IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,201

DEPARTMENT OF REVENUE,

Appellant,

vs.

MAGAZINE PUBLISHERS OF AMERICA, INC., ET AL.,

Appellees.
_____/

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

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APPELLANT, DEPARTMENT OF REVENUE'S INITIAL BRIEF

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ISSUES FOR REVIEW

1. Whether the trial court erred in overruling this Court's precedent and in applying a strict scrutiny test to invalidate the Legislature's sales and use tax scheme.

2. Whether the trial court erred in providing magazine publishers an exemption from tax rather than severing the statutory preferences giving rise to the Magazine's challenge.

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PRELIMINARY STATEMENT

Appellant, Florida Department of Revenue, was the defendant below. Appellees include the Magazine Publishers of America, Inc. (MPA), a national trade association comprised of 213 publishers. The Hearst Corporation, Time, Inc., Golf Digest/Tennis, Inc., and Meredith Corporation, were plaintiffs below and are non-Florida corporate members of the MPA. They will be referred to collectively as the "Magazines."

Appellees also include The Miami Herald Publishing Company, Florida Press Association, The Tallahassee Democrat, Inc., Florida Publishing Company, Inc., who were intervenors. They will be referred to collectively as "Newspaper Publishers."

Also intervening below and appearing as Appellees are the Florida Catholic Conference, Inc., The Voice Publishing Co., Inc., The Daughters of St. Paul, Inc., and Florida Baptist Witness, Inc. They will be referred to collectively as the "Religious Publishers."

The record consists of an Appendix attached hereto. References to the Appendix are designated by (App. ___), with citation to the appropriate page number. References to the transcripts, copies of which are made part of Appendix, are similarly designated.

STATEMENT OF THE CASE AND FACTS

This case began as a complaint by the Magazines for declaratory judgment, seeking an Order declaring that §212.05(1)(i), Fla. Stat.,[1] is void on its face and as applied because it violates the State and Federal constitutions. (App. 7-14) Specifically, the Magazines alleged that the tax violated the First and Fourteenth Amendments to the United States Constitution and Art. I, §§2 and 4 and Art. II, §3 of the Florida Constitution. (App. 12-13)

On cross-motions for final summary judgment, the trial court found that Ch. 212, Fla. Stat., violated the First Amendment because it treated "magazines" and "newspapers" differently - taxing the former while exempting the later. (App. 0-6). The trial court held in a Final Summary Judgment (Order) that it was bound to invalidate a tax on "magazines" and enjoin its collection. (App. 5).

The Magazines include a national trade association, the MPA, comprised of 213 publishers, including: The Hearst Corporation; Time, Inc.; Golf Digest/Tennis, Inc.; and Meredith Corporation. They publish magazines and other publications sold at newsstands

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[1] The statute currently provides in pertinent part:

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

and by subscription, most of whom sell publications to Florida residents. (App. 9-10)

The Newspaper Publishers who sought and were granted intervention below include the Miami Herald Publishing Company (Herald). (App. 538-540) In its motion to Intervene, the Herald alleged that if the trial court were to invalidate the statutory newspaper exemption, the Herald would be adversely affected. (App. 540) Also among the Newspaper Publishers intervening on this basis were the Florida Press Association, an association alleged to include Florida daily and weekly newsprint publishers, the Tallahassee Democrat, Inc., publishing the Tallahassee Democrat, the Florida Publishing Company, publishing The Florida Times-Union, and Citrus Publishing, Inc., publishing The Citrus County Chronicle. (App. 543-546)

The Religious Publishers who intervened below include The Florida Baptist Witness, Inc., publishing weekly the Florida Baptist Witness. (App. 553-554) The Florida Baptist Witness Inc. alleged that if the trial court were to invalidate the exclusion for religious periodicals,[2] it would be adversely affected. (App. 551)

The Religious Publishers also include the Florida Catholic Conference, which alleged that it from time to time sells and distributes religious publications (App. 562-565), The Voice Publishing Company, publishing bi-weekly The Voice, (App. 564)

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[2] Section 212.06(9), Fla. Stat.

and the Daughters of St. Paul, Inc., alleged to own and operate a "bookstore" in Florida which "sells bibles, hymn books, prayer books, religious publications and other items of tangible personal property described in Section 212.06(9), Florida Statutes." (App. 564) Each alleged that they would be adversely affected by a decision of the trial court which invalidated §212.06(9), Fla. Stat. (App. 564)

The Legislature first enacted a statute taxing the sale and use of tangible personal property in Florida in 1949. The Revenue Act of 1949, Ch. 26319, Laws of Fla. (1949), exempted "newspapers" in section 8 thereof. The tax imposed did not apply to the use, sale or distribution of religious publications and like Church service raiments and equipment "to or by Churches for use in their customary religious activities." Ch. 26319, §6, Laws of Fla. This exclusion was later amended to omit the quoted language. Ch. 26871, §8, Laws of Fla. (1951). In 1957 subscriptions to "magazines" entered as second class mail sold for an annual or longer period of time were specifically made exempt. Ch. 57-821 §1 (1957). Magazines and other periodicals sold over the counter remained subject to tax for many years thereafter. See, infra, footnote 4.

Effective July 1, 1987, Ch. 86-166, §5, Laws of Fla., amended §212.08(6), Fla. Stat., to withdraw the exemption previously granted "newspapers." By Ch. 87-101, §12, Laws of Fla., §212.05(1), Fla. Stat., was amended to add subsection (i), which imposed a tax:

> (i) At the rate of 5 percent on the retail price of newspapers and magazines sold or used in Florida.

Thus, a circulation tax applied to virtually all secular publications, including newspapers and magazines, effective July 1, 1987.

Effective 1 January 1988, Chapter 87-548, §8, Laws of Fla. (1987), amended section 212.05(1)(i), Fla. Stat.,to remove reference to "newspapers" leaving "magazines" subject to tax at the increased six percent rate. By Chapter 87-548, §26, Laws of Fla. (1987), an exemption for "newspapers" was created in section 212.08(7)(w), Fla. Stat., providing:

> (w) Newspapers - Likewise exempt are newspapers.

After bringing the complaint, the Magazines obtained an Order (App. 290-291) requiring Appellant to identify publications provided by the Magazines as either "magazines" or "newspapers" and to make its representative available concerning the answers given to the interrogatories. The answers of Appellant to the interrogatories appear in the record (App. 292-296) as does the deposition of Appellant's representative. (App. 245-296) Appellant's Motion to Strike the transcript and answers (App. 47-52) was denied by the trial court. (App. 314)

On 25 May 1989, Appellant moved for Final Summary Judgment on all counts of the Complaint. (App. 15-18) On 22 June 1989, Appellant served a memorandum in support thereof. (App. 19-31)

On 22 June 1989, the Magazines served their Motion for Summary Judgment under Count I, together with several affidavits. (App. 32-46) Simultaneously, the Magazines noticed the filing of the transcripts of depositions taken on October 12, 1989 of two of Appellant's employees, the 13 June 1989 deposition of Charles B. Strausser, taken pursuant to the above mentioned Order and the answers to the above mentioned interrogatories. (App. 151-296) Appellees subsequently served their Memorandum in support of their motion and in opposition to Appellant's motion (App. 53-68) and Appellant served its response. (App. 69-75)

A hearing was held on 12 July 1989 on the cross motions. The trial court continued the hearing (App. 299-340) and Ordered (App. 77-78) that two issues be briefed for further consideration:

> 1. If the Court believes that the law in its present state offends the general applicability rule, what is the court compelled to do under the provisions of Section 212.21, Florida Statutes? Does the Court declare the exemption granted to newspapers to be unconstitutional, or does the Court declare the law as it applies to magazines to be unconstitutional?
>
> 2. Must the Court look to the exemption for religious periodicals in answering the question of the constitutionality of the statute, and should the Court also strike the exemption for religious periodicals if its is going to strike the exemption for newspapers, thereby making the tax applicable to religious periodicals, newspapers and magazines?

During the period of time allowed to brief these issues the various intervenors listed above joined the action as parties, filing various pleadings, motions and memoranda, which are included in the Appendix. (App. 538-683)

After briefing, a hearing on the motions for summary final judgment was held on 5 October 1989 (App. 231-537) to further consider the motions and, additionally, the Religious Publisher's Motion to Strike "all evidence previously submitted by any party concerning the exclusion of religious publications. . ." from the sales tax statute. (App. 144) The trial court granted the Motion to Strike by separate order. (App. 146-148). After hearing, the trial court entered the final Order. (App. 0-6)

Appellant filed an appeal to the First District Court of Appeal. (App. 149-150) On Motion for Certification filed by the Appellees, the First District Certified that the question raised herein required immediate resolution. This Court accepted jurisdiction on 5th January, 1990.

SUMMARY OF THE ARGUMENT

The trial court erred in overruling this Court's controlling precedent. The Magazines claim that differential treatment causes their competitive disadvantage. Limited exclusions from a generally applicable tax are not invalid. The Legislature rationally promoted legitimate goals.

The press is not immune from a generally applicable tax. Newspapers are subject to Florida's excise tax but for an exemption. Religious publications enjoy a preference in the form of an exclusion. Nevertheless, Florida imposes tax on those who are trafficking in the business of speech, including book, magazine and periodical publishers.

If the trial court correctly concludes that differential treatment is invalid, the Order compounds the invalidity by devising a new exemption for magazines. The Order requires the state to treat magazines differently from books and periodicals. No guidance is provided to administer this new exemption.

No precedent allows the judiciary to create a magazine exemption. The cause of any invalid differential treatment lies in statutory preferences. Since magazines are not immune, it does not follow that preferences must be expanded, rather than severed.

The solution to the Magazine's successful argument is to sever the preferences producing differential treatment. Severance is supported by the legislative intent and by precedent. The revenue act is not designed to confer exemptions. Unlike the Order's remedy, severance does not produce an unconstitutional result. Severance eliminates targeting.

I. THE EXISTENCE OF A NEWSPAPER EXEMPTION WAS AN IMPROPER BASIS FOR FINDING AN EXCISE TAX ON MAGAZINES CONSTITUTIONALLY INVALID

A.

That magazine readers suffer an excise tax burden not borne by newspaper readers is not of constitutional significance. This Court stated in Gasson v. Gay, 49 So.2d 525 (Fla. 1950):

> 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.

Id. at 526-527. Gasson is controlling unless changed by this Court. State v. Dwyer, 332 So.2d 333 (Fla. 1976); Hoffman v. Jones, 280 So.2d 431 (Fla. 1973); Eddings v. Davidson, 302 So.2d 155, 157 (Fla. 1st DCA 1974). The trial court erred by overruling Gasson, which decision was rendered long after Grosjean v. American Press, 297 U.S. 233 (1936), relied upon below.

No subsequent decision from any other court could form the basis for overturning this Court's controlling precedent. Dwyer, supra. Moreover, no United States Supreme Court opinion has held that an excise tax exemption limited to "newspapers" creates an invalid classification under the Free Press clause of the United States Constitution.

B.

If this Court chooses to reconsider Gasson, the tax code still passes muster.

The United States Supreme Court has invalidated tax classifications on First Amendment grounds in narrowly limited circumstances: where a tax singled out newspapers for unique, possibly disadvantageous treatment; Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983); Grosjean, supra; where the tax law differentiated among magazines based upon content; Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 233 (1987) (". . .the Arkansas sales tax cannot be characterized as nondiscriminatory, because it is not evenly applied to all magazines." Id. at 229); and where the tax law provided "a tax exemption limited to the sale of religious literature by religious organizations. . . ."; Texas Monthly, Inc. v. Bullock, 489 U.S. ___, 109 S.Ct. 890, 907 (1989) (Blackmun, J., opinion concurring in judgment).

The provision for the limited exemption of "newspapers" from an otherwise general tax does not constitute impermissible discrimination. Gasson, supra. In Minneapolis Star, the Supreme Court stated that exemptions which are isolated exceptions and not the rule do not render a tax on the press invalid as discriminatory. 460 U.S. 585 n.5 (discussing Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946)), (the exemption of small weekly and semi-weekly newspapers from Fair Labor Standards Act did not preclude application of the Act to daily newspapers.).

In Texas Monthly, Justices Brennan and Blackmun opined that the Court could approve an excise tax exemption based on content, so long as the exemption swept widely enough that its sole purpose or effect was not to sponsor religion. 109 S.Ct. at 899-900, 903.

A majority gave Texas the option to expand its exemption to promote some legitimate secular aim. Id. The opinion of Justice White, concurring in judgment, 109 S.Ct. at 905, that Ragland was directly applicable to prohibit content based discrimination generates little, if any, discussion in the other opinions.

A majority interpretation of the First Amendment clearly suggests that a State may legitimately choose to exempt some publications and not others based entirely on content if, for example, Texas had sought to promote ". . .reflection and discussion about questions of ultimate value. . . ." 109 S.Ct. at 900.

Tax exemptions are a form of subsidy administered through the tax system. E.g., Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983). The First Amendment does not require states to subsidize the exercise of rights thereunder. Id. at 546.

The Regan Court reviewed an Internal Revenue Code (I.R.C.) provision denying an organization the ability to receive tax-deductible contributions to support its lobbying activities. Recognizing that exemptions are akin to subsidies, the Court held that Congress' decision not to subsidize lobbying did not burden or interfere with the organization's First Amendment right to lobby. Id. at 548.

In Regan, the organization also raised an equal protection argument. It pointed to another I.R.C. provision allowing deductions for contributions to veterans' organizations, even if engaged in lobbying. The plaintiff argued that since others received a subsidy, plaintiffs must receive one too. Id. at 546-547.

The Supreme Court upheld the regulation, applying the "rational basis" test:

> Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes.
>
> * * *
>
> The broad discretion as to classification possessed by a Legislature in the field of taxation has long been recognized. . . . The burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it.

Id. at 547-548. (quoting Madden v. Kentucky, 309 U.S. 83 (1940)).

The Regan Court expressly rejected the applicability of the higher, "strict scrutiny" standard, even though First Amendment rights were implicated:

> [The lower court's] opinion suggests that strict scrutiny applies whenever Congress subsidizes some speech, but not all speech. This is not the law.

Id. at 548-550. The Regan Court would, however, strictly scrutinize a tax structure designed to suppress particular ideas. Id. at 550. Florida's "newspaper" exemption creates a content-neutral distinction. The determination of whether a publication may be an exempt newspaper is primarily a function of the frequency of its publication. (App. 275-276, 282)

In terms of the qualification for tax-exemption, Rule 12A-1.008, Fla. Admin. Code, places particular emphasis upon the role of "newspapers" in publishing news while it is new. A significant public interest justifies governmental promotion for publishers who engage in the immediate dissemination of news. By

primarily focusing on the criteria of timeliness and immediacy, Florida's exemption isolates a rational basis for classifying between "newspapers" and "magazines". The classification depends not upon content and/or format, but upon the constraints of timing.

Courts must generally sustain a statutory classification if any realistic and rational set of facts my be conceived to support it. E.g., North Ridge General Hospital v. City of Oakland Park, 374 So.2d 461 (Fla. 1979). There it was stated:

> The legislature has wide discretion in creating statutory classifications. There is a presumption in favor of the validity of a statute which treats some persons or things differently from other.
>
> [I]f any state of facts can reasonably be conceived that will sustain the classification attempted by the Legislature, the existence of that state of facts at the time the law was enacted will be presumed by the courts. The deference due to the legislative judgment in the matter will be observed in all cases where the court cannot say on its judicial knowledge that the Legislature could not have had any reasonable ground for believing that there were public considerations justifying the particular classification and distinction made.

374 So.2d at 464-65 (citations omitted). Furthermore, one who assails the classification has the burden of showing it to be arbitrary or unreasonable. Id. at 465.

The Legislature could rationally conclude that newspapers are a primary source of timely and immediate information.[3] While

[3] C.f., Section 252.33, Fla. Stat., the State Emergency

serving a useful public purpose in disseminating information, other publications might rationally be viewed as not providing the goal of immediacy. To further this legitimate goal, the Legislature could rationally pursue a policy of promoting, through use of an exemption, the public's access to news while it is new.

Ragland held impermissible a tax statute different from Florida's which targeted a small group within the press as a whole. 481 U.S. 233. Ragland required, as did Minneapolis Star, 460 U.S. at 581-582, that the taxpayer demonstrate that the tax creates some impermissible type of discrimination.

Nothing in the record demonstrates that the tax here at issue is discriminatory within the meaning of Ragland. There is no showing that a small group is taxed, or that most publishers are exempt. Just as in Regan, the Magazines challenge an exemption.

If the Legislature's rational is held insufficient and this Court overrules Gasson, it is appropriate to strike the preference rather than the underlying revenue measure, the rational for which is clear and critical.

Management Act, which empowers state officials to specifically require newspaper publishers to print public service messages furnishing information or instructions in connection with an emergency.

II. CREATING A NEW MAGAZINE EXEMPTION WAS ERROR

Count I of the Magazines' Complaint had as its sole basis a challenge to the exemptions granted "newspapers" and "religious publications." (App. 11-12) The constitutional injury claimed was that these exemptions caused a differential treatment producing a competitive injury. (App. 11) But for the "newspaper" and "religious publication" exemptions, Count I stated no injury. No claim of immunity was or could be advanced. Nevertheless, the Magazines' sought and received relief in the form of a new exemption.

Recognizing their lack of immunity, the Magazines mischaracterized the sales tax as one targeting "magazines." (App. 11-12) The Magazines have no argument that "magazines" are not subject to tax as part and parcel of the general sales and use tax imposed by the state. The tax as applied to "magazines" is not unique, single in kind, suspicious or special. Chapter 212 does not put "magazines" on a different footing from everything else in the community, except the targeted "newspapers" and "religious publications." There is nothing wrong with the tax on the sale or use of "magazines." If invalidity is found on the basis of differential treatment, such invalidity is found only in the legislative exemptions to the tax's general applicability.

Nevertheless, the Order favors "magazines" with the very differential treatment found to invalidate the Legislature's scheme of taxation (App. 4-5). Striking §212.05(1)(i), Fla.

Stat., (the so called "magazine tax"), does not render "magazines" exempt tangible personal property.[4] Therefore, the summary judgment creates an exemption to Chapter 212, Fla. Stat., for "magazines."

No doubt this exemption ends the differential classification between "magazines" and "newspapers." But it does so by enlarging the items exempt from excise tax. It must be noted

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[4] (Supp. 1988) 212.02 DEFINITIONS. --

(20) "Tangible personal property" means and includes personal property which may be seen, weighed, measured, or touched or is in any manner perceptible to the senses. . . .

212.05 SALES, STORAGE, USE TAX. --

It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state. . . .

(1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:

(a)1.a. At the rate of 6 percent of the sales price of each item or article of tangible personal property when sold at retail in this state, computed on each taxable sale for the purposes of remitting the amount of tax due the state, and including each and every retail sale.

212.0596 TAXATION OF MAIL ORDER SALES. -- . . . .

212.21 DECLARATION OF LEGISLATIVE INTENT. --

(2) It is hereby declared to be the specific legislative intent to tax each and every sale,. . .except as to such sale,. . .as shall be specifically exempted therefrom by this chapter, subject to the conditions appertaining to such exemption.

(3) . . .It is further declared to be the specific legislative intent to tax each and every taxable privilege made subject to the tax or taxes, except such sales,. . .as are specifically exempted therefrom by this chapter to the extent that such exemptions are in accordance with the provisions of the constitutions of the state and of the United Stated. (e.s.)

that other categories of First Amendment expression remain taxable.[5] Preferred treatment is only granted to "magazines." The Order (App. 4-6) requires that the state differentiate "magazines" from other First Amendment traffic so that "magazines" may receive their exemption. Interestingly, the Magazines did not object to this "format" based classification, presumably because the resultant differential treatment is perceived to be in the Magazines' interest.

> MR. FEAGIN: Well, Your Honor, it's the constitutional differential. I don't think -- I'm struggling here. I don't think we want to get ourselves in a posture of trying to represent and endorse to this Court a distinction between magazines and books or some other less periodic publication on a basis that we will represent to you is constitutional.

(App. 530).

Appellant's response to a finding of invalidity premised on competitive injury will completely eliminate differential treatment. The remedy is to eliminate the preference. Withdrawing the favor remedies the competitive injury. Every classification causing differential treatment may be similarly

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[5] Publishers of most books, loose leaf reports and similar items concerning banking, insurance, tax law and other similar types of information, where there is a sale, use, or other distribution for consideration of the publication, are sellers subject to this tax. See Section 212.08(7)(v)(2), Fla. Stat. Handbills, circulars, flyers, advertising supplements and direct mail advertising matter are taxable. Rules 12A-1.008(2)(d), 12A-1.034, F.A.C. (1989); see Rules 12A-1.027 - 12A-1.033, F.A.C. (1989); see also, Ruralist Press, Inc. v. Florida Department of Banking and Finance, 429 So.2d 1270 (Fla. 1st DCA 1983); c.f., 212.05(1)(e) 1., Fla. Stat.

Certain school books are specifically exempt. Section 212.08(7)(q).

treated. Moreover, withdrawing the favor bestowed by the legislature is in accordance with the legislature's stated intention. Section 212.21, Fla. Stat. (Supp. 1988). Providing a new favor clearly is not.

A. NO AUTHORITY EXISTS TO SUPPORT THE JUDICIAL CREATION OF A "MAGAZINE" EXEMPTION.

The Order's remedy requires a preferential treatment after finding such preferential treatment for newspapers violates the Constitution. The Order ruled that the trial court was "bound" to strike a tax on "magazines" because that was the "constitutionally-mandated remedy." (App. 5) The Order ruled that the redress of every injury is the same "[w]hen a tax or other regulation is held to violate the First Amendment." (App. 5)

The First Amendment does not preclude a court from finding that an exemption violates the Constitution. See Big Mama Rag, Inc. v. United States, 631 F.2d 1030 (D.C. Cir. 1980); Texas Monthly supra.

In Big Mama, the plaintiff appealed a ruling upholding the Internal Revenue Service's (IRS) rejection of the plaintiff's application for tax-exempt status as a charitable and educational institution. 631 F.2d at 1032. The plaintiff was a nonprofit corporation which published a monthly newspaper distributed free of charge. Relying heavily on contributions, the corporation desired tax-exempt status to render the contributions tax deductible. 631 F.2d 1032-1033 n.2. Among other grounds, the

ruling was challeged on the basis that the Treasury regulations "full and fair exposition" standard was unconstitutionally vague so as to violate the First Amendment. The court found that the regulation violated that amendment.[6] Notably, the federal court did not rewrite the regulation to include Big Mama.

Appellant does not perceive any mandate preempting severance of the "newspaper" exemption. Fashioning appropriate remedies in light of the facts and the nature of the violation encountered is a judicial prerogative. Here, however, the trial court acted in a legislative capacity to create an exemption when such action was unnecessary to provide full relief.

In fact, the Order did not merely strike the sales tax referenced in §212.05(1)(i), Fla. Stat. Nor did it strike Chapter 212, Fla. Stat., in its entirety. Rather, the Order fashioned an exemption for "magazines" in disregard of the clear legislative intent.

The most that can be said for a theory of constitutionally mandated remedy is that several decisions have stricken discriminatory impositions of tax on and among the press. The decisions relied on by the Order do not dogmatically mandate that the tax on "magazines" be stricken.

Texas Monthly, supra, refutes the conclusion that increasing the objects exempt from tax is mandated by the First Amendment. In Texas Monthly, the Supreme Court, by plurality, found that the

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[6] It should be noted that a related argument, challenging the lack of standards by which "magazines" and "newspapers" are classified, is raised in Count II of the Magazine's complaint. (App. 12-13)

choice of remedy was a matter of state law. Texas provided a sales and use tax exemption for "[p]eriodicals. . .published or distributed by a religious faith. . .consist[ing] wholly of writings promulgating the teachings of the faith and books consisting wholly of writings sacred to a religious faith." 109 S.Ct. at 895.

Texas argued that a publisher unqualified for exemption, lacked standing to challenge an exemption granted others.[7] Texas claimed that if invalid, the proper course under Texas law would be to sever the exemption, not extend it. Therefore, went the argument, since that publisher would end up collecting tax in any event, no judicially redressable injury was presented.

In rejecting Texas' arguments on the merits of its case, the Supreme Court declined to anticipate, much less mandate, what actions Texas' courts could or should take to redress the invalidity.

> It is not for us to decide whether the correct response as a matter of state law to a finding that a state tax exemption is unconstitutional is to eliminate the exemption, to curtail it, to broaden it, or invalidate the tax altogether.

Id. at 896. The Court eschewed involvement in the state law question of how to best end the discrimination caused by an exemption. The Court was not concerned with the means, only that

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[7] Florida has advanced no such standing argument in the instant case.

the preferential treatment violative of the Establishment Clause of the First Amendment be ended.

> On the record before us, neither the Free Exercise Clause nor the Establishment Clause prevents Texas from withdrawing its current exemption for religious publications if it chooses not to expand it to promote some legitimate secular aim.

Id. at 903. Thus, just as in the instant case, Texas Monthly considered a far-reaching tax with limited exemptions. Significantly, the Court did not imposed on Texas the duty to expand its exemption, as did the Order below.

In each Free Press Clause case from which the Order draws an inference of mandate, simply striking an exemption was either not an available option, or was not one which would have cured the differential treatment of the press. None of the opinions premise their remedy on a Free Press Clause mandate to strike taxes. None of these decisions require the expansion of an exemption. Most importantly, none of the decisions provided one segment of the press differential treatment at the expense of any other segment not so favorably treated. In fact, each recognizes the constitutional validity of a generally applicable tax incidently imposed on the press.

In Grosjean, the statute imposed a license tax "single in kind" solely on the business of publishing advertising in publications of a certain circulation. Due to its narrow scope, the law taxed only thirteen publishers out of more than 124 in the state. Minneapolis Star, 460 U.S. at 579. The Court found

the law to be a deliberated and calculated effort to penalize certain publishers. Grosjean, 297 U.S. at 251. The Court found that the "form in which the tax is imposed is itself suspicious." Id.

Removing that tax's internal exemption for smaller papers would not have rendered the advertising license tax an "ordinary form of taxation." Id. at 250.

The Court ended an invalid discrimination without creating a new exemption from an otherwise generally imposed tax. The Court did not force differential treatment into new, broadened patterns.

Similarly, in Minneapolis Star, the state "created a special tax...," which singled out "publications for treatment that is,... unique...." Id. at 582. The Court attached significance to the fact that Minnesota had deliberately chosen not to apply its general sales tax to newspapers and had, instead, enacted a separate special tax applicable only to the press. 460 U.S. at 581, 587-588. The Plaintiff there showed that the use tax was drawn so narrowly as to apply to only fourteen out of 388 paid circulation newspapers in the state. 460 U.S. at 578.

Removing the internal exemption to that unique tax for smaller papers would not have rendered the paper and ink tax one of general applicability. Again, the Court was able to end differential treatment without fashioning a new exemption.

Finally, the Order's reliance on Ragland, 481 U.S. at 221, to support the expansion of exemptions to Florida's excise tax is also misplaced. Arkansas exempted "gross receipts or gross

proceeds derived from the sale of newspapers," and "religious, professional, trade and sports journals and/or publications printed and published within this State. . .when sold through regular subscriptions." 481 U.S. at 224.

In Ragland the publisher showed that the burden of the tax fell on, at most, three magazine publishers. 481 U.S. at 229 n.4. Ragland is an instance of targeting a small group within the press for taxation based upon content. Id. at 234. Unlike the Order, the Ragland opinion does not require Arkansas to continue to pick and choose among publishers to see which deserves exemption. Ragland ended targeting. The Order below mandates it.

A remedy is but the means to relieve the violation of a right. The civil right appertaining to the Free Press Clause of the First Amendment[8] is concerned only that its violation be remedied. Appellant sees no reason to broaden an exemption as a matter of course, without regard to other sufficient remedy. It may be regrettable that in fashioning tax systems, legislatures will occasionally draw what at some later date are held to be improper distinctions. It makes no sense to terminate a tax because of every such longstanding preference. Since there is nothing wrong with an excise tax on "magazines," the protection of constitutional interest does not require a remedy which strikes that tax.

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[8] The object of the constitutional provision was, generally, to prevent previous restraints on publication. Grosjean at 249.

The Magazines, through the summary judgment, will gain a competitive advantage over others who sell the medium by which information is transmitted. The Order, rather than putting all who traffic in commercial expression on a level playing field, creates an advantage for "magazines" and exacerbates differential treatment. The Order is at odds with the holding in Ragland.

Presently, the state imposes tax on the sale of books and periodicals.[9] No doubt the tax has burdened these publishers since 1949, just as it has other segments of the business society. The state also imposes tax on the sale of information services[10] and cable television,[11] for example. The Order renders Florida's generally applicable system of taxation less generally applicable to the exercise of First Amendment rights than it previously had been. These others compete with "magazines" no less than do "newspapers".

By incrementally increasing the field of exempt expression, the Order has not promoted First Amendment goals. It has not eliminated unfairness or targeting. Rather, the Order has furnished "magazine" publishers with a tool by which they may have an advantage over other forms of expression which remain subject to taxation - all because another discrete class of publishers received a preference.

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[9] See footnote 4, supra.

[10] Section 212.08(7)(v)2., Fla. Stat.

[11] Section 212.05(1)(e) 1., Fla. Stat.

In short, the Order's focus on limited preferences misapprehends the comprehensive taxation of the sale of information media already occurring under Florida's ordinary and generally applicable tax statutes. The significance of the choice of remedy - to sever the preferences or destroy by piecemeal litigation the current tax system - cannot be overstated in this age of information.

Because the First Amendment does not command that a tax be eliminated, the trial court erred in dismissing out of hand the saving clause found in §212.21, Fla. Stat. Because the Order, erroneously it is submitted, ruled that it was bound by a constitutional mandate to strike a tax, it never explored any other remedy.

In sum, the cases cited by the Order do not clearly establish any federal mandate under the First Amendment that would remove the judiciary's ability to preserve the tax, or the Florida Legislature's authority to prescribe its recommendation.

Here, the Magazines seek, in their self-interest, relief from an injury that they do not suffer. Plaintiffs collect the same tax that they would collect under a system that taxes all publications. The Order offers no reason why the Magazines should be exempt from a generally applicable economic regulation, other than the non-existent federal mandate.

B. SEVERING AN EXEMPTION IS THE PROPER REMEDY UNDER STATE LAW

The Magazines argued below that nothing is theoretically wrong with a "newspaper" exemption, therefore, Florida's should

not be severed even if Section 212.21[12] is applicable. (App. 64)

Conversely, nothing is wrong with a tax on magazines. In the

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[12] Section 212.21, Fla. Stat. (Supp. 1988), provides:

212.21 Declaration of legislative intent. --

(1) If any section, subsection, sentence, clause, phrase or word of this chapter is for any reason held or declared to be unconstitutional, invalid, inoperative, ineffective, inapplicable, or void, such invalidity or unconstitutionality shall not be construed to affect the portions of this chapter not so held to be unconstitutional, void, invalid, or ineffective, or affect the application of this chapter to other circumstances not so held to be invalid, it being hereby declared to be the express legislative intent that any such unconstitutional, illegal, invalid, ineffective, inapplicable, or void portion or portions of this chapter did not induce its passage, and that without the inclusion of any such unconstitutional, illegal, invalid, ineffective, or void portions of this chapter, the Legislature would have enacted the valid and constitutional portions thereof.

(2) It is hereby declared to be the specific legislative intent to tax each and every sale, admission, use, storage, consumption, or rental levied and set forth in this chapter, except as to such sale, admission, use, storage, consumption, or rental as shall be specifically exempted therefrom by this chapter subject to the conditions appertaining to such exemption. It is further declared to be the specific legislative intent that should any exemption or attempted exemption from the tax or the operation or imposition of the tax or taxes be declared to be invalid, ineffective, inapplicable, unconstitutional, or void for any reason, such declaration shall not affect the tax or taxes imposed herein, but such sale, admission, use, storage, consumption, or rental, or any of them exempted or attempted to be exempted from the tax or taxes, or the operation or the imposition of the tax or taxes shall be subject to the tax or taxes and the operation and imposition thereof to the same extent as if such exemption or attempted exemption has never been included herein.

(3) It is further declared to be the specific legislative intent to exempt from the tax or taxes or from the operation or the imposition thereof only such sales, admissions, uses, storages, consumption, or rentals in relation to or in respect of the things set forth by this chapter as exempted from the tax to the extent that such exemptions are in accordance with the provisions of the constitutions of the state and of the United States. It is further declared to be the specific legislative intent to tax each and every taxable privilege made subject to the tax or taxes, except such sales, admissions, uses, storages, consumptions, or rentals as are specifically exempted therefrom

context of the present challenge, any invalidity in the tax code, if one exists, resides exclusively in tax preferences.

The Magazines' concern arises because their publications are taxed while two other types of publication receive a preference. They challenge this as differential taxation, producing competitive advantage. If correct, there is something wrong with tax preferences and their severance fully answers the challenge.

Chapter 212, Fla. Stat. - The Florida Revenue Act of 1949 - is designed to raise money, not to confer exemptions. Florida's interest in raising revenue is critical. Minneapolis Star, 460 U.S. at 586. Exemptions are merely favors. State ex rel. Szabo Food Services, Inc. v. Dickinson, 286 So.2d 529, 530 (Fla. 1973). The relief received by the Magazines below fails to comport with and directly contradicts the legislative intent.

Pursuant to the Order below, the Magazines would receive a judicially created exemption. There was an enlargement of an exempt classification to include objects not specifically contemplated by the Legislature.

Those challenging discrimination on the basis of "underinclusiveness" are not automatically entitled to receive more favorable treatment. Division of Alcoholic Beverages v. McKesson Corp., 524 So.2d 1000 (Fla. 1988), U.S. appeal pending, Case No. 88-192, (Florida Supreme Court invalidated tax preferences, not the tax); see also, Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980) (Having struck down a

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by this chapter to the extent that such exemptions are in accordance with the provisions of the constitutions of the state and of the United States.

presumption of dependence for widows but not widowers, the Court left it to the state courts to decide whether the defect should be cured by extending or eliminating the presumption); Stanton v. Stanton, 421 U.S. 7, 18 (1975) (In suit by mother seeking additional child support for her daughter, the Court agreed that the State could not cut off support for girls at 18 and for boys at 21, but, although prevailing on the federal issue, the mother "may or may not ultimately win her lawsuit.").

At the hearing on final summary judgment below, the trial court's dilemma was immediately apparent. Having held that the state could not distinguish among "magazines" and "newspapers," the trial court was at a loss to define the scope of the "magazine" exemption it felt bound to create. (App. 521-533) For its part, Appellant does not wish to perform an unconstitutional exercise. If a "newspaper" exemption creates an invalid differential treatment, it follows that a "magazine" exemption does the same. If the judiciary is to require that a magazine exemption be granted, the judiciary, it is respectfully submitted, must supply the tools for its administration.

Not only is severance the legislatively preferred remedy to the Magazines' complaint, it is the only practical remedy given the judicially recognized constitutional constraints. The severance of a tax preference is also recommended by judicial precedent. A court may exercise its inherent authority to preserve the constitutionality of a statute by striking a severable provision. Small v. Sun Oil Company, 222 So.2d 196, 199 (Fla. 1969).

In Small, an excise tax was levied on the production of oil and gas, a portion of which was earmarked for the county of production. Id. at 198. The Legislature reasoned that the excise tax more exactly measured value than could an ad valorem tax. It instructed counties not to increase the value of land for ad valorem tax purposes because of the existence of petroleum. Furthermore, the statute provided that, "no ad valorem tax shall be imposed upon. . .[oil and gas] producing equipment and machinery." Id.

On appeal the parties did not question the lower court's ruling that the equipment exemption violated the constitution. Id. at 199. This Court, therefore, proceeded from essentially the same posture from which we should proceed here: whether the tax must fail because of the inclusion of an exemption.

The Court began by reciting the black-letter law:

> The fact that a portion of an Act may be unconstitutional does not mean that the entire statute must fall. If the legislative purpose expressed in the valid portions of the Act can be accomplished independently of the invalid provisions, and if, considering the Act as a whole, it cannot be said that the Legislature would not have passed the valid portion had it been known that the invalid portion would fall, then it is the duty of the court to give effect to so much of the statute as is good. (Emphasis supplied)

Id. Further along the Court held:

> When a severability clause is included in the statute, as it was in the Act sub judice, the expressed legislative intent in this respect should be carried out

> unless to do so would produce an unreasonable, unconstitutional or absurd result. It would seem to be especially important to carry out the legislative direction as to severability in a revenue measure. (Citations omitted - emphasis supplied)

Id. The Court then discussed whether the intent of the Legislature as expressed in the state could be accomplished independently of the exemption provision. The Court concluded that:

> [T]he ad valorem tax exemption could not possibly have been the inducement, monetarily, for the imposition of the statute excise tax. There is nothing in the statute to indicate that the exemption was, for any other reason, a condition or consideration without which the excise tax would not have been imposed.

Id. at 200.

The Small Court's reluctance to ignore the legislative intent, especially in a revenue measure, echoed the sentiment expressed in State ex rel. Adams v. Lee, 122 Fla. 639, 166 So. 249 (1935). Lee dealt with the Legislature's constitutional power to put into operation an excise tax designed to raise funds for public schools in response to the passage of the homestead exemption. In addressing the severance provision of the Act that Court stated:

> Provisions such as are found set forth in section 18 of this act are common in our modern legislative practice, especially in connection with revenue measures. And, when

> capable of being given a definite and reasonable operation in the course of practical judicial review, and where, in so doing, no absurd results will likely be brought about through their application, such provisions are ordinarily to be extended recognition and upheld as valid by the courts, as an alternative to the bringing about of the necessity for a reconvention of the Legislature to accomplish that which the Legislature itself has anticipated, set forth, determined, and declared in advance it would do if actually required to be called back to perform its own act of amendment. By such means the Legislature may renounce in advance provisions that are likely to be judicially declared to be beyond the scope of a constitutional exercise of legislative power, when at the time of the law's enactment the powers of the Legislature in the premises are undefined.

Id. at 252.

Discussion of the appropriateness of striking an exemption rather than a tax also occurred in King Kole, Inc. v. Bryant, 178 So.2d 2 (Fla. 1965). Bryant involved a statute taxing "bathing and swimming suits," but exempting other types of recreational apparel. Id. at 3. The Court rejected the claim of unconstitutionality, but stated in dicta how it would have ruled had it not done so:

> However, even if the exemption of other apparel did create an illegal discrimination, it would not relieve the appellants of the tax. We are not here holding that the clothing and apparel exemption is unconstitutional. We are simply holding that if it were, the result would be to strike the offending language and leave the remainder of

> the Act intact-including the tax on swimming suits.

Id. at 4. C.f., Eastern Air Lines, Inc. v. Department of Revenue, 455 So.2d 311, 317 (Fla. 1984), cert. dismissed, 476 U.S. 1109 (1985) (severability of full refund provisions is determined by their relation to the overall legislative intent of the statute and whether remainder accomplishes that purpose without the severed portion); Presbyterian Home of the Synod of Florida v. Wood, 297 So.2d 556, 559 (Fla. 1974) (Invalid income test criterion for exemption for charitable homes for aged could be severed so as to accomplish essential legislative purpose.)

Case law extends recognition to legislative far-sightedness when a taxpayer asks to strike a revenue measure. The cases decide that when tax preferences are challenged, as they are by the Magazines, the preferences are uniquely suitable for severance. The Order ignores the legislative intent and precedent.

C. THE ALLEGED COMPETITIVE INJURY IS FULLY REDRESSABLE BY SEVERING THE "NEWSPAPER" EXEMPTION AND "RELIGIOUS PUBLICATION" EXCLUSION

A state can subject the press to generally applicable economic regulations, including an excise tax, without violating the constitution. Tampa Times Co. v. City of Tampa, 158 Fla. 589, 29 So.2d 368, 370 (1947), appeal dismissed, 332 U.S. 749 (1947); see Minneapolis Star, 460 U.S. at 586 n.9 ("our cases have consistently recognized that nondiscriminatory taxes on the receipts or income of newspapers would be permissible.")(dictum); Grosjean, 297 U.S. at 250; c.f., In re Advisory Opinion to the

Governor, 509 So.2d 292, 306 (Fla. 1987) (non-binding opinion of Justices').

The First Amendment has never been construed to immunize the media from generally applicable economic regulation. Ch. 212 is an ordinary and generally applicable tax. In Minneapolis Star, 460 U.S. at 581, the Supreme Court stated that:

> It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems.

Citing a host of its decisions upholding generally applicable regulatory provisions against First Amendment challenges, the Court stated that a generally applicable sales tax might be imposed upon newspapers. Id. at 586.

This principle is firmly rooted in federal jurisprudence. A half century ago, the Court declared that newspapers are not immune "from any of the ordinary forms of taxation for support of the government". Grosjean, 297 U.S. at 250.

This proposition is not one uniquely recognized by federal courts. The Florida Supreme Court acknowledged the point some 40 years ago in Tampa Times Co., supra, stating that "[w]e have no knowledge of any case where a newspaper has been held immune from all forms of taxation." Id. at 29 So.2d 370.

> A government must have revenue. It is not a producer. Its income must be derived by taxation in one form or another. Admittedly a tax, in any form or guise, is a burden yet that alone does not impair freedom of the press <u>any more than an income or ad valorem tax will destroy freedom of speech to any other citizen</u>. (e.s.)

Id.

In North American Publications, Inc. v. Department of Revenue, 436 So.2d 954 (Fla. 1st DCA 1983), review denied, 449 So.2d 265 (Fla. 1984), the publisher of a free-circulation newspaper challenged application of a tax to items used in production. The court distinguished Minneapolis Star, finding that:

> 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.... In no way does the tax imposed in the present case resemble a penalty directed only at a few publications. The nondiscriminatory denial of a tax exemption does not infringe upon First Amendment activities. . . . (e.s.)

Id. at 955-56 (citations omitted).

Imposition of a generally applicable tax on the sale and use of tangible personal property, which incidentally includes the press, no more "chills" free speech than do all the other laws and regulations that add to their cost. The tax is levied on the business of trafficking in First Amendment expression rather than upon the exercise of the right to free speech itself. See Jimmy Swaggart Ministries, infra, (App. 684-697). Thus, severing the challenged newspaper exemption does not produce an unconstitutional result since publishers are not immunized by the Free Press Clause from an ordinary and generally applicable excise tax.

Neither do the Free Exercise and Establishment Clauses of the United States Constitution mandate that every state imposing a general excise tax on the sale and use of tangible personal

property provide an exemption for the sale of religious publications. Jimmy Swaggart Ministries v. Board of Equalization of California, 58 U.S.L.W. 4135, Case No. 88-1374 (U.S. January 17, 1990, slip opinion) (App. 684-697) (a generally applicable sales and use tax upheld); see Texas Monthly, supra,; see also Minneapolis Star, 460 U.S. at 587, n.9, (dictum) (Minneapolis Star Tribunes' argument that a generally applicable sales tax can never be constitutional is incorrect and cases dealing with imposition of a flat license tax are distinguishable from a generally applicable sale tax.)

A generally applicable tax may be applied to those with religious objections. United States v. Lee, 455 U.S. 252, 256 (1982). A "sales and use tax is not a tax on the right to disseminate religious information, ideas, or beliefs per se; rather, it is a tax on the privilege of making retail sales of tangible personal property and on the storage, use, or other consumption of tangible personal property. . . . "Jimmy Swaggart Ministries (App. 691).

The Legislature, agreeing that evangelism is an important value, has favored "religious publications" with an excise tax exclusion. Section 212.06(9), Fla. Stat. But nothing suggests that the Legislature intended that by doing so, other excise tax receipts should be placed in jeopardy. Section 212.21(2), Fla. Stat. (Supp. 1988).

Since the United States Supreme Court decision in Follet v. Town of McCormik, 321 U.S. 573 (1944), it has long been recognized that not every economic burden amounts to an unconstitutional burden on the exercise of religion:

> The exemption from a license tax of a preacher who preaches or a parishioner who listens does not mean that either is free from all financial burdens of government, including taxes on income or property. We said as much in the Murdock case,. . . .

Id. at 577-78.

In Texas Monthly, the plurality invalidated Texas' provision of a sales and use tax exemption for "[p]eriodicals. . . published or distributed by a religious faith. . . consist[ing] wholly of writings promulgating the teachings of the faith and books consisting wholly of writings sacred to a religious faith." Id. at 894. Justice Brennan's opinion announcing the decision states that:

> . . .nothing in our decisions under the Free Exercise Clause prevents the State from eliminating altogether its exemption for religious publications. "It is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimants freedom to exercise religious rights."

Id. at 901 (quoting Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 303 (1985)). Further on, Justice Brennan states:

> [A] State's interest in the uniform collection of sales tax appears comparable to the Federal Government's interest in the uniform collection of Social Security taxes, and mandatory exemptions under the Free Exercise Clause are arguably as difficult to prove. No one has suggested that members of any of the major

> religious denominations in the United States -- the principal beneficiaries of Texas' tax exemption -- could demonstrate an infringement of their free exercise rights sufficiently serious to overcome the State's countervailing interest in collecting its sales tax.
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> * * *
>
> . . .the "routine and factual inquiries" commonly associated with the enforcement of tax laws "bear no resemblance to the kind of government surveillance the Court has previously held to pose an intolerable risk of government entanglement with religion."

Id. at 902-903. Interestingly, the Religious Publishers had stricken from the record below any evidence which might tend to have demonstrated infringement. (App. 143-148) Thus, Appellant submits that no impairment of constitutional significance could be shown should section 212.06(9)'s exclusion be severed. Jimmy Swaggart Ministries (App. 692).

In sum, there is no constitutional impediment to severance of the preferences brought into question by the Magazines. The press is not immune from taxation. Complete and constitutional redress is provided by such severance. Conversely, the Magazines have received a remedy, fashioned by the trial court, which produces on its face an unconstitutional result.

CONCLUSION

The final summary judgment should be reversed and remanded for trial on Count II of the complaint based on Gasson. If the Court overrules that decision and finds unconstitutional the differential treatment challenged by the Magazines, the Court should sever the provisions giving rise to the challenge and remand the case to the trial court for a determination of the attorney's fee issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **JAMES M. ERVIN, Jr.**, Holland & Knight, Barnett Bank, 8th Floor, P.O. Drawer 810, Tallahassee, FL 32302; **WILLIAM L. HYDE**, 101 E. College, P.O. Drawer 1838, Tallahassee, FL 32302; **TIMOTHY J. WARFEL**, Messer, Vickers, Caparello, French & Madsen, First Florida Bank Building, Suite 701, P.O. Box 1876, Tallahassee, FL 32302-1876 and **CECIL L. DAVIS, Jr.**, 119 E. Park Ave., P.O. Box 10316, Tallahassee, FL 32302 and by U.S. Mail to **LAURA BESVINICK**, 100 S.E. 2nd St., Suite 3400, Miami, FL 33131; this 24th day of January, 1990.

KEVIN J. ODONNELL