts from the sale of tangible personal property. Id. at 224.

Again, the Court analyzed the differential tax scheme in First Amendment terms and began by stating the "clearly established" principle that "a discriminatory tax burdens rights protected by the First Amendment." Id. at 227 (citing Minneapolis Star and Grosjean). The Court then noted that in Minneapolis Star the discriminatory tax took two forms: singling out the press as a whole for special taxation, and singling out selected segments of the press for special taxation. Id. at 228. Both forms of discrimination, according to the Court, could be established without proof of an improper censorial motive, because "selective taxation of the press . . . poses a particular danger of abuse by the State." Id.

The Court found that the second type of discrimination -- singling out certain segments of the press -- was present in the Arkansas tax scheme:

> Because the Arkansas sales tax scheme treats some magazines less favorably than others, it suffers from the second type of discrimination identified in Minneapolis Star.

Id. at 229. Due to the presence of this type of discrimination, the Court placed on Arkansas the heavy burden of justifying the scheme with a compelling state interest.

Applying the compelling interest standard, the Court held that the differential taxation of magazines violated the Free Press Clause:

> We stated in Minneapolis Star that "[a] tax that singles out the press, or that

> targets individual publications within the press, places a heavy burden on the State to justify its action." . . . In this case, Arkansas has failed to meet this heavy burden. It has advanced no compelling justification for selective, content-based taxation of certain magazines, and the tax is therefore invalid under the First Amendment.

Id. at 234 (citations omitted; emphasis added). The Court's decision invalidated the differential tax on magazines and eliminated the differential treatment of magazines and newspapers under the Arkansas sales tax. Id. at 233. As a result, the Court found it unnecessary to decide whether "a distinction between different types of periodicals [i.e., newspapers and magazines] presents an additional basis for invalidating the sales tax, as applied to the press." Id. The question not directly answered in Arkansas Writers' is precisely the issue before this Court.

The plurality decision in Texas Monthly, Inc. v. Bullock, ___U.S.___, 103 L.Ed.2d 1 (1989), does not, as DOR suggests, give Free Press Clause sanction to content-based tax differentation between members of the press. Texas Monthly involved a challenge to a Texas sales and use tax exemption for religious publications. Although the challenge was based on both the Free Press Clause and Establishment Clause[8] of the First Amendment, the case was clearly decided under the Establishment Clause:

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[8] The Establishment Clause provides: "Congress shall make no law respecting an establishment of religion. . . ." U.S. Const. amend. I.

> We hold that, when confined exclusively to religious publications advancing the tenets of a religious faith, the exemption runs afoul of the Establishment Clause; accordingly, we need not reach the question whether it contravenes the Press Clause as well.

103 L.Ed.2d at 7. The suggestions in this decision that a broader exemption could pass constitutional muster were made entirely in the context of Establishment Clause review. There was no indication in the plurality decision that a broader exemption would survive compelling interest scrutiny under the Free Press Clause.

DOR's reliance on Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983) is likewise misplaced. Regan was a political contributions case that did not involve a differential tax scheme imposed on the press. Indeed, Regan did not involve the imposition of any direct tax burden on any party. In Regan, Taxation With Representation (TWR), a non-profit political organization, brought a Free Speech Clause challenge against a federal regulation that denied deductions for contributions to organizations engaged in lobbying. The Court upheld the regulation against the Free Speech Clause challenge, concluding that Congress is free to choose which types of organizations it will subsidize through deductions for contributions to those organizations. From a First Amendment standpoint, Regan simply means that Florida is not required to subsidize any particular form of political speech. Regan provides no

support for the premise that Florida may impose differential tax burdens on members of the press absent a compelling interest.

It is noteworthy that the Court decided Regan approximately two months after the decision in Minneapolis Star, yet Regan made no reference whatsoever to Minneapolis Star. Clearly, the Court viewed these two decisions as involving different issues under the First Amendment. TWR's complaint in Regan was that Congress' failure to give tax breaks to persons contributing to TWR somehow infringed TWR's right of free speech. The Court in Regan found no such infringement. The complaint in Minneapolis Star was that the taxpayer was actually subjected to a discriminatory tax burden. The same was true in Arkansas Writers', which also made no reference to Regan, and is equally true here -- this is not a political subsidization case, but involves the imposition of discriminatory tax burdens on members of the press.

The foregoing analysis demonstrates that the First Amendment imposes a strict level of scrutiny when a state subjects the press (or particular segments of the press) to a differential tax. This standard clearly applies to Florida's sales and use tax scheme. Like the sales and use tax in Arkansas Writers', Florida's sales tax of general application

is facially discriminatory as applied to the press.[9] This discriminatory, differential taxation can withstand First Amendment scrutiny only if Florida can show that the scheme promotes a compelling state interest that cannot be achieved without differential taxation.

B. DOR's Proferred Justification For The Differential Tax On Magazines Fails To Pass Constitutional Muster.

DOR asserts that a "significant public interest justifies governmental promotion for publishers who engage in the immediate dissemination of news"; but DOR never identifies what that interest is or explains why it is compelling. Nor does DOR explain how this interest is promoted by imposing the sales tax on magazines while exempting newspapers, or why this interest can be achieved only through differential taxation of the press.

Although the timeliness of a publication's information may be one way of distinguishing it from other publications, DOR offers no explanation of why a weekly magazine is any less timely than a weekly newspaper, or why

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[9]This Court has previously recognized the discriminatory features of the Florida sales and use tax as it applies to the press. In In re Advisory Opinion to the Governor, 509 So.2d 292 (1987), this Court stated that the new services sales tax under review, which taxed both newspapers and magazines as well as advertising and other media services, "serve[d] to eliminate content-based discrimination [from the per-existing law] rather than create it." Id. at 308. The current law under challenge in this suit is substantially the same as the pre-existing law to which this Court was referring in this advisory opinion, in that the current law taxes magazines but not newspapers.

the former should be taxed and the latter should not. Certainly, information published in a weekly magazine is as immediate as information published in a weekly newspaper. In fact, information in weekly magazines is often as immediate as that published in daily newspapers.

Even assuming that an interest in the immediate dissemination of news is a compelling one, however, DOR does not show how that interest is furthered by the differential tax. There is no reason why an exempt publication will publish more timely news than a non-exempt publication. DOR also fails to show why this interest in timely news, if compelling, cannot be accomplished by other means, such as grants or research programs relating to improvements in publication processes.

Moreover, because the timeliness of information often depends on the information itself, DOR's timeliness criterion requires the State to make content-based distinctions between certain publications. DOR contends that its timeliness criterion "places particular emphasis upon the role of newspapers in publishing <u>news</u> while it's new." DOR Initial Brief at 4 (emphasis added). Inherent in this timeliness criterion is a need to determine whether the contents of a publication constitute "news." For purposes of making that determination, the pertinent DOR rule indicates that matters of "general interest that appeal to a wide spectrum of the public" constitute "news," while matters of

"specialized interest" such as legal, mercantile, religious, political, or sporting matters do not. Fla. Admin. Code Rule 12A-1.008(1)(b)5.

This DOR rule evinces the subjective analysis of the contents of a publication that must be conducted to determine whether the publication should receive an exemption as "news" under the existing statute. Further subjective analysis of a publication's content would be required to determine whether the information, if news, is "timely" news. If DOR's subjective analysis of the content of a publication results in a determination that the publication falls within one of the non-"news" classifications, or is not "timely," the necessary consequence of DOR's theory is that the dissemination of such information may be taxed -- i.e., it may be selectively burdened at the discretion of the legislature.

Even if the timeliness criterion was considered to be content-neutral, as DOR asserts, the tax is still subject to the compelling interest standard. In Minneapolis Star, the Court applied a compelling interest standard to a differential tax that was unrelated to the content of the publications involved. 460 U.S. at 585. In the subsequent Arkansas Writers' decision, the Court pointed out that the content-based discrimination inherent in the Arkansas tax involved "a more disturbing use of selective taxation than Minneapolis Star." Arkansas Writers', 481 U.S. at 229. The

Court in no way suggested, however, that only a content-based discrimination would trigger the compelling interest standard established in Minneapolis Star and applied in Arkansas Writers'.

DOR has clearly failed in this case to meet its burden of showing that the tax on magazines is justified by a compelling state interest that cannot be achieved without differential taxation.[10]

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[10]The California decision of Burnett v. National Enquirer, Inc., 144 Cal. App. 3d 991, 193 Cal. Reptr. 206 (1983), app. dismissed, 465 U.S. 1014 (1984), relied upon by DOR below, lends no support to the argument that timeliness is a compelling state interest sufficient to justify differential taxation. Burnett involved the issue of whether the National Enquirer was a "newspaper" under a California statute that limited the damages recoverable for libel by a newspaper or for slander by a radio broadcast. The court concluded that the National Enquirer was a magazine rather than a newspaper, and that the statutory damage limitation for newspapers did not apply to magazines.

The issue of whether this differential treatment of newspapers and magazines violated the Free Press Clause was not addressed by the court in Burnett. Rather, the court justified the differential treatment on the basis that because daily newspapers and radio broadcasters are engaged in the immediate dissemination of news, they cannot always check their sources for accuracy or their stories for inadvertent publication errors. The legislature could therefore conclude that limitations on damages resulting from such inaccuracies or errors are reasonable. Although timeliness may constitute a rational basis for distinguishing between newspapers and magazines under a statute limiting damages for libel and slander, the distinction is not rational -- and certainly not compelling -- in the context of a state's differential taxing scheme.

C. A Rational Basis Test Is Not The Appropriate Standard.

DOR apparently recognizes that the tax on magazines can only survive constitutional scrutiny if this Court applies a more lenient standard of review than that applied by the trial court. Thus, rather than address the compelling interest standard established by the United States Supreme Court under the First Amendment, DOR attempts to persuade this Court that a "rational basis" standard should apply. DOR predicates its position on a decision of the United States Supreme Court and a decision of this Court, both of which were based on the Equal Protection Clause. Neither of the decisions cited by DOR, however, involved differential taxation of the press.

MPA maintains that this Court should follow Grosjean, Minneapolis Star, and Arkansas Writers' in analyzing the present tax scheme under the Free Press Clause of the First Amendment rather than the Equal Protection Clauses of the Fifth and Fourteenth Amendments. Nevertheless, analysis reveals that even under an Equal Protection Clause approach, a "strict scrutiny" rather than "rational basis" standard is warranted.

DOR relies on Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983) in support of its argument that the more lenient rational basis standard should apply here. As previously discussed, Regan involved a Free Speech

Clause attack on a federal income tax exemption provision that denied deductions for contributions to organizations engaged in lobbying. TWR also complained in Regan, however, "that the equal protection component of the Fifth Amendment renders the prohibition against substantial lobbying invalid" because certain other organizations that engaged in lobbying were allowed the exemption denied to TWR. Id. at 546.

In resolving this equal protection issue, the Regan Court contrasted the general "rational relation" standard to be applied for equal protection challenges with the "higher level of scrutiny" that is required where First Amendment rights are implicated:

> Generally, statutory classifications are valid if they bear a rational relation to the 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.

Id. at 547. Because the Court in Regan concluded that the denial of federal income tax deductions for contributions to political groups engaged in lobbying did not infringe on any fundamental First Amendment rights, id. at 546, it applied the rational basis standard to assess TWR's equal protection claims. Id. at 548-51.

Grosjean, Minneapolis Star, and Arkansas Writers' all hold, however, that differential taxation of the press abridges fundamental First Amendment rights. Because Florida's differential tax infringes on a fundamental right,

even an equal protection analysis under Regan requires application of strict scrutiny rather than a rational basis standard.

DOR's reliance on this Court's decision in North Ridge General Hospital v. City of Oakland Park, 374 So.2d 461 (Fla. 1979) is similarly misplaced. Oakland Park involved an equal protection challenge to a special law annexing private property. Because the special law did not interfere with the exercise of a fundamental right, this Court applied a "reasonableness" test. Id. at 464-65. In subsequent decisions, however, this Court has recognized the rule set forth in Regan that strict scrutiny applies when fundamental rights are at issue. See, e.g., Florida High School Activities Ass'n, Inc. v. Thomas, 434 So.2d 306, 308 (Fla. 1983); Graham v. Ramani, 383 So.2d 634, 635 (Fla. 1980).

In this case, the trial court held that although the resolution of MPA's claim under the First Amendment rendered it unnecessary to reach the equal protection issue, the sales tax on magazines is also invalid as a denial of equal protection. MPA maintains that because the sales tax on magazines is manifestly unconstitutional under the Free Press Clause, it is not necessary for this Court to undertake an equal protection analysis. If the Court nonetheless deems such an inquiry essential or appropriate, however, the fact that a fundamental right is at stake clearly mandates

application of the strict scrutiny standard -- a standard that DOR has failed to satisfy.

D. The Trial Court Properly Followed United States Supreme Court Precedent In Holding The Tax On Magazines Unconstitutional.

DOR argues that the trial court erred in not following this Court's decision in Gasson v. Gay, 49 So.2d 525 (Fla. 1950). The trial court properly concluded, however, that the tax on magazines violates the protections of the Free Press Clause, and correctly relied on the recent precedent of the United States Supreme Court specifically addressing this subject. Indeed, in matters of federal law, a Florida court is compelled to follow federal precedent. Miami Herald Publishing Co. v. Ane, 423 So.2d 376, 384-85 (Fla. 3d DCA 1982), aff'd, 458 So.2d 239 (Fla. 1984) (state courts cannot interpret the First Amendment in a manner contrary to United States Supreme Court decision); see also Spencer v. State, 389 So.2d 652, 653 (Fla. 1st DCA 1980) (On Petition For Rehearing).

This Court's decision in Gasson was rendered without the benefit of Minneapolis Star or Arkansas Writers', and appears to have been based entirely on an equal protection inquiry. Gasson focused primarily on the issue of whether certain publications, such as Time and Newsweek, were "newspapers" for purposes of the exemption. With virtually no discussion, the Court held that the differentiation

between newspapers and magazines for sales tax purposes was constitutional.

It is readily apparent from the Court's opinion, however, that Gasson was decided on equal protection grounds and did not address First Amendment considerations:

> The classification made by the legislature so as to tax magazines and periodicals and exempt newspapers, is reasonable and valid and does not offend either the state or federal constitutions as alleged in the bill of complaint.

49 So.2d at 526-27 (emphasis added) (citing Gray v. Central Florida Lumber Co., 104 Fla. 446, 140 So. 320 (1930)). The test used was a standard equal protection analysis applied to a legislative classification. In addition, the Gray case, upon which this Court relied, was decided exclusively on equal protection grounds and presented no First Amendment issues. Because Gasson did not address the First Amendment issues presented in this case, it was not binding on the trial court and should not be deemed controlling here. Twyman v. Roell, 123 Fla. 2, 166 So. 215, 217 (1936).

II. The Proper Remedy Is To Strike the Unconstitutional Tax on Magazines.

Given the fact that the sales tax on magazines violates the Free Press Clause, the only remaining issue is whether the trial court adopted the proper remedy by striking the tax itself, rather than striking the exemptions for news-

papers and religious publications[11] so as to create a tax of general applicability. Under controlling federal authorities and a proper construction of the sales tax severability clause, section 212.21, Florida Statutes (1989), the answer is clear: the trial court properly struck the tax on magazines.

Courts have a duty to invalidate statutory provisions that violate the United States Constitution or the Florida Constitution. State ex rel. Davis v. City of Largo, 110 Fla. 21, 149 So. 420, 421 (1933). Under federal constitutional law, it is the Florida sales tax on magazines that impermissibly burdens freedom of the press and that must be stricken to remedy the constitutional defect. The severability clause embodied in section 212.21 does not require a different result under state law.

Section 212.21 does not state or suggest that a tax exemption shall be held invalid under these circumstances; nor does it authorize or direct the Court to impose the tax on newspapers and religious publications in order to save the tax on magazines. The statute is a general severability

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[11]MPA's Motion for Summary Judgment filed with the trial court below was based solely on the differential treatment of magazines and newspapers because the presence of the newspaper exemption alone is sufficient evidence of a differential, discriminatory tax. The absence of a compelling state interest to support this differential tax is a sufficient basis for this Court to strike the tax on magazines. If this Court were to accept DOR's invitation to create a tax of general applicability, however, MPA agrees with DOR that both the newspaper and religious publication exemptions must be stricken.

clause, which simply provides that if a taxing statute or exemption is unconstitutional it shall be stricken and shall not affect the validity of the remainder of Florida's sales tax laws. Pursuant to this statute, the trial court properly struck the unconstitutional tax on magazines and left intact the other provisions of Chapter 212, including the newspaper and religious publication exemptions. DOR has failed to demonstrate any sound reason why that result should be disturbed.

A. The Established Remedy For A Tax That Violates The Press Clause Is To Strike The Tax.

The Free Press Clause prohibits abridgements or burdens on the freedom of the press. As recently stated by the United States Supreme Court: "Our cases clearly establish that a discriminatory tax on the press burdens rights protected by the First Amendment." Arkansas Writers', 481 U.S. at 227 (emphasis added). Unlike the Establishment Clause, for example, the Free Press Clause by its terms does not prohibit laws that may be beneficial to the press, but only those that impose improper burdens.

In the present case, it is the discriminatory tax that burdens certain segments of the press and is, therefore, unconstitutional. Although the newspaper exemption is conclusive evidence that the tax on magazines is discriminatory, it is the imposition of the tax that impermissibly burdens the press and is unconstitutional. Thus, the trial

court properly discharged its duty to invalidate that which violates the Constitution -- the tax on magazines.

In every Free Press Clause case where the United States Supreme Court has addressed this issue, it has remedied the constitutional infirmity by striking the tax. In Grosjean, the challenged tax applied only to newspapers having a weekly circulation of 20,000 or more. The Court did not extend the tax to other businesses by eliminating the exemption for newspapers having a circulation of less than 20,000 -- the Court struck the tax.

Similarly, Minneapolis Star involved a statute that imposed a tax on paper and ink used in the publication of newspapers, but exempted the first $100,000 in purchases. The result was that some newspaper publishers were required to pay tax while others were not. Upon finding that this discriminatory tax violated the Free Press Clause, the Court invalidated the tax rather than striking the exemption or subjecting other businesses to the tax.

Finally, in Arkansas Writers', the challenged state sales tax applied to some types of magazines but not to others. In addition, newspapers were exempted from the tax. The Court struck the tax on those magazines that were subject to tax rather than imposing the tax on those publications that the legislature had expressly exempted. In doing so, the Court rejected the state's assertion that the proper remedy would be to strike the exemptions. 481 U.S. at

227.[12] Thus, the Arkansas Writers' decision mandates the same remedy that the trial court adopted in this case -- invalidating a burden on the press proscribed by the First Amendment by striking the offending tax.

The Texas Monthly decision does not support DOR's assertion that this Court should strike the exemptions rather than strike the tax on magazines. As previously discussed, the plurality in Texas Monthly based its decision on the Establishment Clause of the First Amendment, not the Free Press Clause. 103 L.Ed.2d at 7. The Establishment Clause prohibits preferences; the Free Press Clause prohibits abridgements or burdens. Under the Establishment Clause, a preference that unconstitutionally favors religious entities is invalid. Id. at 14. Under the Free Press Clause, it is the burden -- the discriminatory tax -- that is invalid.

A court can cure an impermissible preference under the Establishment Clause either by broadening the preference so that it does not favor only religious publications, or by eliminating the preference altogether. Neither approach requires a court to strike or invalidate an otherwise valid provision of law. On the other hand, expanding the Florida

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[12]Although the Court addressed the issue in the context of a challenge to the taxpayer's standing, the question of the proper remedy was clearly before the Court. The lower court holding, quoted in the Court's opinion, was that the remedy to be afforded, if any, was to strike the exemption. 481 U.S. at 226. This issue was also addressed in the briefs of the parties. See Reply Brief for Appellant, Arkansas Writers' Project v. Ragland, 481 U.S. 221 (1987).

sales tax in an effort to create a tax of general applicability would require this Court to strike presumptively valid and longstanding tax exemptions.[13]

In addition to Grosjean, Minneapolis Star, and Arkansas Writers', state courts that have recently addressed the same remedy issue under the Free Press Clause have invalidated the tax on magazines rather than the exemption for newspapers. Louisiana Life, Ltd. v. McNamara, 504 So.2d 900 (La.App. 1987); Dow Jones & Co., Inc. v. Oklahoma, No. 70,663 (Okla. July 5, 1989) (1989 Okla. Lexis 114).[14]

This Court also addressed the differential taxation issue in City of Tampa v. Tampa Times Co., 153 Fla. 709, 15 So.2d 612 (1943), and struck in its entirety a license tax on newspaper publishers that was graduated according to circulation levels. Rather than modifying the tax so that it

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[13]Big Mama Rag, Inc. v. United States, 631 F.2d 1030 (D.C. Cir. 1980), relied on by DOR, was also decided on grounds other than the Free Press Clause. The court in Big Mama held that a federal income tax exemption for contributions to certain educational and charitable organizations was invalid because of a vagueness problem. The decision did not involve differential tax burdens on the press nor any other First Amendment issues.

[14]In Louisiana Life, a magazine publisher challenged a Louisiana sales and use tax scheme identical to that at issue in this case. Applying the Minneapolis Star standard, the court concluded that there was no compelling interest sufficient to support the differential tax. As a result, the court held that the tax was invalid. Dow Jones involved a slightly different discriminatory sales and use tax, in that Oklahoma exempted publications delivered by carrier or sold for less than 75 cents; all other publications were subject to tax. Although recognizing that the discrimination was not content-based, the court nevertheless applied the compelling interest standard and held the tax invalid.

would be uniform across circulation levels, this Court invalidated the offending tax.

These cases clearly establish that the proper remedy for a violation of the Free Press Clause is to strike the discriminatory tax, not to strike exemption provisions in an attempt to create a tax of uniform application.

B. Striking The Tax Is Also The Appropriate Remedy Under An Equal Protection Analysis.

Although First Amendment Free Press Clause principles establish the proper remedy for a discriminatory tax in this case, the same remedy would also result under an Equal Protection Clause analysis. In either instance, a court strikes the tax burden that discriminates against the taxpayer rather than increasing the tax burden of the taxpayer's competitors.

The United States Supreme Court resolved this remedial dilemma long ago. In Iowa-Des Moines National Bank v. Bennett, 284 U.S. 239 (1931), the Court recognized that although equal treatment is attainable by either reducing a taxpayer's taxes or increasing its competitor's taxes, the latter alternative is not a fair or appropriate remedy:

> 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. . . . Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative.

Id. at 247.

The constitutional requirement of equal treatment "is not satisfied if a State does not itself remove the discrimination, but imposes on him against whom the discrimination has been directed the burden of seeking an upward revision of the taxes of other members of the class." Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, 488 U.S. ____, 102 L.Ed.2d 688, 699 (1989) (quoting from Hillsborough v. Cromwell, 326 U.S. 620, 623 (1946)); see also Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 446-47 (1923). The established constitutional principle is that the remedy for discriminatory taxation is to equalize discriminatory tax burdens through tax reductions rather than tax increases. This remedy is consistent with the remedy established by the United States Supreme Court decisions under the Free Press Clause.

C. Section 212.21 Requires That The Tax on Magazines Be Stricken and Does Not Authorize or Require That This Court Strike The Exemption For Newspapers and Religious Publications.

While neither Grosjean, nor Minneapolis Star, nor Arkansas Writers' gave any indication that the remedy for a discriminatory tax under the Free Press Clause is a matter of state law,[15] DOR nonetheless asserts here that the issue of

[15]This should be contrasted with the decision in Texas Monthly, where the Court specifically stated that the remedy for an impermissible exemption under the Establishment Clause is a matter of state law. 103 L.Ed.2d at 9.

the appropriate remedy is controlled by section 212.21, Florida Statutes (1989). The plain language of section 212.21 shows, however, that its purpose was not to dictate narrow remedies in matters involving federal constitutional violations, nor to authorize courts to rewrite the sales tax law in order to preserve state revenues. Rather, the statute contains a broad severability clause intended to prevent the invalidation of Chapter 212 in whole (or in major part) solely because one of its provisions is unlawful.

In essence, section 212.21 expresses a legislative intent that no one provision -- tax or exemption -- is critical to the law as a whole. If there is a flaw in any such provision, the statute directs the courts to excise the provision and leave the remainder of the law intact. Section 212.21 clearly does not (and could not) direct a court to find one provision versus another to be unconstitutional. The relevant paragraphs simply state that if a provision is held to be unconstitutional, a court should strike <u>that provision</u> and should leave other lawful provisions unaffected.

As previously discussed, federal constitutional law, rather than state statutory provisions, determine whether it is the discriminatory tax, or exemptions which evidence the discrimination, that violate the Free Press Clause. Nevertheless, the remedy that section 212.21 requires is consistent with the federally mandated remedy.

Section 212.21(1) states that if any provision in the sales and use tax law is held to be unconstitutional, it shall not affect any other provision not held to be unconstitutional. Because the tax on magazines is unconstitutional, it should be excised from the statute with no impact on any other provision of Chapter 212, including the newspaper exemption.

Sections 212.21(2) and (4), on the other hand, state that if an exemption from tax is declared unconstitutional, then that exemption shall be invalid and the remainder of the statute should be unaffected. Invalidation of the exemption is clearly preconditioned on a finding that the exemption is unconstitutional. There are numerous examples of situations where exemptions are themselves invalid. The principal example, previously discussed, is the United States Supreme Court's decision in Texas Monthly. Another example is this Court's decision in Small v. Sun Oil Co., 222 So.2d 196 (Fla. 1969).

The Court in Small invalidated an exemption from county ad valorem taxation for machinery and equipment used in oil production where the oil produced was subject to a severance tax. The exemption at issue violated article IX, section 1 of the Florida Constitution of 1885, which limited the types of properties that could be exempted from property tax. Based on a severability clause in the law, this Court struck the invalid exemption and allowed the remainder of the tax to stand. In so doing, the Court reversed the lower

court judgment, which had declared that the entire act was invalid as a result of the defective exemption.

It is instructive to compare the language of section 212.21 with the statute at issue in King Kole, Inc. v. Bryant, 178 So.2d 2 (Fla. 1965), which involved a special excise tax imposed on swimming equipment and other sporting equipment. The term "swimming equipment" was statutorily defined to include bathing suits and swimming suits. Manufacturers of swimming suits challenged the tax as discriminatory because other forms of clothing were not subject to the tax.

After concluding that the differential tax treatment was constitutional, this Court stated in dicta that even if the tax on bathing suits was unlawful, the result, in accordance with the express intent of the legislature, would not be the elimination of the tax on bathing suits. Id. at 2. The Court's conclusion in this regard was specifically based on the following severability provision in the tax law:

> It is the intention of the legislature that if any express exemption herein is construed as causing the tax herein imposed to be discriminatory, every such sale, use and storage exempted shall be subject to said tax, it being the intent of the legislature to enact no unconstitutional or discriminatory exemptions.

Id. at 5 (emphasis added).

The statutory language at issue in King Kole differs significantly from that in section 212.21. The former states that if an exemption is construed to render the

tax invalid, the legislative intent is to eliminate the exemption and tax the formerly exempt items. The latter, however, contains no expression of intent to tax newspapers or religious publications in order to avoid an unconstitutional discrimination against magazines. King Kole shows that had the Legislature intended the result DOR urges here, it knew how to draft language that would accomplish this result. The language of section 212.21 clearly does not evidence such an intent. Because the legislature did not use the same language, it must be presumed that the legislature intended a different meaning. E.g., Trushin v. State, 384 So.2d 668, 677 (Fla. 3d DCA 1980), aff'd, 425 So.2d 1126, 1131-32 (Fla. 1982); Brooks v. Anastasia Mosquito Control District, 148 So.2d 64, 66 (Fla. 1st DCA 1963).

Section 212.21 is, as its title indicates, a "declaration of legislative intent." To the extent that legislative intent may be regarded as persuasive, it is significant that the Florida Legislature has traditionally exempted newspapers from the sales and use tax. The first Florida statute imposing a sales and use tax on tangible personal property, enacted in 1949, exempted newspapers, Ch. 26319, §8, Laws of Fla. (1949); and the exemption for newspapers has remained in effect continuously since 1949, except for the six-month period from July 1, 1987 to January 1, 1988, when the exemption was temporarily withdrawn in conjunction with the ill-fated sales tax on services. Thus,

from an historical perspective, there is little doubt that the legislative intent has been to exempt newspapers from the sales and use tax.

The result reached by the trial judge is likewise consistent with established rules of statutory construction requiring that tax laws be strictly construed against imposition of a tax. As this Court explained in Overstreet v. Ty-Tan, Inc., 48 So.2d 158, 160 (Fla. 1950):

> A cardinal rule for construing taxing statutes requires that they impose the tax in clear and specific terms, otherwise they will be held not to impose it. Taxing statutes should be liberally construed in favor of the taxpayer. It is not within the power of taxing offices or this court to say who shall be taxed or to impose a tax on any person or class unless the Legislature in clear and specific terms authorizes the tax.

See also, e.g., State ex rel. Seaboard Air Line R. Co. v. Gay, 160 Fla. 445, 35 So.2d 403, 409 (1948) ("taxes can be lawfully levied, assessed, and collected only in the express method pointed out by statute," and "[a]n act, therefore, may not be construed to impose a tax unless its terms definitely so provide.").

Thus, even if the literal terms of section 212.21 can be characterized as inconclusive with respect to the proper remedy in this case, the longstanding legislative intent to exempt newspapers and the rule of strict construction applicable to taxing statutes support the conclusion that it is the tax on magazines rather than the exemption for

newspapers that should be stricken to cure the constitutional infirmity. Because DOR has failed to substantiate its contention that the trial court erred in reaching that result, the order entered below should be affirmed.

CONCLUSION

The United States Supreme Court decisions in Grosjean, Minneapolis Star, and Arkansas Writers' not only establish a strict scrutiny standard for judicial review of differential taxation of the press, but also prescribe the parameters for constitutionally permissible taxation of the press generally. Grosjean and Minneapolis Star establish that a state may not single out the press as a whole for special taxation. Arkansas Writers' holds that a state's taxing scheme may not single out certain types of publications within a particular segment of the press. This case falls squarely within those two extremes -- Florida has imposed a sales tax on one segment of the press, magazines, while exempting from the sales tax another segment, newspapers. Absent a compelling justification that can only be achieved through this differential treatment, Florida's sales tax on magazines must fail.

The foregoing arguments and authorities clearly confirm the correctness of the trial court's conclusions that the Florida sales and use tax as applied to magazines violates the Free Press Clause, and that the proper remedy for the violation is to invalidate the tax. Accordingly, the order entered below should be affirmed in all respects.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail this 16th day of February, 1990, to KEVIN J. ODONNELL, ESQUIRE, Department of Legal Affairs, Tax Section, the Capitol, Tallahassee, Florida 32399-1050; WILLIAM L. HYDE, ESQUIRE, 101 E. College, P.O. Drawer 1838, Tallahassee, Florida 32302; TIMOTHY J. WARFEL, ESQUIRE, Messer, Vickers, Caparello, French & Madsen, First Florida Bank Building, Suite 701, P. O. Box 1876, Tallahassee, Florida 32302-1876; CECIL L. DAVIS, JR., ESQUIRE, 119 E. Park Avenue, P.O. Box 10316, Tallahassee, Florida and by Overnight Express Mail to LAURA BESVINICK, ESQUIRE, 100 S. E. 2nd Street, Suite 3400, Miami, Florida 33131.

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