



10-1973

Miami Herald Publishing Co. v. Tornillo

Lewis F. Powell Jr.

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SUPREME COURT, U.S.

in the
Supreme Court
of the
United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a division of
KNIGHT NEWSPAPERS, INC.,

Appellant,

v.

PAT L. TORNILLO, JR.,

Appellee.

On Appeal from the Supreme Court of Florida

JURISDICTIONAL STATEMENT

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November 19, 1973

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TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTION PRESENTED	3
CONSTITUTIONAL AND STATUTORY PROVI- SIONS INVOLVED	3
STATEMENT OF THE CASE	5
THE QUESTIONS ARE SUBSTANTIAL	7
A. The Florida statute which requires the press to publish a reply as a condition to publishing matter critical of political candidates violates the First Amendment	9
1. The decision below is in conflict with the rationale of prior cases	9
2. Governmental regulations requiring publication of materials must meet the same constitutional standards as regu- lations prohibiting publication	14
3. There is no compelling state interest which justifies the intrusions which the Florida statute makes upon free- dom of expression guaranteed by the First Amendment	16

II

TABLE OF CONTENTS (cont.)

	Page
4. The Florida Supreme Court's attempted analogy between permissible regulation of the press and of the broadcast media is invidious	20
5. The effect of the Florida statute will be to reduce, not increase, the flow of expression of political views	27
B. The vagueness and ambiguity of the Florida statute significantly increase its unconstitutional effect upon legitimate expression	29
CONCLUSION	33

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Simon, Attorney fo
Miami, Florida 3313

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CERTIFICATE OF SERVICE

	Page
Court's at- permissible and of the us -----	20
statute will the flow of rs -----	27
of the Flor- ase its un- itimate ex- -----	29
-----	33

I HEREBY CERTIFY that three copies of the fore-
going Jurisdictional Statement were served this 19th day
of November, 1973, by personal delivery, upon Mr. Tobias
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Miami, Florida 33130.

JAMES W. BEASLEY, JR.

James W. Beasley, Jr.

III

APPENDIX

	Page
A. Opinion of the Supreme Court of Florida...	App. 1
B. Opinion and Order on Petition for Rehearing	App. 25
C. Decision of the Circuit Court for Dade County, Florida	App. 31
D. Notice of Appeal to the Supreme Court...	App. 35
E. Statutes Involved	App. 41
F. Editorial, <i>The Miami Herald</i> , September 20, 1972	App. 45
G. Editorial, <i>The Miami Herald</i> , September 29, 1972	App. 47
H. Editorial Reply, September 30, 1972	App. 49
I. <i>State v. News - Journal</i> , 36 Fla. Supp. 164 (Volusia County, Fla., Judges Court, 1972)	App. 51

CERTIFICATE OF SERVICE

IV

TABLE OF CITATIONS

CASES

	Page
<i>Ashton v. Kentucky</i> , 384 U.S. 195 (1966)	30, 32
<i>Associated Press v. N.L.R.B.</i> , 301 U.S. 103 (1937)	15
<i>Associated Press v. U.S.</i> , 326 U.S. 1 (1945)	12, 15, 16
<i>Associates & Aldrich Co. v. Times Mirror Co.</i> , 440 F.2d 133 (9th Cir. 1971)	11, 14
<i>Avins v. Rutgers, State University of New Jersey</i> , 385 F.2d 151 (3rd Cir. 1967)	11, 13
<i>Bridges v. California</i> , 314 U.S. 252 (1941)	16
<i>Burstyn v. Wilson</i> , 343 U.S. 495 (1952)	21
<i>Capital Broadcasting Co. v. John Mitchell</i> , 333 F. Supp. 582 (D.D.C. 1971), <i>aff'd</i> , 405 U.S. 1000 (1972)	24
<i>Chicago Joint Board, Amal. Cloth. Workers v.</i> <i>Chicago Tribune Co.</i> , 435 F.2d 470 (7th Cir. 1970), <i>cert. denied</i> , 402 U.S. 973 (1971)	10, 13

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Sullivan, 376 U.S.
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and social cha
v. United Stat
1498, 1506, 77
the opportunity

TABLE OF CITATIONS (Cont.)

CASES

	Page
<i>Chronicle & Gazette Pub. Co., Inc. v. Attorney General,</i> 94 N.H. 148, 48 A.2d 478 (1946), <i>appeal dismissed</i> , 329 U.S. 690 (1947)	12
<i>Columbia Broadcasting System, Inc. v. Democratic National Committee,</i> —— U.S. ——, 36 L.Ed.2d 772 (1973)	8, 10, 12, 13 14, 18, 20, 22, 23, 24, 25, 26
<i>Craig v. Harney,</i> 331 U.S. 367 (1947)	16
<i>Dombrowski v. Pfister ,</i> 380 U.S. 479 (1965)	28
<i>Friedenburg v. Times Pub. Co.,</i> 170 La. 3, 127 So. 345 (1930)	12
<i>Grosjean v. American Press Co.,</i> 297 U.S. 233 (1936)	27
<i>Giacco v. Pennsylvania,</i> 382 U.S. 399 (1966)	32
<i>Hudson Distributors v. Lilly & Co.,</i> 377 U.S. 386 (1964)	3
<i>In re Louis Wohl,</i> 50 F.2d 254 (E.D.Mich. 1931)	12.

TABLE OF CITATIONS (Cont.)

CASES

	Page
<i>Lovell v. Griffin</i> , 303 U.S. 444 (1938)	15
<i>McGill v. State</i> , 209 Ga. 500, 74 S.E.2d 78 (1952)	12
<i>Mercantile National Bank v. Langdeau</i> , 371 U.S. 555 (1963)	3
<i>Mills v. Alabama</i> , 384 U.S. 214 (1966)	3, 16
<i>Manasco v. Walley</i> , 63 So.2d 91 (Miss. 1953)	19
<i>Musser v. Utah</i> , 333 U.S. 95 (1948)	15
<i>NAACP v. Button</i> , 371 U.S. 415 (1963)	30, 32
<i>National Broadcasting Co. v. United States</i> , 319 U.S. 190 (1943)	23
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964)	27
<i>New York Times Co. v. United States</i> , 403 U.S. 713 (1971)	15

STATE v. J

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TABLE OF CITATIONS (Cont.)

CASES

	Page
<i>Opinion of the Justices</i> , 298 N.E.2d 829 (Mass. 1973)	17, 20
<i>Pittsburgh Press Co. v. Pittsburgh Committee on Human Relations</i> , —— U.S. ——, 37 L.Ed.2d 669 (1973)	29
<i>Poughkeepsie Buying Service Inc. v. Poughkeepsie Newspapers, Inc.</i> , 205 Misc. 982, 131 N.Y.S.2d 515 (1954)	12
<i>Resident Participation of Denver, Inc. v. Love</i> , 322 F. Supp. 1100 (D. Col. 1971)	12, 18
<i>Red Lion Broadcasting Co. v. FCC</i> , 395 U.S. 367 (1969)	20, 21, 23, 26
<i>Rosenbloom v. Metromedia</i> , 403 U.S. 29 (1971)	28
<i>Shuck v. Carroll Daily Herald</i> , 215 Iowa 1276, 247 N.W. 813 (1933)	12
<i>State v. News-Journal</i> , 36 Fla. Supp. 164 (Volusia County, Fla., Judges Ct. 1972)	6
<i>Terminello v. Chicago</i> , 337 U.S. 1 (1949)	15

VIII

TABLE OF CITATIONS (Cont.)

CASES

	Page
<i>Thomas v. Collins</i> , 323 U.S. 516 (1945)	16
<i>Washington Post Co. v. Keogh</i> , 365 F.2d 965 (D.C. Cir. 1966), <i>cert. denied</i> , 385 U.S. 1011 (1967)	28
<i>Winters v. New York</i> , 333 U.S. 507 (1948)	30, 32

CONSTITUTIONS AND STATUTES

United States Constitution

First Amendment	<i>passim</i>
Fourteenth Amendment	2, 4, 6

Florida Constitution

Article I	2
-----------------	---

United States Statutes

28 U.S.C. §1257	3
-----------------------	---

TABLE

Florida Statutes

§86.091
§97.021
§104.38
§770.02
§775.082
§775.083

MISS. CODE ANN. §

NEV. REV. STAT. §2

Ch. 310, Laws of Nevada
of April 14, 1969

WIS. STAT. §895.05

MIS

CHAFEE, GOVERNMENT
COMMUNICATIONS

EMERSON, THE SYSTEM
EXPRESSION (19

	Page
.....	16
cert. denied, 385	
.....	28
.....	30, 32
STATUTES	
.....	<i>passim</i>
.....	2, 4, 6
.....	2
.....	3

IX

TABLE OF CITATIONS (Cont.)

	Page
Florida Statutes	
§86.091	5
§97.021	4
§104.38	<i>passim</i>
§770.02	5
§775.082	4
§775.083	4
MISS. CODE ANN. §3175 (1942)	19
NEV. REV. STAT. §200.570 (1963)	19
Ch. 310, Laws of Nevada, Fifty-Fifth Session (Act of April 14, 1969)	20
WIS. STAT. §895.05	19
MISCELLANEOUS	
CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS (1947)	15
EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970)	21

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United States

OCTOBER TERM, 1973

NO.

THE MIAMI HERALD PUBLISHING COMPANY,
a division of
KNIGHT NEWSPAPERS, INC.,

Appellant,

v.

PAT L. TORNILLO, JR.,

Appellee.

On Appeal from the Supreme Court of Florida

JURISDICTIONAL STATEMENT

Appellant The Miami Herald Publishing Company, a division of Knight Newspapers, Inc. ("*The Miami Herald*") appeals from the judgment of the Supreme Court of Florida entered on July 18, 1973, rehearing denied October 10, 1973, which reversed a decision of the Circuit Court of

Dade County, Florida and upheld the constitutionality of Section 104.38, Florida Statutes. This Jurisdictional Statement is submitted to show that the Supreme Court has jurisdiction of this Appeal and that substantial constitutional questions are presented which merit review by this Court.

OPINION BELOW

The initial opinion of the Florida Supreme Court dated July 18, 1973 and the opinion denying rehearing dated October 10, 1973 are not yet reported. The opinion of the Circuit Court of Dade County is reported at 38 Fla. Supp. 80 (1973). Copies of these three opinions are included in the Appendix to this Statement.

JURISDICTION

This action was brought by Appellee Pat L. Tornillo, Jr. ("Tornillo") against *The Miami Herald* for a mandatory injunction directing *The Miami Herald* to print verbatim a statement by Appellee and for damages based upon an alleged violation of Section 104.38, Florida Statutes, a criminal statute. On October 20, 1972, the Circuit Court for Dade County dismissed the Complaint, holding Section 104.38, Florida Statutes, to be in violation of the First and Fourteenth Amendments to the United States Constitution, and Article I of the Florida Constitution. Tornillo appealed directly to the Florida Supreme Court on November 3, 1972, and that Court reversed the decision of the Circuit Court and upheld the constitutionality of Section 104.38, Florida Statutes, in an opinion dated July 18, 1973. *The Miami Herald* filed a Petition for Rehearing, which was denied by the Supreme Court of Florida on October 10, 1973. *The Miami Herald* filed a

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QUESTIONS

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Appellee Pat L. Tornillo,
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Notice of Appeal on November 1, 1973. A copy of the Notice of Appeal is included in the Appendix to this Statement. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, U.S.C., Section 1257(2). Although the Supreme Court of Florida remanded this case to the trial court for further proceedings, the opinion and judgment of the Florida Supreme Court are final for purposes of 28 U.S.C. §1257(2). The Florida Supreme Court conclusively decided the controlling constitutional issue, and its decision, which is binding upon the trial court, is therefore reviewable by this Court. *Mills v. Alabama*, 384 U.S. 214 (1966); *Hudson Distributors v. Lilly & Co.*, 377 U.S. 386 (1964); *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963).

QUESTION PRESENTED

Does Section 104.38, Florida Statutes, abridge freedom of the press and due process of law in violation of the First and Fourteenth Amendments to the United States Constitution by compelling a newspaper to provide free space, under criminal sanctions, to a candidate in any state election to reply to any publication in the newspaper which "assails [his] personal character," or charges him with "malfeasance or misfeasance" in office, or "otherwise attacks his official record"?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in part:

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The Fourteenth Amendment to the United States Constitution provides, in part:

“... No State shall ... deprive any person of life, liberty, or property, without due process of law....”

The principal statute involved in this case is Section 104.38, Florida Statutes, which is part of the Florida Election Code:

“§104.38 Newspaper assailing candidate in an election; space for reply. — If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083.”

Sections 775.082 (5) and (6) and 775.083, which provide criminal sanctions for violations of §104.38, Fla. Stat., are reproduced in the Appendix to this Statement, together with Sections 97.021(1)-(4) and (18), which define the terms “election” and “candidate”, as used in Section 104.38. No other terms contained in Section 104.38 are defined in the Florida Election Code.

Section 770.02, Fla. Stat., is a retraction statute which limits a plaintiff in a libel action to actual damages which upon plaintiff's request, the publisher of the alleged defamatory statement prints a retraction. This Statute is in the Appendix to this Statement.

STATEMENT OF THE CASE

In the fall of 1972, Tornillo was a candidate for Democratic Party nomination for a seat in the Florida House of Representatives. On September 20, 1972 and September 29, 1972, *The Miami Herald* published editorials relating to Tornillo's candidacy. Copies of these editorials appear in the Appendix to this Statement.

On September 30, 1972, Tornillo requested *The Miami Herald* to print verbatim and free of cost a statement submitted by Tornillo, purportedly in reply to the editorials pursuant to Section 104.38, Florida Statutes. *The Miami Herald* did not print the material submitted by Tornillo. Tornillo did not request a retraction pursuant to §770.02, Fla. Stat., or otherwise claim that the editorials were libelous, untrue, or inaccurate.

On October 1, 1972, Tornillo filed a civil action in the Circuit Court for the Eleventh Judicial Circuit seeking to require *The Miami Herald* to publish his “reply,” and obtain damages. Circuit Judge Francis J. Christie held an emergency hearing on the matter on October 2, 1972. The Attorney General was notified of the suit pursuant to §86.091, Fla. Stat., requiring notice of any action in which a statute is alleged to be unconstitutional, and was represented at the hearing.

At the hearing, the Court was advised that the Attorney General had refused to appeal a decision by Volusia County Judge J. Robert Durden which had held §104.38 unconstitutional, because the Attorney General himself had reservations about the constitutionality of the statute. At case, *State v. News-Journal*, 36 Fla. Supp. 164 (Volusia County, Fla., Judges Ct. 1972) was apparently the first case brought under §104.38 since its enactment in 1963. A copy of the opinion in that case is contained in the appendix to this Statement. The Attorney General advised Judge Christie that his opinion was unchanged since the *News-Journal* case, and that he continued to have doubts about the constitutionality of §104.38, and therefore would not defend the statute.

At the conclusion of the hearing, Judge Christie ordered Tornillo's case dismissed with prejudice, holding the statute void on its face as an impermissible restriction upon freedom of speech and press in violation of the First and Fourteenth Amendments to the Constitution of the United States and, in addition, denied due process of law under the Fourteenth Amendment because of its vagueness and ambiguity.

Tornillo appealed the judgment of the Circuit Court directly to the Supreme Court of Florida. The Attorney General of Florida filed a brief urging affirmance of the Circuit Court's decision. Amicus curiae briefs urging affirmance of the Circuit Court's judgment were also filed by the American Civil Liberties Union of Florida, Inc. and the News Publishing Company, publisher of two daily newspapers, the *St. Petersburg Times* and the *St. Petersburg Independent*. Donald U. Sessions, an attorney acting on his behalf, filed an amicus curiae brief urging reversal.

On July 10, 1973, the Supreme Court of Florida rendered an Opinion, *per curiam*, which reversed the Circuit Court and upheld the validity of §104.38, Fla. Stat., finding that the statute did not violate the Constitutions of the United States or of Florida. One Justice dissented. On August 2, 1973, *The Miami Herald* filed a Petition for Rehearing. Twenty-two Florida newspaper publishers filed amicus curiae briefs urging the Court to grant the Petition and reverse its initial decision. The Attorney General of Florida filed a second Brief advancing similar views.

The Petition for Rehearing was denied in a *per curiam* opinion dated October 10, 1973, one Justice again dissenting. On November 1, 1973, *The Miami Herald* filed a Notice of Appeal to the Supreme Court of the United States.

THE QUESTIONS ARE SUBSTANTIAL

Introduction

This appeal involves the constitutionality of a novel form of governmental regulation of the press which is ostensibly designed to promote fairness in elections, but which in fact represents a severe restraint upon the exercise of journalistic discretion by putting the government in the editor's chair. In essence, the Florida statute in question conditions a newspaper's right to print editorials, news stories, advertising, or any other matter bearing unfavorably upon political candidates by requiring that such matter is printed, the newspaper must offer the

candidates free space for a "reply." Violations of the statute are punishable as misdemeanors of the first degree. The Florida Supreme Court has also held that the statute may be invoked as the basis for a private action for mandatory injunction and damages.

The issues presented by this case have fundamental and far-reaching implications. Tornillo has asserted that the Florida statute is not only consistent with the First Amendment, but essential to providing him and others similarly situated with a means of publicly expressing their political views. Tornillo has sought to bring himself within the ambit of the Federal Communications Act's fairness doctrine and the personal attack rules of the Federal Communications Commission, urging that these doctrines can and should be applied to newspapers.

By contrast, *The Miami Herald's* position below and before this Court is that the "right of reply" statute represents an abridgement of a basic and vital constitutional protection provided to the press by the First Amendment. By its terms, the statute imposes governmental controls on editorial decisions to publish critical stories about political candidates. Such controls directly threaten journalistic integrity and weaken freedom of expression. The *per curiam* decision of the Supreme Court of Florida upholding the reply statute is thus in fundamental and irreconcilable conflict with the principles underlying this Court's decision in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, ___ U.S. ___, 36 L.Ed.2d 772 (1973) and the decisions of other courts. Governmental regulation of the content of newspapers by requiring publication, in the absence of compelling state

interests, is no less an unconstitutional restraint than governmental prohibition upon publication. The attempted analogy between newspapers and telecommunications media, if upheld, would eradicate the long recognized distinction between permissible regulation of print media and the electronic media. Censorship of newspapers in the guise of promoting fairness by requiring a right of "reply" or "access" is, nevertheless, censorship. As such, it is the exact opposite of the freedom of speech and press guaranteed by the First Amendment.

Even assuming that a State might legislate some form of access to the press without violating the guarantees of freedom of expression provided in the First Amendment, the Florida criminal statute at issue in this case is inconsistent both with the First Amendment guarantees of a free press and the due process rights in the Fourteenth Amendment, because the statute is excessively broad, vague, and ambiguous. The Florida Supreme Court attempted to cure some of the more obvious constitutional defects in the statute through interpretation, but the effort simply revealed more clearly the vices of the statute.

A. The Florida Statute which Requires Requiring the Press to Publish a Reply as a Condition to Publishing Matter Critical of Political Candidates Violates the First Amendment

1. *The Decision below is in conflict with the rationale of prior cases.*

This Court has never ruled directly upon a state statute requiring newspaper publication of a "reply." The

fundamental question is whether the editorial discretion of newspapers may be constitutionally circumscribed by governmental regulation which compels publication. In *Columbia Broadcasting System*, this Court held that a broadcaster may not be forced to accept paid political advertising, concluding that governmental intrusion upon the exercise of "journalistic discretion" to determine what should or should not be published contravenes the "rigid limitations" of the First Amendment. Similarly, other federal courts, including three Circuit Courts of Appeal, have uniformly rejected any notion that the First Amendment permits the adoption of governmental regulation which compels a newspaper to publish material against its will.

The arguments advanced by Tornillo in the proceedings below were essentially similar to those made and rejected in *Chicago Joint Board, Amal. Cloth. Workers v. Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970). In that case, the newspaper refused to publish advertisements submitted to it by the union, which presented the union's views on a labor dispute in which it was engaged.

"It is urged that the privilege of First Amendment protection afforded a newspaper carries with it a reciprocal obligation to serve as a public forum, and if a newspaper accepts any editorial advertising it must publish all lawful editorial advertisements tendered to it for publication at its established rates. We do not understand this to be the concept of freedom of the press recognized in the First Amendment. The First Amendment guarantees of free expression, oral or printed, exist for all . . . The Union's right to free speech

does not give it the right to make use of the defendants' printing presses and distribution systems without defendants' consent." *Id.* at 478.

The union's petition for certiorari was denied. 402 U.S. 973 (1971).

The constitutional issues involved in an attempt to compel a newspaper to publish were also squarely faced by the Ninth Circuit Court of Appeals in *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971). In that case, a movie distributor claimed that its First Amendment rights were violated by the newspaper's refusal to accept certain proffered advertising without modifications requested by the newspaper. The Ninth Circuit firmly dismissed the would-be advertiser's claim of infringement of First Amendment rights.

"Appellant has not convinced us that the Courts or any other governmental agency should dictate the contents of a newspaper." *Id.* at 135 (footnote om.).

A similar result was reached in *Avins v. Rutgers, State University of New Jersey*, 385 F.2d 151 (3rd Cir. 1967). The plaintiff in that case sought to compel the Rutgers Law Review to publish an article which it had previously rejected. The Third Circuit Court of Appeals affirmed the District Court's decision, refusing to order publication even in a state-supported publication.

"The right to freedom of speech does not open every avenue to one who desires to use a particu-

lar outlet for expression . . . Nor does freedom of speech comprehend the right to speak on any subject at any time . . . [Plaintiff] does not have the right, constitutional or otherwise, to commandeer the press and columns of the Rutgers Law Review for the publication of his article, at the expense of the subscribers to the Review and the New Jersey taxpayers, to the exclusion of other articles deemed by the editors to be more suitable for publication. On the contrary, the acceptance or rejection of articles submitted for publication in a law school law review necessarily involves the exercise of editorial judgment and this is in no wise lessened by the fact that the law review is supported, at least in part by the State." *Id.* at 153-54.

rd, Resident Participation of Denver, Inc. v. Love, F.Supp 1100 (D.Col. 1971).*

While the precise form of governmental regulation issue here may differ from that involved in *Columbia Broadcasting System* and the cases discussed above, the

*Without resorting to constitutional grounds, numerous other cases rejected the concept that a newspaper should be considered to "public utility" compelled to accept and publish all advertising offered to it. *E.g.*, *McGill v. State*, 209 Ga. 500, 74 S.E.2d 78, 81-82 (1953); *Chronicle & Gazette Pub. Co., Inc. v. Attorney General*, 94 Cal. 148, 48 A.2d 478, 482 (1946), *appeal dismissed*, 329 U.S. 690 (1948); *Shuck v. Carroll Daily Herald*, 215 Iowa 1276, 247 N.W. 813 (1931); *In re Louis Wohl*, 50 F.2d 254, 255 (E.D. Mich. 1931); *enburgh v. Times Pub. Co.*, 170 La. 3, 127 So. 345 (1930); *Poughkeepsie Buying Service, Inc. v. Poughkeepsie Newspapers, Inc.*, 131 N.Y.S.2d 515 (1954); *see Associated Press v. United States*, 326 U.S. 1, 19 (1945).

question presented is exactly the same: whether newspapers may be required to publish (either as a "reply" or directly), advertisements, editorials, and articles which in the exercise of editorial judgment would not otherwise be printed. Section 104.38, Fla. Stat., curtails the exercise of journalistic discretion in the determination of what will be published in exactly the same fashion as the demands made in *Columbia Broadcasting System*, and kindred cases. In terms of the exercise of editorial judgment and the maintenance of journalistic integrity, the distinction between a demand for a "right of reply" such as that involved here and in *Chicago Joint Board, Amal. Cloth. Workers, supra*, and for "access" such as that raised in *Avins, supra*, is one without a difference. Both manifestly require the suspension of editorial discretion and permit the government through regulation to "commandeer the press and columns" of newspapers and thereby dictate the contents of those columns.

Columbia Broadcasting System and similar cases unmistakably hold that deciding what to publish and what not to publish rests within journalistic discretion which is protected against any governmental intrusion by the First Amendment. The Florida Supreme Court, upholding the constitutionality of §104.38, Fla.Stat., espoused a diametrically opposite view—that decisions by newspapers as to what they will publish may be suspended or abridged by governmental regulation. The Florida Supreme Court's view of the protections accorded by the First Amendment to newspapers in this case is in basic and irreconcilable conflict with the scope of that protection as expressed in *Columbia Broadcasting System* and kindred cases.

2. Governmental regulations requiring publication must meet the same constitutional standards as regulations prohibiting publication.

The Florida Supreme Court's decision conflicts with the rationale of this Court in *Columbia Broadcasting System* because of its conclusion that regulations which affirmatively require publication somehow stand on a different constitutional footing than regulations prohibiting publication. The decision below rests in large measure upon this supposed distinction between these two types of regulations. For example, the Florida Supreme Court specifically states that §104.38, Fla. Stat., "does not constitute an incursion upon First Amendment rights or a prior restraint, since no specified newspaper content is excluded." (App. 8) (Emphasis in the original.) Thus, the Florida Supreme Court concluded that the statute at issue here, because it compels rather than prohibits publication, is not repugnant to the First Amendment.

The First Amendment admits of no such distinction. As the Ninth Circuit Court of Appeals stated in *Associates & Aldrich Co. v. Times Mirror Co.*, *supra*, "There is no difference between compelling publication of material that the newspaper wishes not to print and prohibiting a newspaper from printing news or other material." 440 F.2d at 135.

The majority of decisions in this Court which have tested various statutes against the First Amendment guarantees have been in cases involving statutory restrictions upon publication. Unless these restrictions have been justified by a clear and present danger to a compelling state

interest, the statutes have consistently been voided. E.g., *Terminello v. Chicago*, 337 U.S. 1 (1949); *Musser v. Utah*, 333 U.S. 95 (1948); *Lovell v. Griffin*, 303 U.S. 444 (1938).

"The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government." *New York Times Co. v. United States*, 403 U.S. 713, 717 (Justice Black concurring) (1971).

Just as the First Amendment forbids unwarranted censorship of the press which would prohibit or restrain publication, a statute compelling a newspaper to publish specific information also violates the First Amendment. Both types of regulations "fetter" the maintenance of journalistic integrity and affect "the impartial distribution of news," *Associated Press v. NLRB*, 301 U.S. 103, 133 (1973). Thus in sustaining a decree forbidding monopolistic activities of a press association, this Court carefully pointed out that the decree did "not compel AP or its members to permit publication of anything which their 'reason' tells them should not be published." *Associated Press v. U.S.*, *supra* at 20. Just as a State cannot prohibit publication in the absence of a clear and present danger to a compelling state interest, a state may not become an editor and compel publication. "[L]iberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper." II Chafee, *Government and Mass Communications* 633 (1947).

3. *There is no compelling state interest which justifies the intrusions which the Florida statute makes upon freedom of expression guaranteed by the First Amendment.*

First Amendment freedoms may not be impinged upon unless there is a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. *E.g., Bridges v. California*, 314 U.S. 252, 262-63 (1941); *Craig v. Harney*, 331 U.S. 367 (1947). Statutes prohibiting any type of publication, particularly criminal statutes, are presumed unconstitutional unless it can be demonstrated that the infringement is justified by a "clear and present danger" to a critical public interest. *E.g., Thomas v. Collins*, 323 U.S. 516, 530 (1945); *Associated Press v. U.S.*, *supra* at 7.

Although there is no available legislative history for the 1913 Florida statute, the Supreme Court of Florida discussed two possible objectives of the statute which were used to justify its constitutionality. First, the Florida Supreme Court cited a proper legislative purpose in ensuring fair elections. This objective is insufficient basis for upholding the statute. This Court held in *Mills v. Alabama*, *supra*, that the reasonableness of a state's interest in fair elections cannot justify a criminal statute restricting the contents of a newspaper. *Mills* was ignored by the Supreme Court of Florida.

The second attempted justification of the statute was as a counter to alleged monopolization and concentration in the media. Even if the monopolization and concentration issues had properly been before the Florida Supreme Court, these issues would have provided no justification for up-

holding §104.38, Fla. Stat.* The Supreme Judicial Court of Massachusetts so ruled in a recent advisory opinion on the constitutionality of a proposed right of access statute.

"The situation at which §39A [the proposed statute] is directed may be the 'monopolistic status' of certain news publications. However, compulsion to publish all responsive political advertisements, applicable to all newspapers and other publications of general circulation in the Commonwealth, goes beyond what is essential to the furtherance of any interest of a State in its citizens having a right of access to newspapers in order to express, at their expense, political ideas which otherwise would not be published. See Barron, Access to the Press — A New First Amendment Right, 80 Harv. L. Rev. 1641, 1676-1678. Indeed no set of circumstances may exist which would support a legislative mandate that a newspaper or other publication of general circulation must publish a political advertisement. The views expressed and implied in the opinion of the court and in the dissenting opinions in the *Pittsburgh Press Co.* case, *supra*, [*Pittsburgh Press Co. v. Pittsburgh Committee on Human Relations*, ___ U.S. ___, 37 L.Ed.2d 669 (1973)] create substantial doubt that such legislation would pass

*The Florida Supreme Court's contention on this issue went totally beyond the issues raised by the Record in the case before that Court, or the Briefs of the parties filed in that Court. The sole factual support for the Court's contention was a magazine article appended to an Amicus Curiae Brief filed by an attorney on his own behalf. The Florida Supreme Court had never before taken judicial notice of such an article, much less given it substantive weight. In so doing, the Court violated its own rules, and abridged fundamental due process.

constitutional muster.” *Opinion of the Justices*, 298 N.E.2d 829, 835 (Mass. 1973) (footnote om.).

Similar arguments of lack of access were asserted in *Resident Participation of Denver, Inc. v. Love*, *supra*, but the three-judge Court rejected the contention that newspapers can constitutionally be required to furnish free space for expression of views of citizens.

“We are aware that lack of access to those media which reach large audiences has, some believe, given birth to a frustration which compels otherwise peaceful citizens to engage in violence to get their views to the nation. A cause of this frustration, one critic maintains, is that, although the courts have been vigorous in protecting free speech, they have been indifferent to creating opportunities for expression. Barron, Access to the Press — A New First Amendment Right, 80 Harv.L.Rev. 1641 (1967). We note, however, that while Professor Barron spends considerable space exploring a statutory solution to this problem, he devotes much less attention to constitutional arguments and but one paragraph to the problem of state action, which we find insurmountable. Professor Barron simply concludes, without noticeable explanation, that newspapers can be subjected to the ‘constitutional restrictions which quasi-public status invites.’ *Id.* at 1669. As desirable as this result might be, we are unable in good faith to reach it.” 322 F.Supp. at 1105.

The separate opinion of Justice Douglas in *Columbia Broadcasting* likewise recognized and disposed of the con-

tention that alleged concentration in the media can be cured by a government *fiat* to be fair.

“Thomas I. Emerson, our leading First Amendment scholar has stated that

‘ . . . any effort to solve the broader problems of a monopoly press by forcing newspapers to cover all “newsworthy” events and print all viewpoints, under the watchful eyes of petty public officials, is likely to undermine such independence as the press now shows without achieving any real diversity.’ *The System of Freedom of Expression* (1970), p. 671.” — U.S. at —, 36 L.Ed.2d at 811.

In addition to §104.38, there appear to have been only two similar “right of reply” statutes enacted in the United States. *Miss. Code Ann.* §3175 (1942) and *Nev.Rev. Stat.* §200.570 (1963).^{*} The Mississippi statute was evicted in *Manasco v. Walley*, 63 So.2d 91 (Miss. 1953), which held that the statute could be invoked only if the publication concerning the candidate was *libelous*, even though the statute by its terms is invoked by a publication “reflect[ing] upon the honesty, integrity or moral character” of a candidate. *Id.* at 96. Nevada repealed its mandatory “right of reply” statute in 1969, and replaced it

^{*}In addition, *Wis. Stat.* §895.05 provides that publication of a reply in lieu of a retraction prohibits a recovery against a newspaper in a defamation action other than actual damages. There is, furthermore, a fundamental difference between a right of retraction statute and the right of reply statute at issue here: the former is permissive, mitigating damages if a retraction is made and thus intended to encourage freedom of expression; the reply statute by contrast, is mandatory, with penal sanctions, and is designed to control the exercise of editorial discretion.

with a retraction statute. Ch. 310, Laws of Nevada, Fifty-Fifth Session (Act of April 14, 1969). The paucity of such legislation and the history of the few statutes that have been enacted illustrates the lack of necessity for "right of reply" or "access" to ensure that a diversity of views and ideas are disseminated among the people. Such legislation is inimical to our system of freedom of expression. Nevertheless, if the decision of the Florida Supreme Court is not reversed, it is likely that other States will consider similar statutes in a misguided effort to legislate fairness.

For these reasons, the solution to "the broader problems of a monopoly press" do not lie, as the Florida Supreme Court mistakenly conceived, in the imposition of regulations which substitute the government for the editor in the determination of what should be published. Indeed, as the Supreme Judicial Court of Massachusetts made plain in its *Opinion, supra*, there are "no set of circumstances . . . which would support a legislative mandate that a newspaper . . . must publish."

4. *The Florida Supreme Court's attempted analogy between permissible regulation of the press and of the broadcast media is invidious.*

Whatever continuing validity may inhere in the decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), this Court's subsequent decision in *Columbia Broadcasting System* leaves no doubt that the fairness doctrine is applicable and constitutionally permissible, if at all, solely and exclusively in the context of the broadcast media. It has long been recognized that differences between the media may justify differences in the extent to which First Amendment protections are accorded.

Burstyn v. Wilson, 343 U.S. 495 (1952). It may well be that *Red Lion, supra*, represents the outer limit of permissible governmental regulation of the content of radio and television station broadcasts, as this Court suggested in *Columbia Broadcasting System*. In any event, as Professor Emerson points out in his discussion of the significance of the *Red Lion* decision,

"Government regulation designed to promote the system of freedom of expression takes on quite a different cast when it is applied to media of communication other than radio and television."
Emerson, The System of Freedom of Expression
667 (1970).

The Florida Supreme Court's decision simply overlooks the fundamental constitutional distinction between the broadcast media and the press. In a remarkable analysis, the Court asserted that newspapers are subject to the same regulation as broadcast media because newspapers make use of the airwaves in their operations through telegraphs and other means of telecommunication. (App. 18) Carried to its logical conclusion, this line of reasoning would fully sustain, for example, regulations requiring newspapers to be licensed before they begin operations. That is precisely the sort of regulation which the framers of the First Amendment fully intended to forbid. The attempted analogy of the Court below between the statute at issue here and the question presented in *Red Lion, supra*, thus completely overlooks the fundamental differences, both in technology and in First Amendment principles, which exist between newspapers and the broadcast media.

That such a distinction does exist and is sustained on policy grounds is plain. It was recently reemphasized by this Court in *Columbia Broadcasting System, supra*, in the following language:

"The tensions inherent in such a regulatory structure [of broadcasting] emerge more clearly when we compare a private newspaper with a broadcast licensee. The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers — and hence advertisers — to assure financial success; and, second, the journalistic integrity of its editors and publishers." — U.S. at —, 36 L.Ed.2d at 792.

In *Columbia Broadcasting System*, this Court went on to say that the measure of freedom accorded to broadcasters is "not as large as that exercised by a newspaper." *Id.* If broadcasters cannot constitutionally be compelled to abdicate editorial discretion and accept material for broadcast, it follows, a *fortiori*, that newspapers whose range of discretion is even greater cannot be subjected to regulation which requires them to publish materials against their will.

The *Columbia Broadcasting* case was decided on May 29, 1973, after briefs had been submitted to the Florida Supreme Court in this case, but the decision was promptly called to the attention of that Court. Nevertheless, the Florida Supreme Court did not even mention *Columbia Broadcasting* in its *per curiam* opinion. *Columbia Broadcasting* was mentioned only in the specially concur-

ring opinion filed by Justice Roberts, in which five other members of the Court joined. Justice Roberts correctly reasoned that the *Columbia Broadcasting* case was distinguishable due to the differences between broadcast and other media. However, having distinguished broadcast media from other media, Justice Roberts reached the amazing conclusion that the press can be subjected to even *more* regulation than the broadcast media. Justice Roberts further asserted that the Court's *per curiam* opinion, which rested heavily upon the *Red Lion* case, did not conflict with *Columbia Broadcasting*, because *Red Lion* was adhered to in the later decision. A distinction was further discerned in that *Columbia Broadcasting* rejected a requirement that broadcasters accept paid advertising because, among other things, this would provide access only to the affluent, whereas the Florida statute provides access regardless of ability to pay. Such logic flies directly in the face of the long-established constitutional principle that the only basis for *any* regulation of the content of broadcasting is its unique use of limited airwaves. *E.g., Columbia Broadcasting System, Inc. v. Democratic National Committee, supra; Red Lion Broadcasting Co. v. FCC, supra; National Broadcasting Company v. United States*, 319 U.S. 190, 226 (1943).

The difference, therefore, between regulation which may be permissible in the context of radio and television and that which is permitted with respect to the newspapers derives from the basic technology of the two media. As this Court recognized long ago in *National Broadcasting Company v. U.S., supra*, the regulation of broadcasting is virtually unavoidable since all who wish to speak over the airwaves simply cannot be permitted to do so or none will be heard. Whether the necessity of licensing broadcast

stations and the technology limitations of the spectrum are, of themselves, a sufficient ground to justify the Fairness Doctrine is, in light of this Court's evolving views as expressed in *Columbia Broadcasting System*, open to question. In any case, the only grounds upon which the Fairness Doctrine can be sustained is "the unique characteristics of electronic communication." *Capital Broadcasting Co. v. John Mitchell*, 333 F.Supp 582 (D.D.C. 1971), *aff'd* 405 U.S. 1000 (1972).

The direct conflict between the attempt by the Florida Supreme Court to draw an analogy between the broadcast and print media and this Court's views is illustrated by the following excerpts from the Court's opinion in *Columbia Broadcasting System*:

"[T]he broadcast media pose unique and special problems not present in the traditional free speech case. Unlike other media, broadcasting is subject to an inherent physical limitation. . . . The Court spoke to this reality when, in *Red Lion*, we said 'it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.' *Red Lion*, *supra*, 395 U.S., at 388." — U.S. at —, 36 L.Ed.2d at 783.

* * *

"Nor can we accept the Court of Appeals view that every potential speaker is 'the best judge' of what the listening public ought to hear or indeed the best judge of the merits of his or her views. All journalistic tradition and experience is

to the contrary. For better or worse, editing is what editors are for; and editing is selection and choice of material." — U.S. at —, 36 L.Ed.2d at 796.

Similar views were expressed in the concurring opinions of Justices Douglas and Stewart:

Justice Douglas:

"It would come as a surprise to the public as well as to publishers and editors of newspapers to be informed that a newly created federal bureau would hereafter provide 'guidelines' for newspapers or promulgate rules that would give a federal agency power to ride herd on the publishing business to make sure that fair comment on all current issues was made.

* * *

"Of course there is private censorship in the newspaper field. But for one publisher who may suppress a fact, there are many who will print it. But if the government is the censor, administrative fiat not freedom of choice carries the day." — U.S. at —, 36 L.Ed.2d at 811, 812.

Justice Stewart:

"There is never a paucity of arguments in favor of limiting the freedom of the press. The Court of Appeals concluded that greater government control of press freedom is acceptable here because of the scarcity of frequencies for broad-

casting. But there are many more broadcasting stations than there are daily newspapers.

* * *

"Perhaps I overstate the logic of the opinion of the Court of Appeals. Perhaps its 'balancing' of First Amendment 'values' would require no more than that newspapers be compelled to give 'limited' access to dissident voices, and then only if those voices were 'responsible'. And perhaps it would require that such access be compelled only when there was a single newspaper in a particular community. But it would be a close question for me which of these various alternative results would be more grossly violative of the First Amendment's guarantee of a free press. For that guarantee gives *every* newspaper the liberty to print what it chooses and reject what it chooses, free from the intrusive editorial thumb of Government." ____ U.S. at ____, 36 L.Ed.2d at 807-808.

(Footnotes omitted)

The attempt by the Florida Supreme Court to analogize §104.38, Fla. Stat., with the Fairness Doctrine must, therefore, necessarily fail. The supposed analogy ignores completely the express and repeated statements by this Court that such constitutional merit as the Fairness Doctrine may have rests entirely on the "unique and special problems" presented by the technology of the electronics media which are wholly absent in the instant case. The reliance of the Court below upon *Red Lion* was thus error. If its decision permitted to stand, it will obliterate the

distinctions which this Court has found to exist between the media and will accord to newspapers a lesser measure of journalistic freedom than that accorded to broadcasters.

5. *The effect of the Florida statute will be to reduce, not increase, the flow of expression of political views.*

Section 104.38, Fla. Stat., cannot be permitted to stand because there is no compelling state interest to sustain a regulation which suspends the unfettered exercise of editorial discretion and requires the publication of material against the newspaper's will. The impact upon the vital role of a free press, if this statute is upheld, will be profound.

"A free press stands as one of the greater interpreters between the government and the people. To allow it to be fettered is to fetter ourselves." *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

The Florida Supreme Court ignored numerous First Amendment cases in which statutes have been struck down which might have a constitutionally impermissible chilling effect on freedom of expression. For example, one of the principal reasons for the doctrine announced in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), was to provide more "elbow room" for free expression on subjects of public interest and concern.

"... would-be critics of official conduct may be deterred from voicing their criticism, even

though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.' *Speiser v. Randall*, *supra*, 357 U.S. at 526. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments." *Id.* at 279.

See also, *Rosenbloom v. Metromedia*, 403 U.S. 29, 52-53 (1971); *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

As the District of Columbia held in *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967):

"Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is 'hardly less virulent for being privately administered.'"

The intrusion of §104.38, Fla. Stat., reaches to "any matter" published in a newspaper, presumably including not only editorials, which were the basis of Tornillo's complaint in this case, but also news stories, columns, advertising, cartoons, and any other material. The statute, therefore, sweeps far broader than the narrow regulation of

classified advertising cautiously upheld by this Court in *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*, ____ U.S. ____, 37 L.Ed.2d 669 (1973).

If a newspaper cannot print publications concerning political candidates unless it is prepared to publish their "replies" at its expense, the newspaper will be deterred from making the initial publications. Conscientious newspapers will be reluctant to print anything concerning impending elections if in doing so they become obligated to provide free space for "replies" that may be antithetical to the newspapers' views. Such "replies" could be obscene or libelous. The potential expense of printing the "replies" could be substantial due to the large number of candidates and the considerable amount of space that every responsible newspaper in this state devotes to coverage of elections. The deterrent effect of the statute is even more severe because it provides for criminal penalties, even though its interpretation is subject to considerable uncertainty, as discussed below.

B. The Vagueness and Ambiguity of the Florida Statute Significantly Increase Its Unconstitutional Effect Upon Legitimate Expression

Even if some form of reply or access statute might theoretically be compatible with the First Amendment, §104.38, Fla. Stat., is not such a statute. The statute's vagueness and ambiguity result in uncertainty as to its meaning, greatly increasing its inhibitory effect upon the free expression protected by the First Amendment.

It is fundamental that restrictions upon free expression, even if otherwise constitutional, may violate the First Amendment if they are insufficiently precise.

"Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer." *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966). (fn.om.)

The constitutional test of definiteness is particularly strict in the case of a criminal statute such as §104.38, Fla. Stat. *E.g.*, *NAACP v. Button*, 371 U.S. 415, 432-33 (1963); *Winters v. New York*, 333 U.S. 507, 515 (1948).

The principal ambiguities in the statute include the following:

(i) What is a "newspaper"? Does the term include any publication, such as magazines, newsletters, pamphlets, brochures and handbills? Does it include "newspapers" published in other states but circulated in Florida?

(ii) Does the term "columns" in the statute include editorials, signed columns, news articles and letters to the editor? Does the term include advertisements? Cartoons? Does the term include replies published pursuant to §104.38, Fla. Stat.?

(iii) What is an "assault" on personal character, or an "attack" on an official record? Do they merely en-

compass criticism, no matter how truthful or valid? Does personal character include any individual human quality?

(iv) Need a "candidate" be mentioned specifically by name to be entitled to a reply, or does a reply right arise if a "candidate" can be identified in a publication, even though not named? If a publication refers to a group, does each member of the group have a right to reply?

(v) What is an equally "conspicuous" place for publication of a reply? Is page four of a newspaper as conspicuous as page five?

(vi) How lengthy a reply may be made? If a newspaper editorial states only, "John Doe is not fit for office," what is the length of the permitted reply? Seven words? Can a statute providing such a "reply" be seriously considered as enhancing public discussion?

Although both lower Florida courts which passed upon the statute held it void for vagueness, the Florida Supreme Court sought to circumvent this obstacle in two ways. First, the Court sought to resolve certain ambiguities in the statute by interpretation, holding that a newspaper need not publish a reply unless it was:

"wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slanderous of the publication nor anyone else, nor vulgar nor profane." (App. 16)

Such an interpretive approach which seeks to remedy massive gaps in the statute cannot cure constitutional infirmities. Criminal statutes affecting freedom of expression must delineate precise standards of conduct without resort to wholesale judicial construction. *Winters v. New York*, *supra* at 515 (1948); *Ashton v. Kentucky*, *supra*; *NAACP v. Button*, *supra*. Moreover, despite the Florida Supreme Court's efforts, major ambiguities and uncertainties remain. The unconstitutional effect of the statute cannot be diminished by the Court's intentions, expressed in its *per curiam* decision denying the Petition for Rehearing, to refine and define the statute's terms in future cases. *E.g., Giaccio v. Pennsylvania*, 382 U.S. 399 (1966).

The second aspect of the Florida Supreme Court's curative effort was its holding that because the plaintiff was seeking only civil remedies, the Court need not pass upon whether the statute measured up to standards required of criminal statutes. The Court reasoned that even if the statute was impermissibly vague so that it could not be the basis of a criminal prosecution, the statute was sufficient for an implied civil right of action. The Court thus held, in effect, that an unconstitutionally vague criminal statute may be invoked for a civil remedy. Such logic is without precedent.

CONCLUSION

In upholding the constitutionality of §104.38, Florida Statutes, the Supreme Court of Florida ignored fundamental First Amendment principles. The questions presented by this appeal are substantial, with major implications for the public interest in freedom of speech and of the press.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF FLORIDA

CASE NO. 43,009

PAT L. TORNILLO, JR.,

Appellant,

vs.

THE MIAMI HERALD PUBLISHING COMPANY,
a Division of Knight Newspapers, Inc.,

Appellee.

July 18, 1973

PER CURIAM

This cause is before us upon direct appeal from Circuit Court of Dade County, holding Florida Statute 104.38¹ unconstitutional thereby vesting jurisdiction in this Court under Article V, Section 3(b)(1), Florida Constitution, as amended 1973.

¹F.S. §104.38 — Newspaper assailing candidate in an election; space for reply — If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083.

Appellant Tornillo, plaintiff below, who was a candidate for the State Legislature demanded that appellee print verbatim his replies to two editorials printed therein attacking appellant's personal character. The appellee refused and Tornillo filed complaint for declaratory and injunctive relief and punitive damages. Pursuant to Florida Statute 86.091, the Attorney General of this State was advised that appellant intended to contest the constitutionality vel non of Florida Statute 104.38. In view of the circumstances, the trial court granted the request for an emergency hearing.

Preliminarily, the trial court determined that the statutory provision in question is a criminal statute and that absent special circumstances, equity will not ordinarily enjoin commission of a crime. *Pompano Horse Club Co. v. State*, 93 Fla. 415, 111 So. 801 (1927). Notwithstanding this infirmity in appellant's complaint, the trial court further concluded that F.S. §104.38 is violative of Article I, Sections 4 and 9 of the Constitution of Florida and the Fourteenth Amendment to the Constitution of the United States as a restraint upon freedom of speech and press and because it is impermissibly vague and indefinite.

Believing that the promulgation of this statute is authorized by Article IV, Section 4,² and the First³ and Fourteenth Amendments to the Constitution of the United

²Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against invasion; and On Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

³Amendment I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; . . .

States, and Article VI, Section 1,⁴ and Article I, Section 4⁵ of the Florida Constitution, and believing that this statute enhances rather than abridges freedom of speech and press protected by the First Amendment, we hold that it does not constitute a violation of the First and Fourteenth Amendments to the Constitution of the United States or Article I, Section 4, Florida Constitution.

The election of leaders of our government by a majority of the qualified electors is the fundamental precept upon which our system of government is based, and is an integral part of our nation's history. Recognizing that there is a right to publish without prior governmental restraint,⁶ we also emphasize that there is a correlative responsibility that the public be fully informed.

The entire concept of freedom of expression as seen by our founding fathers rests upon the necessity for a fully informed electorate. James Madison wrote that, "A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy; or, perhaps both. Knowledge will forever govern ignorance;

⁴Section 1. Regulation of elections. — All elections by the people shall be by direct and secret vote. General elections shall be determined by a plurality of votes cast. Registration and elections shall, and political party functions may, be regulated by law.

⁵Section 4. Freedom of speech and press. — Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.

⁶Near v. Minnesota, 283 U.S. 697, *New York Times v. United States*, 430 U.S. 713, *Martin v. City of Struthers*, 319 U.S. 141, *Lamont v. Postmaster General*, 381 U.S. 301.

and a people who mean to be their own governors, must arm themselves with the power which knowledge gives (to W. T. Barry, August 4, 1822).”

The public “*need to know*” is most critical during an election campaign. By enactment of the first comprehensive corrupt practices act relating to primary elections in 1909 our legislature responded to the need for insuring free and fair elections. Article III, Section 26, and Article VI, Section 9, Constitution of Florida 1885, commanded the Legislature to pass laws “regulating elections and prohibiting under adequate penalties, all undue influence thereof from power, bribery, tumult or other improper practices” and to “enact such laws as will preserve the purity of the ballot given under this Constitution.” This act of 1909 did not deal with the subject of the wrongful use of newspapers or other printed or written matter, with the exception of a provision which declared it to be a misdemeanor for any candidate or other person to have or distribute on day of primary at or near any polling place any writing against any candidate in the primary. Florida Statute 104.38 was originally enacted in 1913 as Chapter 6470, Section 12, Laws of Florida, 1913.⁸ This second act adopted

⁷⁶ Writings of James Madison 398 (Hunt Ed. 1906), The Complete Madison 337 (1953).

⁸Chapter 6470, Section 12 (Laws of Florida, 1913), provided, “That if any newspaper in its columns assails the personal character of any candidate for nomination in a primary election, or charges such candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall, upon request of such candidate, immediately publish free of cost any reply he may make thereto, in as conspicuous a place and in the same kind of type as the matter that calls for such reply; provided, such reply does not take up more space than the matter replied to. A person who fails to comply with the provisions of this Section, shall upon conviction be punished by fine not exceeding five hundred dollars, or by imprisonment.” See subsequent history of stat-

in 1913 known as the corrupt practices act was enacted to supplement the act of 1909. The statutory provision, the constitutionality vel non which is being questioned in the instant cause, was enacted not to punish, coerce or censor the press but rather as a part of a centuries old legislative task of *maintaining conditions conducive to free and fair elections*. The Legislature in 1913 decided that owners of the printing press had already achieved such political clout that when they engaged in character assailings, the victim’s electoral chances were unduly and improperly diminished. To assure fairness in campaigns, the assailed candidate had to be provided with an equivalent opportunity to respond; otherwise not only the candidate would be hurt *but also* the people would be deprived of both sides of the controversy.⁹

What some segments of the press seem to lose sight of is that the First Amendment guarantee is “not for the

ute, Section 5927, Revised General Statutes of Florida, 1920, entitled newspaper assailing candidate must give free space for reply. This provision was re-enacted as Section 875.40, Florida Statutes, which varies only slightly from the present law. Section 875.40, Florida Statutes was identical to Chapter 6470, Section 12 (Laws of Florida, 1913). In 1951, the Legislature renumbered and slightly revised this provision to cover any elections (not just primaries) and to provide that, “Any one failing to comply with the provisions of the section shall, upon conviction, be guilty of a misdemeanor.” Chapter 268.70, Laws of Florida, 1951. Section 104.38 was entitled, “Newspaper assailing candidate in election; space for reply.” See also Chapter 28151, General Laws, 1953, which adds the words “or for election” so that the preliminary portion of the statute reads: “If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election . . .” In 1972, HB 2801 attempting to repeal F.S. 104.38 died in committee.

⁹Ex Parte Hawthorne, 116 Fla. 608, 156 So. 619 (1934). 9 Florida L.J. 297 (1935), “Brief History of the Corrupt Practices Act of Florida,” J. V. Keen.

benefit of the press so much as for the benefit of us all.”¹⁰ Speech concerning public affairs is more than self expression. It is the essence of self government.¹¹

Mr. Justice Learned Hand expressed the role of the press well when he emphasized,

“However neither exclusively, nor even primarily are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: The dissemination of news from as many different sources and with as many different facets and colors as possible.”¹²

In *Pennekamp v. Florida*, 328 U.S. 331 (1946), the Supreme Court of the United States emphasized that the power of the press must be tempered with responsibility when it explained,

“Without a free press there can be no free society. Freedom of the press, however, is not an end in itself but a means to the end of a free society. The scope and nature of the constitutional protection of freedom of speech must be viewed in that light and in that light applied. . . . “A free press is vital to a democratic society because its freedom gives it power. Power in a democracy implies responsibility in its exercise.

¹⁰*Time, Inc. v. Hill*, 385 U.S. 374, 389.

¹¹*Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

¹²*United States v. Associated Press*, 52 F.Supp. 362, 372.

No institution in a democracy, either governmental or private, can have absolute power. Nor can the limits of power which enforce responsibility be finally determined by the limited power itself. . . . In plain English, freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise. Most State constitutions expressly provide for liability for abuse of the press's freedom. That there was such legal liability was so taken for granted by the framers of the First Amendment that it was not spelled out. Responsibility for its abuse was embedded in the law. The First Amendment safeguarded that right.

“The press does have the right, which is its professional function, to criticize and to advocate. The whole gamut of public affairs is the domain for fearless and critical comment, and not the least the administration of justice. But the public function which belongs to the press makes it an obligation of honor to exercise this function only with the fullest sense of responsibility. Without such a lively sense of responsibility a free press may readily become a powerful instrument of injustice.” [Emphasis Supplied]

The concept which appears throughout the decisions underlying First Amendment guarantees that there is a broad societal interest in the free flow of information to the public by the Supreme Court of the United States was explicitly stated in *New York Times v. Sullivan*, 376 U.S. 254 (1964), as well as other Supreme Court decisions, as follows:

"The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Roth vs. United States, 354 U.S. 476, 484, 1 L.Ed.2d 1498, 1506, 77 S.Ct. 1304. The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the republic, is a fundamental principle of the constitutional system."

The statute here under consideration is designed to add to the flow of information and ideas and does not constitute an incursion upon First Amendment rights or a prior restraint, since no specified newspaper content is excluded. There is nothing prohibited but rather it requires, in the interest of full and fair discussion, additional information.

The right of the public to know all sides of a controversy and from such information to be able to make an enlightened choice is being jeopardized by the growing concentration of the ownership of the mass media into fewer and fewer hands, resulting ultimately in a form of private censorship. Through consolidation, syndication, acquisition of radio and television stations and the demise of vast numbers of newspapers, competition is rapidly vanishing and news corporations are acquiring monopolistic influence over huge areas of the country. We take note of a recent

article in Florida Trend magazine, March 1973, explicating that the Miami Herald is the largest newspaper published in Florida, that it is larger in size than the next two largest newspapers; and that it is not only a large city daily newspaper but also is a regional and international newspaper.

Freedom of expression was retained by the people through the First Amendment *for all the people and not merely for a select few*. The First Amendment *did not create a privileged class* which through a monopoly of instruments of the newspaper industry would be able to *deny to the people the freedom of expression* which the First Amendment guarantees. The Supreme Court of the United States in *Associated Press v. United States*, 384 U.S. 1, 20, clearly expounded,

"It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.

Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity."

More recently in *Red Lion Broadcasting Co. v. F.C.C.*, 381 F.2d 908, affirmed 395 U.S. 367 (1969), the Supreme Court opined,

"Nor can we say that it is inconsistent with the First Amendment goal of producing an informed public capable of conducting its own affairs to require a broadcaster to permit answers to personal attacks occurring in the course of discussing controversial issues, or to require that the political opponents of those endorsed by the station be given a chance to communicate with the public. Otherwise, station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. 'Freedom of the press from governmental interference under the First Amendment does not

sanction repression of that freedom by private interests.' *Associated Press v. United States*, 326 U.S. 1, 20 (1945)."

By this tendency toward monopolization, the voice of the press tends to become exclusive in its observation and its wisdom which in turn deprives the public of their right to know both sides of controversial matters.

Appellant urges that if a newspaper may attack a candidate with impunity and he is provided no right to reply, the public interest in free expression suffers, because they can only hear the publisher's side of the controversy and are denied the dissenting view.

Although we have carefully considered appellee's argument that *Red Lion Broadcasting Co. v. F.C.C.*, supra, is inapplicable to the present cause, we cannot discount certain excerpts therefrom which are applicable to First Amendment guarantees in general. Therein, the Supreme Court explained that,

"Congress does not abridge freedom of speech or press by legislation directly or indirectly multiplying the voices and views presented to the public through time sharing, fairness doctrines, or other devices which limit or dissipate the power of those who sit astride the channels of communication."
395 U.S. at 401, n. 28.

That Court further stated in *Red Lion Broadcasting v. F.C.C.*, supra, at 390, in *Associated Press v. U.S.*, supra, at 20, and *New York Times v. Sullivan*, supra, at 270, that it is the purpose of the First Amendment to preserve

an uninhibited marketplace of ideas wherein truth will prevail rather than to countenance a monopolization of that market whether by government or private enterprise.

Florida's right of reply statute is consistent with the First Amendment as applied to this State through the Fourteenth Amendment. In *Rosenbloom v. Metromedia*, 403 U.S. 29, 47, we find that the Supreme Court of the United States is inclined to this position by the following quote from the majority opinion:

"Furthermore, in First Amendment terms, the cure seems far worse than the disease. If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern."

To this comment, the Court appended the following note:

"Some States have adopted retraction statutes or right-of-reply statutes. See Donnelly, *The Right of Reply: An Alternative to an Action for Libel*, 34 Va. L.Rev. 867 (1948); Note, *Vindication of the Reputation of a Public Official*, 80 Harv. L.Rev. 1730 (1967). Cf. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

"One writer, in arguing that the First Amendment itself should be read to guarantee a right of access to the media not limited to a right to respond to defamatory falsehoods, has suggested several ways the law might encourage public dis-

cussion. Barron, *Access to the Press — A New First Amendment Right*, 80 Har. L. Rev. 1641, 1666-1678 (1967). It is important to recognize that the private individual often desires press exposure either for himself, his ideas, or his causes. Constitutional adjudication must take into account the individual's interest in access to the press as well as the individual's interest in preserving his reputation, even though libel actions by their nature encourage a narrow view of the individual's interest since they focus only on situations where the individual has been harmed by undesired press attention. A constitutional rule that deters the press from covering the ideas or activities of the private individual thus conceives the individual's interest too narrowly."

Although appellee attempts to minimize the import of the aforestated quotation, we feel compelled to note that such remarks regarding right to reply legislation are entirely consistent with past precedent establishing the fundamental purpose of the First Amendment to inform the people.

Neither appellant nor appellee takes issue with the holding of the trial court that it lacked jurisdiction to enjoin an alleged violation of Florida Statute 104.38. This provision is criminal in nature and absent special circumstances equity will usually not enjoin commission of a crime.¹³

Appellant urges that the Right of Reply Statute in question is neither impermissibly vague nor unnecessarily

¹³*Pompano Horse Club Co. v. State*, supra, 17 Fla. Jur. Injunctions, §46.

broad. We must agree and therefore uphold the constitutionality of this statutory provision. It is a fundamental principle that this Court has the duty, if reasonably possible, consistent with protection of constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality and if reasonably possible a statute should be construed so as not to conflict with the constitution.¹⁴ Courts are inclined to adopt that reasonable interpretation of a statute which removes it farthest from constitutional infirmity. In *Gitlow v. People of New York*, 268 U.S. 652, the Supreme Court of the United States stated every presumption is to be indulged in favor of the validity of a statute, and the case is to be considered in the light of the principle that the State is primarily the judge of regulations in the interest of public safety and welfare.

We do not believe that Florida's statutory right of reply is lacking in any of the required standards of preciseness. The statute is sufficiently explicit to inform those who are subject to it as to what conduct on their part will render them liable to its penalties.

We recognize that certainty is all the more essential when vagueness might induce individuals to forego their rights of speech, press and association for fear of violating an unclear law. *Scull v. Virginia*, 359 U.S. 344 (1959), *Ashton v. Kentucky*, 384 U.S. 195 (1965).

¹⁴*Buck v. Gibbs*, 34 F. Supp. 510, Mod. 313 U.S. 387 (1940); *Hunter v. Owens*, 80 Fla. 812, 86 So. 839 (1920); *Cragin v. Ocean 4 Lake Realty Co.*, 133 So. 569, 135 So. 795 (1931), appeal dismissed, 286 U.S. 523; *Haworth v. Chapman*, 113 Fla. 591, 152 So. 663 (1933); *Hanson v. State*, 56 So.2d 129 (1952); *Overstreet v. Blum*, 227 So.2d 197 (Fla. 1969); *Hancock v. Sapp*, 225 So.2d 411 (Fla. 1969); *Rich v. Ryals*, 212 So.2d 641 (Fla. 1968).

In *Brock v. Hardie*, 154 So. 690, 694 (1934), relative to the issue of vagueness, this Court said,

"Whether the words of the Florida statute are sufficiently explicit to inform those who are subject to its provisions what conduct on their part will render them liable to its penalties is the test by which the statute must stand or fall, because, as was stated in the opinion above mentioned, 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'

"Such seems to be the test approved by the Supreme Court of the United States. Citation of authorities as to what may be considered the exact meaning of the phrase 'so vague that men of common intelligence must necessarily guess at its meaning,' so that certain conduct may be considered within or outside the true meaning of that phrase, or what language of a statute may lie within or without it, would be of little aid to us.

"We must apply our own knowledge with which observation and experience have supplied us in determining whether words employed by the statute are reasonably clear or not (sic) in indicating the legislative purpose, so that a person who may be liable to the penalties of the act may know that he is within its provisions or not."

Inter alia, appellee attacks the constitutionality of the statute on grounds of vagueness and overbreadth because of the use of the term "any"—referring to the type of reply allowable. This statute provides in part,

"if any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply" [Emphasis Supplied]

Because of the longstanding policy of this Court to give a statute, if reasonably possible, a construction supporting its constitutionality, we hold that the mandate of the statute refers to "any reply" which is wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slanderous of the publication nor anyone else, nor vulgar nor profane.

We conclude that the statute in question is as certain and definite as others heretofore upheld as constitutionally permissible. The following statement made by Judge Tamm in *Red Lion Broadcasting Co. v. F. C. C.*, supra, 381 F.2d at 921, is clearly applicable to the instant cause: "Here there is no broad-reaching, all-embrasive statutory provision penalizing knowing as well as unknowing conduct."

Although apparently not raised before the trial court, the brief of Amicus Times Publishing Co. has raised the issue that Florida Statute 104.38 is a deprivation of property right without due process. With this contention, we can not agree. Florida Statute 104.38 is a valid exercise of the state police power enacted to assure the integrity of the electoral process. In *Miller v. Schoene*, 276 U.S. 272 (1928), the Supreme Court stated,

"And where the public interest is involved pre-ferment of that interest over the property interest of the individual, to extent even of its destruction, is one of the distinguishing characteristics of every exercise of police power which affects property." Id. at 279, 280.

We find this argument of deprivation of property rights by being required to furnish free space to be without merit. See *Miller v. Schoene*, supra; *Marsh v. Alabama*, 326 U.S. 501, at 506; *Red Lion Broadcasting v. F. C. C.*, supra; *Rosenbloom v. Metromedia*, supra; *Chronicle Publishing Co. v. Attorney General*, 94 N.H. 148, 48 A.2d 478 (1946); *Amalgamated Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

In conclusion, we do not find that the operation of the statute would interfere with freedom of the press as guaranteed by the Florida Constitution and the Constitution of the United States. Indeed it strengthens the concept in that it presents both views leaving the reader the freedom to reach his own conclusion. This decision will encourage rather than impede the wide open and robust dissemination of ideas and counterthought which the concept of free press both fosters and protects and which is essential to intelligent self government.

Newspapers are not wholly dependent on electronic media as were the broadcasters in *Red Lion Broadcasting Co. v. F. C. C.*, supra. However, we have no difficulty in taking judicial notice that the publishers of newspapers in this contemporary era would perish without this vital source of communications. The dissemination of news other than purely local is transmitted over telegraph wires or over air waves. This not only includes dissemination of news but also in chain newspaper operations so prevalent today, the Miami Herald being one; even editorials are prepared in one place and transmitted electronically to another. Therefore, the principles of law enunciated in *Red Lion Broadcasting Co. v. F. C. C.*, supra, have been taken into consideration in reaching our opinion.

A half free press would be deceptive to the public. Florida Statute 104.38, in the interest of all the people, provides that candidates for public office under certain prescribed circumstances shall have a right of reply, a right of expression. It does not deny to the owner of the instruments of the newspaper industry any right of expression. The statute *assures*, and *does not abridge*, the right of expression which the First Amendment guarantees. The statute supports the freedom of the press in its true meaning—that is, the right of the reader to the whole story, rather than half of it—and without which the reader would be “blacked out” as to the other side of the controversy.

For the foregoing reasons, we find Florida Statute 104.38 to be constitutional and reverse the holding of the trial court that it is unconstitutional.

Accordingly, the judgment of the trial court is reversed and this cause is remanded to the trial court for further proceedings not inconsistent herewith.

It is so ordered.

CARLTON, C.J., ADKINS, McCAIN and DEKLE, JJ.,
and RAWLS, District Court Judge, Concur
ROBERTS, J., Concurs Specially with Opinion
BOYD, J., Dissents with Opinion
ROBERTS, J., Specially Concurring:

I concur in the opinion and judgment of the majority. We are fully cognizant of the recent decision rendered by the Supreme Court of the United States in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, —U.S.—, 41 U.S.L.W. 4688, decided May 29, 1973, which holds that neither the Federal Communications Act nor the First Amendment require broadcasters to accept paid editorial advertisements. But this opinion in no way derogated the earlier opinion of that court in *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969), validating the fairness doctrine of the Federal Communications Commission which imposes two affirmative responsibilities on the broadcaster—coverage of issues must be adequate and must fairly reflect differing viewpoints. As the Supreme Court stated in *Columbia Broadcasting*, supra, “In fulfilling its Fairness Doctrine obligations, the broadcaster must provide free time for the presentation of opposing views if a paid sponsor is unavailable, . . . and must initiate programming on public issues if no one else seeks to do so. See John J. Dempsey, 6 P & F Radio Reg. 615 (1950); *Red Lion*, supra, 395 U.S., at 378.”

The complaints filed in *Columbia Broadcasting*, supra, by the Democratic National Committee and the Business Executives Move for Vietnam Peace, alleged that a broadcaster had violated the First Amendment by refusing to sell it time to broadcast spot announcements expressing political views of the different groups. The Supreme Court turned its decision primarily on the limited nature of the broadcasting airwaves and the existence of the Fairness Doctrine which requires broadcasters to provide free time for presentation of opposing political views when a paid sponsor is not available. The decision in *Columbia Broadcasting* is directed solely to the peculiar and limited nature of broadcasting frequencies, and that decision is not applicable to the instant facts presently before this Court in the case sub judice. Chief Justice Burger commences the body of his opinion with the following remarks:

"Mr. Justice White's opinion for the Court in *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969), makes clear that the broadcast media pose unique and special problems not present in the traditional free speech case. Unlike other media, broadcasting is subject to an inherent physical limitation. Broadcast frequencies are a scarce resource; they must be portioned out among applicants. All who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated. The Court spoke to this reality when, in *Red Lion*, we said 'it is idle to posit an unabridgable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.' *Red Lion*, supra, 395 U.S., at 388.

"Because the broadcast media utilize a valuable and limited public resource, there is also present an unusual order of First Amendment values. *Red Lion* discussed at length the application of the First Amendment to the broadcast media. In analyzing the broadcasters' claim that the Fairness Doctrine and two of its component rules violated their freedom of expression, we held that '[n]o one has a First Amendment right to a license or to monopolize a radio frequency; to deny a station license because 'the public interest' requires it 'is not a denial of free speech.' *Red Lion*, supra, 395 U.S., at 389. Although the broadcaster is not without protection under the First Amendment, *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948), '[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.' *Red Lion*, supra, 395 U.S., at 390."

After recounting the history of broadcast regulations, the court in *Columbia Broadcasting*, supra, opined that broadcasters are charged with the duty of providing the listening and viewing public with access to a balanced presentation of information on issues of public importance. The Supreme Court was particularly concerned with forcing broadcasters to accept paid political advertisements when broadcasting frequencies are so limited because of a substantial risk that such a system would be monopolized by

those who could and would pay the costs, and that a system so heavily weighted in favor of the financially affluent or those with access to wealth would in effect undermine the effective operation of the Fairness Doctrine. The views of the affluent would prevail since they would have it within their power to purchase time more frequently, and editorial advertising could then be monopolized by those of one political persuasion. Those were the concerns of the Supreme Court in *Columbia Broadcasting*, supra, when it rendered its decision that broadcasters are not required to accept paid editorial advertisements regardless of the content thereof.

Our opinion in the instant cause in no way conflicts with the recent decision of the Supreme Court in *Columbia Broadcasting*, supra.

CARLTON, C.J., ADKINS, McCAIN and DEKLE, JJ.,
and RAWLS, District Court Judge, Concur

BOYD, J., Dissenting:

I respectfully dissent.

This statute carries a penalty provision for violations thereof, and it therefore must be most strictly construed in favor of any person accused thereunder. The statute is so vague on its face as to raise doubts in the minds of those reading it as to the exact underlying legislative intent.

There are no standards as to when a publisher must carry a reply. For example, the following are just some of the important questions left unanswered by this statute.

Does the law include both news stories and editorial comment? If a story mentions a "situation", but does not mention the candidate by name, may he reply? When the publisher knows his statements are true, must he publish a statement from the candidate which he knows to be false? If the reply of the candidate libels other persons, must the publisher print it, and, if so, is the publisher subject to liability for any resulting libel suit? If the candidate's reply were to contain obscene language, would the publisher still have to print it—and thereby invite prosecution under our obscenity laws?

The First Amendment to the Constitution of the United States provides that, "Congress shall make law . . . abridging the freedom of speech, or of the press. . . ." Article I, Section 4 of the Constitution of the State of Florida similarly provides: "No law shall be passed to restrain or abridge the liberty of speech or the press." Since these constitutional provisions prohibit the government from limiting the right of the publisher to publish news and comment editorially, it would be equally unconstitutional for the government to compel a publisher to print a statement of any other person, or persons, against that publisher's will.

The majority opinion correctly observes that freedom of speech and freedom of the press carry the duty to speak the truth. And, of course, the constitutional rights of freedom of speech and freedom of the press must be exercised with appropriate regard to the provisions of our libel and obscenity statutes. As in all other areas of public and private service, some errors will, from time to time, surely occur. Yet, recognizing that the survival of a free press is contingent upon the press fulfilling its duty to the ge-

eral public, the overwhelming majority of those in the publishing press comply with the highest of ethical standards.

We are taught in the Bible that, "the truth will make you free".¹

Free people can make proper decisions for their own self-government only when they are adequately informed by a free press. To the extent that government limits or adds to that which a publisher must distribute, freedom of speech and freedom of the press are thereby diminished.

Almost everyone whose name has been carried frequently in the news media has been offended, at one time or another, by stories or comments with which he disagrees. This is part of the price one pays for success and notoriety. If there exists a problem in this state of affairs, the muzzling of a free press is not the solution to such problem.

I therefore dissent.

¹John 8:32

APPENDIX B

IN THE SUPREME COURT OF FLORIDA

CASE NO. 43,009

PAT L. TORNILLO, JR.,

vs.

THE MIAMI HERALD PUBLISHING COMPANY
a Division of Knight Newspapers, Inc.,

October 10, 1973

ON PETITION FOR REHEARING

PER CURIAM

Appellee, Miami Herald, by petition for rehearing strenuously argues that this Court's opinion overlooks the fact that §104.38, Florida Statutes, is a criminal statute and that this Court is without power to rewrite or perform plastic surgery on a criminal statute in an attempt to cure the statute's vagueness by writing a definition of "rehearing." Appellee then journeys upon numerous hypothetical inquiries—What is a newspaper? What is an assault? What is a "conspicuous place"?—and then reasons that these "obvious ambiguities" render the subject statute vague and that same must be held unconstitutional.

As was emphatically stated in the opinion of this Court, the action underlying this cause before us is a civil action which was filed in the Circuit Court for the Eleventh Judicial Circuit seeking to require appellee to publish appellant's reply pursuant to Florida Statute 104.38 and for damages. No criminal penalty is sought in the case sub judice, and, therefore, the validity vel non of the criminal penalty is not here involved. We are not unmindful of the line of decisions from this Court and the Supreme Court of the United States requiring more specificity in statutory authorship to support a statute which imposes a criminal penalty. However, the language of our opinion clearly defines what would constitute a wrongdoing. We take this opportunity to restate the following excerpt from our opinion:

"It is a fundamental principle that this Court has the duty, if reasonably possible, consistent with protection of constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality and if reasonably possible a statute should be construed so as not to conflict with the constitution.¹ Courts are inclined to adopt that reasonable interpretation of a statute which removes it farthest from constitutional infirmity. In *Gitlow v. People of New York*, 268 U.S. 652, the Supreme Court of the United States stated every presumption is to be

¹*Buck v. Gibbs*, 34 F.Supp. 510, Mod. 313 U.S. 387 (1940); *Hunter v. Owens*, 80 Fla. 812, 86 So. 839 (1920); *Cragin v. Ocean & Lake Realty Co.*, 133 So. 569, 135 So. 795 (1931), appeal dismissed, 286 U.S. 523; *Haworth v. Chapmen*, 113 Fla. 591, 152 So. 663 (1933); *Hanson v. State*, 56 So.2d 129 (1952); *Overstreet v. Blum*, 227 So.2d 197 (Fla. 1969); *Hancock v. Sapp*, 225 So.2d 411 (Fla. 1969); *Rich v. Ryals*, 212 So.2d 641 (Fla. 1968).

indulged in favor of the validity of a statute, and the case is to be considered in the light of the principle that the State is primarily the judge of regulations in the interest of public safety and welfare."

Even had this Court found the statute, the constitutionality vel non which is being questioned sub judice, not to be sufficiently definite and specific to support a criminal penalty, this criminal penalty provision would not be fatal to the statute because the statute is so constructed that the criminal penalty can be easily severed and deleted and still leave a complete legislative expression establishing a civil right to damages. This Court has long held that where certain clauses, provisions, or sections of a statutory enactment are in violation of constitutional mandates, it does not necessarily follow that the whole enactment should fail, and this Court has held that the Court may sever the unconstitutional provision and uphold the remainder if that which is left is complete in itself, sensible, and capable of being executed, whether or not the enactment contains a severability clause. *State ex rel. Boyd v. Deal*, 24 Fla. 293, 4 So. 899 (1888), *Gwynn v. Hardee*, 92 Fla. 543, 110 So. 343 (1926); *Louis K. Liggett Co. v. Lee*, 149 So. 8 (Fla. 1933); *City of Daytona Beach v. Harvey*, 48 So.2d 924 (Fla. 1950); *Youngblood v. Darby*, 58 So.2d 315 (Fla. 1952); *Harris v. Bryan*, 89 So.2d 601 (Fla. 1956); *Cramp v. The Board of Public Instruction of Orange County*, 137 So.2d 828 (Fla. 1962); *Davis v. State*, 146 So.2d 892 (Fla. 1962); *Musleh v. Marion County*, 200 So.2d 168 (Fla. 1967); *Small v. Sun Oil Company*, 222 So.2d 196 (Fla. 1969). In *State v. Newell*, 85 So.2d 124 (Fla. 1956), this Court opined:

“We have held that it is not always necessary to declare an entire Act invalid where a portion thereof is unconstitutional simply because the Act does not contain a severability clause. *State v. Calhoun County*, 126 Fla. 376, 170 So. 883, 886, and cases therein cited. The test is whether this court can say that the Legislature would not have enacted the law under scrutiny except for the provision which is herein held unconstitutional and invalid.”

A comparable statute to Florida Statute 104.38 requiring a full and fair correction, apology, and retraction to be published in the same editions or corresponding issues of the periodical in which said article appeared, and in as conspicuous place and type as was said original article,² as an abatement of the publisher's liability for punitive damages, was held constitutional by this Court in *Ross v. Gore*, 48 So.2d 412 (Fla. 1950). Courts have generally regarded this type of statute to be in aid of a free press. We take judicial notice that this statute has been frequently used to avoid punitive damages apparently with no adverse effect to newspaper publishers. But, indeed, this statute has been utilized to their financial advantage.

²Florida Statute 770.02 provides:

“If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case shall recover only actual damages.”

We also here note another retraction statute promulgated by the Florida Legislature which defines a procedure for abatement of criminal penalty. Florida Statute 836.08 provides:

“Correction, apology, or retraction by newspaper.

—If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then any criminal proceeding charging libel based on an article so retracted, shall be discontinued and barred.”

Reverting to the hypothetical inquiries posed by appellee, it is observed that similar questions might well be posed as to the vagueness of certain provisions of Florida Statute 770.02, viz: “good faith”; “falsity”; “a full and fair correction”; “apology”; “conspicuous place”; and Florida Statute 836.08, viz: “correction”; “apology”; “reasonable grounds”; or “a full and fair correction”. In short, the definition and meaning of specific words or phrases in a particular factual situation have been and will be an infinite subject of inquiry so long as *Homo sapiens* engage in the art of communication. At this stage of the instant controversy, we are confronted not with the wisdom of the Legislature in enacting the challenged statutory provision;

our task is to preserve the prerogative of the legislative body unless it clearly contravenes the basic federal and state charters adopted by our citizenry.

In conclusion, it must be remembered that First Amendment Freedom of the Press is for the benefit of *all* the people and not just those who have invested money in the publishing business.

The petition for rehearing is denied.

CARLTON, C.J., ROBERTS, ADKINS, McCAIN and DEKLE, JJ., and RAWLS, District Court Judge, Concur
BOYD, J., Dissents

APPENDIX C

TORNILLO v. MIAMI HERALD PUBLISHING CO.

No. 72-20199.

Circuit Court, Dade County.

October 20, 1972.

38 Fla. Supp 80

FRANCIS J. CHRISTIE, Circuit Judge.

Final judgment: Plaintiff, a candidate for the state legislature, demanded that the Miami Herald print verbatim his replies to two editorials in the Herald relating to his candidacy for public office. The Herald refused.

Plaintiff then brought this action for a mandatory injunction and for damages seeking to enforce §104.38, Florida Statutes, by a civil action. The editorials and plaintiff's replies are attached to the complaint. In view of the nature of the relief requested the court granted plaintiff's request for an emergency hearing on October 2, 1972.

Pursuant to §86.091, Florida Statutes, the attorney general was advised that the defendant intended to ask the court for a declaration that §104.38 was unconstitutional. The attorney general was served with a copy of the complaint and was represented at the hearing.

§104.38 is a criminal statute. Absent special circumstances equity will not enjoin the commission of a crime. *Pompano Horse Club Co. v. State* (1927), 93 Fla. 415, 111 So. 801, 52 A.L.R. 51; 17 Florida Jurisprudence, *Injunctions*, §46.

However, there is a more serious infirmity in plaintiff's case. The court is of the opinion that §104.38 violates Article I, §§4 and 9 of the Florida Constitution and the Fourteenth Amendment to the U. S. Constitution.

This question was considered in *State v. News-Journal Corporation*, 36 Fla. Supp. 164, a case filed in the county judge's court of Volusia County, Florida. In a carefully reasoned opinion dated February 14, 1972, Judge J. Robert Durden held §104.38 unconstitutional on two grounds—an infringement upon freedom of the press, and a denial of due process of law because the statute is too vague, indefinite and uncertain to constitute notice of what language may fall within its purview and what constitutes a reply which must be printed. The attorney general advised the court that he had elected not to appeal Judge Durden's decision on the ground that he also had the same reservations about the constitutionality of the statute.

This court concurs in Judge Durden's opinion. State statutes prohibiting or directing any type of publication, particularly upon pain of criminal sanction, are presumed unconstitutional unless it can be demonstrated that the infringement can be justified as required to protect a substantial public interest threatened by a clear and present danger. *Near v. Minnesota*, 283 U.S. 697 (1931); *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *Palko v. Connecticut*, 302 U.S. 319, 327 (1937). The "priority" given First Amendment freedoms "gives these liberties a sanctity and a sanction not permitting dubious intrusions." *Thomas v. Collins*, supra at page 530. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963). The First

Amendment prohibits the government from restraining the publication even of top secret documents alleged to be vital to the national security. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

Clearly if the state may not prohibit what a newspaper may print it cannot assume the editorial function and direct a newspaper what to print. By the First Amendment, "The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government." *New York Times Co. v. United States*, supra at page 717 (Justice Black concurring) (1971).

Since §104.38, Florida Statutes, so clearly reaches cases in which its restraint upon freedom of speech and press does not measure up to any permissible First Amendment standard the statute is void on its face.

Because of its broad intrusion into the area protected by the First Amendment, §104.38 also suffers from an additional infirmity—it is impermissibly vague and indefinite and this vagueness serves to restrict and stifle protected expression. No editor could know from the statute exactly what words would offend the statute or the scope of the reply intended to be mandated. A state may not enact such a broad statute and leave it to the courts, on a case by case basis, to determine the constitutionality of its application to various circumstances. To do so places a citizen in an untenable position of foregoing his protected liber-

ties, or risking criminal prosecution. This dilemma itself impermissibly restricts free expression. *Smith v. Cahoon*, 283 U.S. 564 (1931).

"Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer." *Ashton v. Kentucky*, 384 U.S. 195, 200 (1966).

The strict standards of overbreadth and vagueness in First Amendment cases are even stricter where a statute provides criminal sanctions. "The standard for certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanctions for enforcement." *Winters v. New York*, supra at page 515.

The attorney general advised the court at the bearing (sic) that his opinion as to the unconstitutionality of this statute had not changed since *State v. News-Journal Corporation*, supra, and therefore he did not elect to intervene to defend the statute.

Plaintiff stated that if the court found the statute on which this suit is based unconstitutional he did not desire to take further proceedings in this court and requested that his suit be dismissed with prejudice.

Accordingly, confirming the court's oral ruling made at the conclusion of the hearing, this cause is dismissed with prejudice at plaintiff's cost.

APPENDIX D

IN THE SUPREME COURT OF FLORIDA

CASE NO. 43,009

PAT L. TORNILLO, JR.,

Appellant.

vs.

THE MIAMI HERALD PUBLISHING COMPANY,
a Division of Knight Newspapers, Inc.,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that The Miami Herald Publishing Company, a division of Knight Newspapers, Inc., Appellee in this case, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Florida upholding the constitutionality of Section 104.38, Florida Statutes, which was entered in this action on July 18, 1973 and adhered to upon Petition for Rehearing on October 10, 1973.

This Appeal is taken pursuant to 28 U.S.C. §1257 (2).

PAUL & THOMPSON

/s/ Dan Paul

Dan Paul

/s/ James W. Beasley, Jr.

James W. Beasley, Jr.
Counsel for Appellee

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Notice of Appeal to the Supreme Court of the United States were served by mail upon the following this 30th day of October, 1973:

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Attorney for Appellant
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Miami, Florida 33130

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Attorney General, State of Florida
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/s/ James W. Beasley, Jr.

APPENDIX E

FLORIDA STATUTES

97.021 Definitions

The following words and phrases when used in this code shall be construed:

(1) "Primary election" means election held preceding the general election, for the purpose of nominating a party nominee to be voted for in the general election to fill a national, state or county office. The first primary is a nomination or elimination election, the second primary is a nominating election only.

(2) "Special primary election" is a special called nomination election designated by the governor, for the purpose of nominating a party nominee to be voted on in a general or special general election.

(3) "General election" means an election held on the first Tuesday after the first Monday in November in the even numbered years, for the purpose of filling national, state and county offices and for voting on constitutional amendments as proposed by the legislature.

(4) "Special general election" is a special called election for the purpose of voting on a party nominee to fill a vacancy in the national, state or county office.

* * * *

(18) "Candidate" shall mean any person who has filed his qualification papers, and paid his qualifying fees as required by law.

770.02 Correction, apology, or retraction by newspaper

If it appears upon the trial that said article was published in good faith, that its falsity was due to an honest mistake of the facts, and that there were reasonable grounds for believing that the statements in said article were true, and that within ten days after the service of said notice a full and fair correction, apology and retraction was published in the same editions or corresponding issues of the newspaper or periodical in which said article appeared, and in as conspicuous place and type as was said original article, then the plaintiff in such case shall recover only actual damages.

775.082 Penalties for felonies and misdemeanors

* * * *

(5) A person who has been convicted of a designated misdemeanor may be sentenced as follows:

(a) For a misdemeanor of the first degree, by a definite term of imprisonment in the county jail not exceeding 1 year;

(b) For a misdemeanor of the second degree, by a definite term of imprisonment in the county jail not exceeding 60 days.

(6) Nothing in this section shall be construed to alter the operation of any statute of this state authorizing a trial court, in its discretion, to impose a sentence of imprisonment for an indeterminate period within minimum and maximum limits as provided by law.

775.083 Fine in lieu of or in addition to other criminal penalty

A person who has been convicted of a crime, other than a capital felony, may be sentenced, when specifically designated by statute, to pay a fine in lieu of or in addition to any punishment described in § 775.082. Fines for designated crimes shall not exceed:

(1) \$10,000, when the conviction is of a felony of the first or second degree;

(2) \$5,000, when the conviction is of a felony of the third degree;

(3) \$1,000, when the conviction is of a misdemeanor of the first degree;

(4) \$500, when the conviction is of a misdemeanor of the second degree;

(5) Any higher amount equal to double the pecuniary gain derived from the offense by the offender or double the pecuniary loss suffered by the victim.

(6) Any higher amount specifically authorized by statute.

App. 45

APPENDIX F

THE MIAMI HERALD

September 20, 1972

The State's Laws And Pat Tornillo

LOOK who's upholding the law!

Pat Tornillo, boss of the Classroom Teachers Association and candidate for the State Legislature in the Oct. 3 runoff election, has denounced his opponent as lacking "the knowledge to be a legislator, as evidenced by his failure to file a list of contributions to and expenditures of his campaign as required by law."

Czar Tornillo calls "violation of this law inexcusable."

This is the same Pat Tornillo who led the CTA strike from February 19 to March 11, 1968, against the school children and taxpayers of Dade County. Call it whatever you will, it was an illegal act against the public interest and clearly prohibited by the statutes.

We cannot say it would be illegal but certainly it would be inexcusable of the voters if they sent Pat Tornillo to Tallahassee to occupy the seat for District 103 in the House of Representatives.

APPENDIX G

THE MIAMI HERALD

September 29, 1972

FROM the people who brought you this—the teacher strike of '68—come now instructions on how to vote for responsible government, i.e., against Crutcher Harrison and Ethel Beckham, for Pat Tornillo. The tracts and blurbs and bumper stickers pile up daily in teachers' school mailboxes amidst continuing pouts that the School Board should be delivering all this at your expense. The screeds say the strike is not an issue. We say maybe it wouldn't be were it not a part of a continuation of disregard of any and all laws the CTA might find aggravating. Whether in defiance of zoning laws at CTA Towers, contracts and laws during the strike, or more recently state prohibitions against soliciting campaign funds amongst teachers, CTA says fie and try and sue us—what's good for CTA is good for CTA and that is natural law. Tornillo's law, maybe. For years now he has been kicking the public shin to call attention to his shakedown statesmanship. He and whichever acerbic prexy is in alleged office have always felt their private ventures so chock-full of public weal that we should leap at the chance to nab the tab, be it half the Glorious Leader's salary or the dues checkoff or anything else except perhaps mileage on the staff hydrofoil. Give him public office, says Pat, and he will no doubt live by the Golden Rule. Our translation reads that as more gold and more rule.

(Cont.)

APPENDIX H

FROM: Pat L. Tornillo, Jr.,
CTA Executive Director,
and Candidate (Dem.) for
State Rep., Dist. 103
1809 Brickell Avenue
Miami, Florida 33129
Phone: 854-0220

September 30, 1972

EDITORIAL REPLY

Since the *Herald* has chosen to publicly attack my record, accomplishments, and positions on various issues, and those of the CTA, I again request that under Florida Statue 104.38, the *Herald* print the following record of affirmative and legal action.

In 1968, CTA signed a no-strike affidavit.

In 1969, CTA filed and won a suit in the Supreme Court of Florida, which gives all public employees the right to bargain collectively without the right to strike.

In 1971, CTA filed the Tornillo suit, which enabled the School Board to receive \$7.6 million and are presently cooperating with the Board in their effort to retain this money and avoid further financial chaos.

Since 1968, CTA has reimbursed the taxpayers of Dade County for the full salary and all fringe benefits of its president.

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Since 1970, CTA has not used the school mail service to communicate with its members.

Since 1970, CTA has paid all costs of payroll deduction of dues for its members.

We have attempted to obey all the laws of the state, not intentionally violating any, while continuing our efforts to alert the public to the impending financial crisis facing the schools.

We have, however, also retained our belief in the right of public employees to engage in political activity and to support the candidates of our choice, as is the right of any citizen in this great country of ours.

Aye, there's the rub.

* * * *

TABLE

Opinion of the Justices
298 N.E.2d 82

Pittsburgh Press Co. v. United States
Human Relations
U.S. _____

Poughkeepsie Daily Eagle and Herald
Newspapers, Inc.
205 Misc. 982,

Resident Participants v. Board of Education
322 F. Supp. 1

Red Lion Broadcasting Co. v. FCC
395 U.S. 367 (1964)

Rosenbloom v. Metromedia, Inc.
403 U.S. 29 (1971)

Shuck v. Carroll
215 Iowa 1276 (1931)

State v. News-Journal
36 Fla. Supp. 1 (1972)
Ct. 1972) _____

Terminello v. Chicago
337 U.S. 1 (1950)

(Cont.)

APPENDIX I

STATE v. NEWS-JOURNAL CORPORATION.

Docket 64, Page 2438.

County Judge's Court, Volusia County.

February 14, 1972.

36 Fla.Supp. 164

ROBERT DURDEN, County Judge.

This cause came on to be heard on defendant's motion to dismiss on January 21, 1972. At said hearing, the court received a stipulated statement of facts and heard argument by the Volusia County Prosecutor and counsel for defendant.

Stipulated facts

The News-Journal Corporation is a Florida Corporation which publishes the Daytona Beach Morning Journal, a daily newspaper published in Volusia County. On September 29, 1971, there was published in the Daytona Beach Morning Journal a political article written by the News-Journal political editor, Ray Ruester, entitled *Kane's City Hall Power Grab*. The subject of the article was the incumbent mayor, Richard Kane, and his alleged attempts to create a strong mayor government for the city which, by charter, has a commission manager form of government.

Page

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By a letter dated September 29, 1971, addressed to the editor, News-Journal Corporation, Richard Kane requested that pursuant to §104.38, Florida Statutes, the News-Journal Corporation immediately publish a reply to the column. The material which Mayor Kane sought to have published as his reply was attached to his letter to the editor and consisted of an article written by Richard Kane and previously published in the Halifax Reporter, a newspaper published in Volusia County, on September 4, 1971.

The News-Journal Corporation refused to publish the material as requested. Mayor Kane thereafter signed an affidavit and caused a warrant to be issued for the News-Journal Corporation for violation of §104.38, Florida Statutes.

The News-Journal Corporation filed its motion to dismiss contending, inter alia, that §104.38 is unconstitutional under article 1, §4, of the constitution of Florida, and the first and fourteenth amendments to the constitution of the United States.

Decision

§104.38, Florida Statutes, provides as follows—

If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candi-

date immediately publish free of costs any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall, upon conviction, be guilty of a misdemeanor.

The defendant in its motion to dismiss contends that the above-quoted statute is unconstitutional. This court agrees with the defendant for the reasons as stated herein.

First, this court recognizes that the intent of the above-quoted statute is to regulate the press which is protected by the first amendment to the United States Constitution and article 1, §4, of the Florida Constitution. The cases limiting restraint of the free press are numerous. The case of the New York Times Company v. Sullivan, 376 U.S. 254 (1964), is recognized as one of the landmark decisions in dealing with the question of freedom of the press. Mr. Justice Brennan, rendering the opinion of the court in that case, stated —

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484, 1 L.ed. 2d 1498, 1506, 77 S.Ct. 1304. The maintenance of the opportunity for free political discussion to the

end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the republic, is a fundamental principle of the constitutional system.

Applying the rule of law as set forth therein it is the opinion of this court that the statute in question imposes an unconstitutional infringement upon the freedom of the press.

Second, it should be recognized that the statute in question is a criminal statute, the violation of which is punishable by fine or imprisonment. It is a well settled rule of law of this state, and of all other states, that a criminal statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. *Cramp v. Board of Public Instruction of Orange County, Florida*, 368 U.S. 278; *Aztec Motel, Inc. v. State, ex rel. Faircloth*, 251 So.2d 849 (Florida Supreme Court, 1971); *Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1951).

This court is of the opinion that the language of the statute in question is too vague, indefinite and uncertain to constitute notice of what language may fall within the purview of the statute and what constitutes a reply which must be printed at the request of candidates. This court is of the opinion that this statute is not reasonably definite and certain and that the constitutional requirement of definiteness is violated in that this statute fails to give a person of ordinary intelligence fair notice of its violation.

RECEIVED

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States
October Term, 1973

No. A-504

The Miami Herald Publishing Company, a division
of Knight Newspapers, Inc.

Appellant,

v.

Pat L. Tornillo, Jr.,

Appellee.

APPLICATION FOR STAY OF MANDATE OF SUPREME COURT
OF FLORIDA

To the Honorable Lewis F. Powell, Jr. Associate
Justice of the Supreme Court and Circuit Justice for the
Fifth Circuit:

Appellant, The Miami Herald Publishing Company,
a division of Knight Newspapers, Inc. ("The Miami Herald"),
is this day filing a Jurisdictional Statement in this case,
a copy of which is attached to this Application. Appellant
prays that an order be entered staying the mandate of the
Supreme Court of Florida, which will otherwise issue on
November 20, 1973, pending a final determination of the
matter by this Court. In support of this Application,
Appellant respectfully shows as follows:

1. Appellant is the publisher of a newspaper, The Miami Herald. On October 1, 1972, suit was instituted against The Miami Herald in the Circuit Court for Dade County, Florida, by Appellee Pat L. Tornillo ("Tornillo") to obtain a mandatory injunction directing The Miami Herald to print verbatim a statement by Appellee, and damages. Tornillo's cause of action was based on Section 104.38, Fla. Stat., a criminal statute, which makes it a misdemeanor for a newspaper to refuse to publish "any reply" by a political candidate to any matter critical of the candidate published in the newspaper.

2. The Circuit Court for Dade County dismissed Tornillo's complaint, and in an opinion dated October 20, 1972, held Section 104.38, Fla. Stat., to be in violation of the First and Fourteenth Amendments to the United States Constitution, and Article I of the Florida Constitution. On July 18, 1973, the Supreme Court of Florida reversed the judgment of the Circuit Court, and held that Section 104.38, Fla. Stat., "does not constitute a violation of the First and Fourteenth Amendments to the Constitution of the United States or Article I, Section 4, Florida Constitution." The Miami Herald filed a Petition for Rehearing, which was denied by the Supreme Court of Florida in an opinion dated October 10, 1973. Copies of these three opinions are included in the Appendix to the attached Jurisdictional Statement.

3. On August 2, 1973, concurrently with the filing of its Petition for Rehearing, The Miami Herald petitioned the Supreme Court of Florida pursuant to Rule 3.15 of the Florida Appellate Rules for an extension of time for issuance of the Court's mandate and a stay of proceedings in the Florida courts,

should the Petition for Rehearing be denied. On October 16, 1973, the Supreme Court of Florida granted the petition and ordered proceedings to be stayed "to and including November 19, 1973 to allow [Appellant] to seek review in the Supreme Court of the United States and obtain any further stay from that court." (Emphasis added) A copy of that Order is attached hereto as Exhibit 1.

4. Appellant filed a Notice of Appeal with the Supreme Court of Florida on November 1, 1973. A copy of that Notice is included in the Appendix to the attached Jurisdictional Statement.

5. This Court has jurisdiction to review this case pursuant to 28 U.S.C. §1257(2). Application for the stay is made pursuant to Rules 18, 50 and 51 of the Rules of this Court.

6. Reasons for seeking appeal. A stay of mandate pending appellate review by this Court should be granted where the matters to be raised on appeal "are of such significance and difficulty that there is a substantial prospect that they will command four votes for review," Organized Village of Lake v. Egan, 80 S.Ct. 33, 4 L.Ed.2d 34 (1959) (Opinion of Mr. Justice Brennan as Circuit Justice) and where the Court will ultimately have jurisdiction over the appeal, Rosenblatt v. American Cyanamid Company, 86 S.Ct. 1, 15 L.Ed.2d 39 (1965) (Opinion of Mr. Justice Goldberg as Circuit Justice). Appellant submits that the major issues to be raised on appeal present such substantial constitutional questions as to warrant a stay under the foregoing standards:

a. The unprecedented regulation of the press permitted by the opinion below is in violation of the First and Fourteenth Amendments to the United States Constitution.

As more fully discussed in the accompanying Jurisdictional Statement, the decision of the Florida Supreme Court upholding the constitutionality of Section 104.38, which requires a newspaper to publish the reply of any candidate in any state election who is criticized in matter printed in the newspaper, so basically conflicts with traditional concepts of freedom of speech and press as to constitute a form of censorship. Although this Court has never decided the specific constitutional question of whether the government may command the private press to publish certain information and ideas, several lower Federal and State Courts have faced similar issues. The Florida Supreme Court's opinion in this case is in direct conflict with these cases. There is a likelihood of a substantial amount of future litigation of the question since several states already have such statutes and at least one other state legislature has considered such a law in the past year.

b. The decision below is in serious conflict with this Court's recent series of cases distinguishing the broadcast and other news media for purposes of government regulation.

As discussed in the accompanying Jurisdictional Statement, the holding of the Florida Supreme Court that a form of the fairness doctrine may appropriately be applied to the printed media clearly conflicts with this Court's decision in Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969) and in Columbia Broadcasting System, Inc. v. Democratic National Committee, ____ U.S. ____, 36 L.Ed.2d 772 (1973).

In those cases, this Court took great pains to point out that any regulation of the broadcast media in terms of programming content could be justified only by reference to the physical and technological distinctions between the broadcast and printed media. In one stroke, the decision of the Florida Supreme Court would wipe away that distinction and permit unprecedented regulation of the press. Disregarding this Court's denial of any right of guaranteed paid access to the broadcast media in Columbia Broadcasting, the decision below would fling open the doors to the pressroom by permitting free access to a newspaper's columns to any candidate criticized in the newspaper.

7. Reasons stay should be granted.

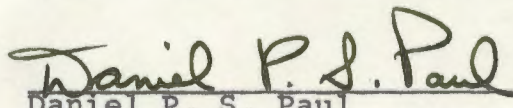
While the opinion of the Supreme Court of Florida announces a final determination of the issue of the constitutionality of Section 104.38, it also remands the cause to the trial court "for further proceedings not inconsistent herewith." Unless a stay is ordered by this Court, such proceedings may be commenced on or after November 20, 1973. The issues to be resolved in such proceedings could include the factual questions raised in the complaint and the measure of damages. If forced to defend such proceedings while prosecuting an appeal before this Court, Appellant will suffer a financial and legal burden which is irreparable. An ultimate decision by this Court holding §104.38, Fla. Stat., unconstitutional could not restore the time and expense which The Miami Herald would have incurred in defending the action in the Florida courts. Furthermore, the courts of Florida would be burdened with the trial of a cause that may ultimately be mooted by a decision from this Court.

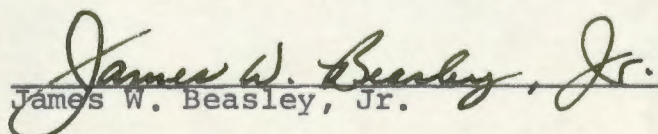
While continued proceedings in the Florida courts will cause considerable harm to The Miami Herald and a possible unnecessary burden to the judicial system, Appellee will not suffer any damages if a stay is granted. Tornillo's original prayer for an injunction and a retraction prior to the election of November, 1972 has long ago been mooted by the fact that the election has been held, and his only remaining claim is for damages. Tornillo will suffer no detriment from awaiting a final resolution of the question of constitutionality of Section 104.38 by this Court.

The foregoing factors were recognized by the attached Order of the Supreme Court of Florida staying proceedings through November 19, 1973, which expressly contemplates this Court's granting a further stay in this case.

WHEREFORE, Appellant prays that the judgment and mandate of the Supreme Court of Florida, which will otherwise issue on November 20, 1973, be stayed pending a final disposition of this case by this Court.

Respectfully submitted,

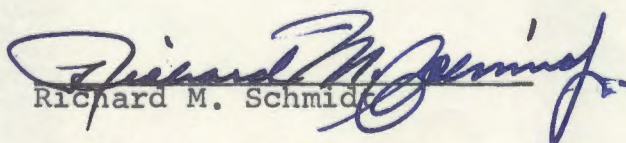

Daniel P. S. Paul


James W. Beasley, Jr.

PAUL & THOMSON
1300 First National Bank Building
Miami, Florida 33131
(305) 371-5461

Counsel for Appellant

Of Counsel:


Richard M. Schmidt

Martin J. Gaynes
Ian D. Volner
COHN & MARKS
1920 L Street, N. W.
Washington, D. C. 20036

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1973

TUESDAY, OCTOBER 16, 1973

PAT L. TORNILLO, JR.,

**

Appellant,

**

vs.

** CASE NO. 43,009

THE MIAMI HERALD PUBLISHING
COMPANY, a division of KNIGHT
NEWSPAPERS, INC.,

**

**

Appellee.

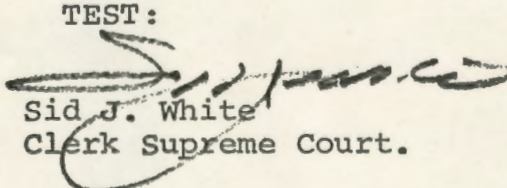
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**

Appellee's petition for extension of time for issuance of mandate is granted and proceedings in this Court and in the lower courts are hereby stayed to and including November 19, 1973, to allow appellee to seek review in the Supreme Court of the United States and obtain any further stay from that court.

A True Copy

TEST:


Sid J. White
Clerk Supreme Court.

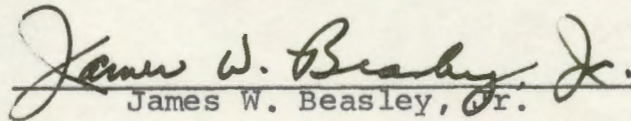
sg

cc: Honorable James W. Beasley
Honorable Tobias Simon
Honorable Robert L. Shevin
Honorable Jonathan L. Alpert
Honorable William C. Ballard
Honorable Donald U. Sessions
Honorable Richard P. Brinker

EXHIBIT 1.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing
Application for Stay of Mandate of Supreme Court of Florida
was served this 19th day of November, 1973 upon Mr. Tobias
Simon, Attorney for Appellant, 1492 South Miami Avenue,
Miami, Florida 33130, by personal delivery.


James W. Beasley, Jr.

Supreme Court of the United States
Washington, D. C. 20543

November 20, 1973

MEMORANDUM FOR MR. JUSTICE POWELL

SUBJECT: The Miami Herald Publishing Co. v. Tornillo, A-504
(No. 73-797) (Application for Stay)

IMMEDIATE SITUATION: A Florida Circuit Court held unconstitutional a Florida criminal statute which makes it a misdemeanor for a newspaper to refuse to publish a reply by a political candidate to any matter critical of the candidate published in the newspaper. The Florida SC reversed and remanded the case back to the trial court for trial on the complaint for injunction. The SC stayed its mandate through November 19 (Monday) to allow applicant to seek review "and obtain any further stay" in this Court.

FACTS: Respondent, who was a candidate for the state legislature, demanded that applicant print verbatim his replies to two editorials relating to his candidacy for public office. Applicant refused and respondent filed complaint for declaratory and injunctive relief seeking to enforce by civil action Florida Statute 104.38 which provides:

§ 104.38 Newspaper assailing candidate in an election; space for reply. -- If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or changes said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or

firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree

The trial court dismissed the complaint on the grounds that the Florida statute was an unconstitutional infringement upon freedom of speech and press and because the statute was impermissibly vague and indefinite.

The SC of Florida (Per Curiam; Boyd, diss.) reversed and remanded. On October 10, 1973, the Florida SC denied a rehearing. On October 16, the SC granted a stay of its mandate to and including November 19 to allow applicant to seek review before this Court and to "obtain any further stay from that court."

Applicant filed the instant application and Jurisdictional Statement on November 19.

RATIONALE OF THE FLORIDA SC: Recognizing that there is a right to publish without prior governmental restraint, the SC emphasized that there is a correlative responsibility that the public be fully informed and that the public "need to know" is most critical during an election campaign. To these ends the court found that the Florida statute "enhances" rather than abridges freedom of speech and press.

The SC found the Florida statute designed to add to the flow of information and ideas and that it does not constitute an incursion upon First Amendment rights or a prior restraint, since no specified newspaper content is excluded.

The SC noted a tendency towards monopolization of the press and, citing Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969), found that it is the purpose of the First Amendment to preserve an uninhibited market place of ideas wherein truth will prevail rather than to countenance a monopolization of that market whether by government or private enterprise.

In upholding the Florida "right-of-reply" statute, the SC noted this Court's reference to such statutes in Rosenbloom v. Metromedia, 403 U.S. 29, 47, n. 15.

The Florida SC also found the statute sufficiently explicit to inform those who are subject to it as to what conduct will render them liable to its penalties.

CONTENTIONS OF APPLICANT: Noting that this Court has never ruled directly upon a state statute requiring newspaper publication of a reply, applicant argues that the decision below is in conflict with the rationale of this Court in such cases as Red Lion and Columbia Broadcasting System, Inc. v. Democratic National Committee, 36 L. Ed. 2d 772 (1973).

Citing Associates & Aldrich Co. v. Times Mirror Co., 440 F.2d 133 (9th Cir. 1971), applicant contends that the Florida SC erred in its apparent conclusion that regulations which affirmatively require publication somehow stand on a different constitutional footing than regulations prohibiting publication.

Noting the Florida SC's reliance on the constitutional recognition given the "Fairness Doctrine" by this Court in Red Lion and Columbia Broadcasting, applicant urges that that doctrine can be sustained in those media only because of the unique characteristics of electronic communication. Citing Columbia Broadcasting, applicant argues that the state court erred in drawing an analogy between the broadcast and the print media.

Applicant contends that the Florida statute represents an abridgement of a basic and vital constitutional protection provided to the press by the First Amendment, imposing governmental controls on editorial decisions to publish critical stories about political candidates.

Citing numerous (6) ambiguities in the statute, applicant also argues that the statute's vagueness and ambiguity increases its unconstitutional effect upon legitimate expression.

Applicant states that if the Florida SC's mandate is not stayed, proceedings in the trial court may commence on or after November 20 and that it will suffer a financial and legal burden which is irreparable -- that an ultimate favorable decision by this Court could not restore the time and expense which applicant would have incurred in defending the action in the Florida courts.

On the other hand, applicant argues that respondent's original complaint for an injunction has been mooted by the fact that the election has been held, and his only remaining claim is for damages.

Furthermore, applicant suggests that the Florida SC order staying its mandates through November 19 expressly contemplates this Court's granting a further stay in this case.

DISCUSSION: This case appears to be an important one of first impression before the Court and one the Court may well want to hear.

The constitutionality of the "fairness doctrine" as applied in the broadcast media has been recognized, and some of its limitations established, by this Court. Although the Court's dicta would suggest that a similar doctrine would be inapplicable to the press, or, at least its limitations more constricted, the question apparently is not free from doubt. In this regard, it is noted that in Rosenbloom the Court specifically noted that state right-of-reply statutes were a possible solution to the fear that private citizens will not be able to respond adequately to publicity involving them. 403 U.S. at 47. While the reference may be read narrowly in the factual context of this case, the footnote cited a law review note advocating a right to reply for political candidates. Note, Vindication of the Reputation of a Public Official, 80 Har. L. Rev. 1730, 1745-47. In any event, it would appear doubtful whether this Court would ^{conferance} ~~consent~~ a criminal right-to-reply statute such as the one here.

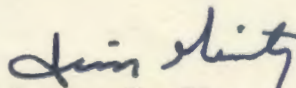
It should be noted that the Attorney General of Florida has indicated in another case involving the same statute that he has reservations about its constitutionality. Opinion of Circuit Court, J. S. at App. 32. He also joined applicant on the petition for rehearing urging the Florida SC to grant the petition and reverse its initial decision.

Applicant does not make a strong case for irreparable injury. Granting a stay on the alleged injuries of time and expense involved in lower court litigation may establish a bad precedent. On the other hand, however, it does not appear that respondent would suffer any injury if a stay is granted.

RECOMMENDATION: This case appears to be significant. You may wish to refer it to the Conference.

Balancing the "equities" involved, I am inclined to think that the stay should be granted. However, there seems to be no immediate danger of significant injury to applicant and you may wish to call for a response.

Although it's out of my bailiwick, it would appear appropriate to call for a response to the J. S. from the Florida AG.


James B. Ginty

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 20, 1973

A-504 The Miami Herald Publishing Co. v. Tornillo

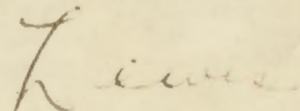
MEMORANDUM TO THE CONFERENCE:

I am sending to each of you with this Memorandum:

- (i) Application for Stay of Mandate in the above case;
- (ii) Jurisdictional statement filed on behalf of the applicant;
- (iii) Memorandum of November 20 from Jim Ginty which summarizes the facts, decision of the Florida Supreme Court, and the contentions of the applicant.

After conferring with the Chief Justice, I have today signed an Order in my capacity as Circuit Justice staying the application pending further order of this Court. In view of the importance of the issue, I am referring the application to the Court for consideration at our Conference on November 30.

Sincerely,



LFPjr/gg

November 20, 1973

A-504 The Miami Herald Publishing Co. v. Tornillo

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Sincerely,

LFPjr/gg

miss
memo

November 20, 1973

A-504 (No. 73-797) The Miami Herald
Publishing Co. v. Tornillo

Dear Chief:

The attached application for a stay of mandate has been filed with me as Circuit Justice.

The Florida Supreme Court stayed its mandate through today to allow an application to be made to us. Thus, I am inclined to act today unless you think otherwise. Also, I am inclined to grant a stay pending action on the application by the full Court (at our next Conference). As you will see from Jim Ginty's memo the case raises a major question of first impression. I am satisfied that there will be at least four votes to grant.

I will call you early this afternoon to discuss this, if convenient with you.

Sincerely,

The Chief Justice

lfp/ss
Enc.

November 20, 1973

MEMORANDUM FOR MR. JUSTICE POWELL

SUBJECT: The Miami Herald Publishing Co. v. Tornillo, A-504
(No. 73-797) (Application for Stay)

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Furthermore, applicant suggests that the Florida SC order staying its mandates through November 19 expressly contemplates this Court's granting a further stay in this case.

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Although its out of my bailiwick, it would appear appropriate to call for a response to the J. S. from the Florida AG.

James B. Ginty

Appellee
answers no final
judg. below, or s/c Fla
remanded case for trial
after holding state was
const. If not "final",
there is no review under
28 USC 1257
& we have no
power to grant a stay
But 9th Cir. has decision on 10
court. is "final" const. issue. See v. hanging down
Marquette Blais

Powell

RECEIVED

NOV 29 1973

OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

NO. A-504 73-797

THE MIAMI HERALD PUBLISHING COMPANY, A DIVISION OF
KNIGHT NEWSPAPERS, INC.

PAT I. TORNILLO, JR. vs. Appellant,
Appellee.

APPELLEE'S RESPONSE TO APPLICATION FOR STAY
OF MANDATE OF SUPREME COURT OF FLORIDA

WHILE FLORIDA STATUTE §104.38 makes the newspaper publisher's refusal to grant access for a reply a misdemeanor, the Plaintiff in this cause sought declaratory and injunctive relief and punitive damages only. The Supreme Court of Florida held these civil remedies were available to the Plaintiff under the statute and the applicable state law; indeed, it added that:

"The criminal penalty can be easily severed and deleted and still leave complete legislative expression establishing a civil right to damages." (Order Denying Rehearing, Appendix to Jurisdictional Statement, page 27)

The complaint in this matter was filed two days before, and a hearing was held one day before, the 1972 primary elections for the State Legislature. THE MIAMI HERALD filed no answer or other responsive pleading.¹ Its defenses to the civil relief prayed for in the complaint, other than its assertion of the statute's invalidity under the First Amendment, if any, are still officially unstated. However, the Appellant's Brief filed in the Supreme Court of Florida suggests that the MIAMI HERALD is protecting its flanks with a number of subsidiary and independent

1. The parties as well as the court below, treated the hearing as if a demurrer or motion to dismiss were pending. The trial judge, in fact, "dismissed" the suit "with prejudice". On appeal, the Supreme Court of Florida reversed, stating "the cause is remanded to the trial court for further proceedings not inconsistent herewith." (Opinion of Florida Supreme Court, Appendix to Jurisdictional Statement, page 19.)

factual defenses, quite separate from the sole constitutional question now before this Court. 2

On page 26 of its Florida Supreme Court Brief, THE MIAMI HERALD candidly and forthrightly admits:

"It is conceivable that some type of 'reply' statute could be drafted which could meet the test of the First Amendment."

And, assuming the existence of a statute, when appeals are exhausted -- it reserves the right to assert that the subject candidatorial attacks were not proscribed thereby; and if so, the statute would not compel publication of these particular responses because they are nonresponsive. THE MIAMI HERALD has not conceded the finality of the judgment affected by this appeal! Thus, from page 21 of the HERALD Brief:

"--What kinds of publications give rise to a requirement of printing a reply? The statute provides right of reply when a newspaper makes a publication 'in its columns?' Does this mean any publication of any nature in a newspaper? Does it include news articles? Editorials? 'Columns?' Advertisements? Letters to the Editor? Does it include only publications originated by the newspaper or does it also include publication of articles from news syndicates, such as the Associated Press, or syndicated columns?

--What is the nature of publications which give rise to a right of reply? The statute applies when a newspaper 'assails the personal character of a candidate... or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record...' Is an endorsement of one candidate an 'attack' on his opponent? Cf., Ex Parte Hawthorne, 116 Fla. 608, 156 So. 619, 625 (1934) (concurring opinion of Justice Buford). Does the statute apply only if a candidate is libeled? Cf., Manasco v. Walley, supra. What is the 'personal character' of a person? Cf.,

2. Objections on vagueness grounds have been effectively overcome by the Florida Supreme Court's own gloss on the statute:

"Because of the longstanding policy of this Court to give a statute, if reasonably possible, a construction supporting its constitutionality, we hold that the mandate of the statute refers to 'any reply' which is wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slanderous of the publication nor anyone else, nor vulgar nor profane." (Opinion of the Florida Supreme Court, Appendix to Jurisdictional Statement, pg. 16.)

Firestone v. Time, Inc., ___ So.2d ___ (Fla. 1972) Case No. 41,868). Is the statute invoked by a publication of an opinion or comment, or does it also come into play when a factual publication is made? Does the statute apply regardless of whether the factual matter is true or not?

--To elections for what offices does the statute apply? Federal offices? State offices? County or municipal offices?

--What type of reply is required to be published? Does the newspaper have the power to refuse to publish obscene or defamatory replies? Cf. Opinion of the Justices, supra, at 921.

--Where must the reply be printed? The statute calls for publication of the reply in 'as conspicuous a place' as the initial publication, but this standard is totally subjective. Is page four of a newspaper as 'conspicuous' a place as page five? Is the editorial page as 'conspicuous' a place as the front page?

--How lengthy a reply must be published? If a newspaper prints a news article describing a gambling raid, and identifies a candidate as having been arrested, does the candidate have a right to a two or three word reply (in equal length to the number of words in his name) or a reply equal to the length of the entire article, even though the candidate may be mentioned only incidentally?"

Appellee believes it is not without significance that in Mills v. Alabama, 384 U.S. 214, 16 L.Ed. 2d 484, 86 S.Ct. 1434, this Court held a challenge to the Alabama State Corrupt Practices Act involving prosecution for publishing an editorial on election day as final (for the purposes of 28 U.S.C. 1257) although no trial had taken place below. The reason for the finality is that this Court found that the Alabama Supreme Court had rendered a judgment binding upon the trial court "that it must convict Mills under this state statute if he wrote and published the editorial."

Mills conceded that he did write the editorial and that therefore he had no defense in the Alabama trial court.

In Mercantile National Bank v. Langdeau, 371 U.S. 555, 9 L.Ed. 2d 523, 83 S.Ct. 520, "finality" was established because there was involved:

"A separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the Plaintiff's cause of action."

If THE MIAMI HERALD PUBLISHING COMPANY will concede that it has nothing more to present to the trial court and that

as a practical matter, the judgment is final against it on all issues -- that if it loses this appeal, it must publish the replies and/or be liable for such damages as may be proved -- this threshold difficulty to both jurisdiction and the granting of a stay, may be obviated. Unfortunately, and we invite a statement from the Appellant to the contrary, THE MIAMI HERALD PUBLISHING COMPANY seeks to assert that the Florida Supreme Court order was "final" while purporting to preserve independent and factual defenses for its forthcoming trial -- if the decision below should be affirmed.

But for the nagging question of the finality of the decision of the Supreme Court of Florida, the Appellee agrees that the matters raised on appeal are of such magnitude as to warrant full review by the Supreme Court of the United States. The federal issues that have been raised and preserved are clearly "substantial". With or without a formal stay order, the Appellee will not seek further relief from the state courts of Florida pending disposition of the present appeal.

However, a continuation of the Appellant's written attitudes to the posture of the case reflect upon the possibility that jurisdiction may be declined; and to this extent, may bear upon the disposition of Mr. Justice Powell's stay order. Appellee will approach the matter in greater detail in our forthcoming response to the Jurisdictional Statement. We have no other objections to the continuation of the stay pending final disposition of this matter on appeal.

Respectfully submitted,

TOBIAS SIMON

TOBIAS SIMON & ELIZABETH duFRESNE, P.A.
1492 South Miami Avenue
Miami, Florida 33130

JEROME BARRON, ESQ.
The George Washington University
National Law Center
Washington, D.C.

Counsel for Appellee

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed on this 27th day of November, 1973 to

PAUL & THOMSON
1300 First National Bank Building
Miami, Florida 33131

COHN & MARKS
1920 L Street, N.W.
Washington, D.C. 20036

VS.

JUSTICE POWELL

Stay Continued
(Juv. St filed
73-797)

[illegible]

Grant on Memo

Await Discussion of
Jurisdiction (Final
Decision)

This is Miami Herald Case

(See Mills v. Ala on jurisdiction)

— read narrowly, this may
not be final. But actually
this is as final as the North
Dakota Case (ownership of drugs
& land). Court issue has been
decided.

PRELIMINARY MEMO

January 11, 1974 Conference
List 1, Sheet 1

No. 73-797

MIAMI HERALD PUBLISHING
CO. (a division of Knight
Newspapers, Inc.)

v.

TORNILLO

Appeal from Fla SC
(Carlton, Adkins, McCain, Dekle,
Rawls, p. c.; Roberts, specially
concurring; Boyd, dissenting)
State Civil

Timely;

1. Appellee brought an action in Circuit Court, Dade County

(Christie) for declaratory and injunctive relief and punitive damages against
appellant for appellant's refusal to publish appellee's reply to editorials
concerning appellee's candidacy for a seat in the Florida House of Repre-
sentatives. The Court dismissed the action, declaring Fla. Stat. 104.38,
under which the action was brought, unconstitutional as violative of the

Note
I think this
is jurisdiction
under Mills.
In any event,
if could
hear case &
decide this
issue later.

JB

First Amendment and as impermissibly vague. The Fla SC, in a per curiam decision (Carlton, Adkins, McCain, Dekle, Rawls, p.c.; Roberts, specially concurring; Boyd, dissenting) reversed the lower court, holding the statute constitutional, and remanding to the trial court for further proceedings not inconsistent with its decision.

Appellant claims that Fla. Stat. 104.38 is unconstitutional in that it violates the First Amendment and requirements of due process. Appellee raises a jurisdictional question of finality of the state court judgment.

2. FACTS: Appellee Tornillo was a candidate for the Democratic Party nomination for a seat in the Florida House of Representatives in the fall of 1972, when on Sept. 20 and Sept. 29, 1972, appellant published editorials harshly critical of appellee's candidacy. Appellant termed a strike which appellee led as an illegal act, and termed the election of appellee as "inexcusable." App. 45. Appellant stated that appellee had for years "been kicking the public shin to call attention to his shakedown statesmanship. . . . Give him public office, says Pat [appellee, Pat L. Tornillo, Jr.], and he will no doubt live by the Golden Rule. Our translation reads that as more gold and more rule." App. 47.

Appellee demanded that appellant print verbatim his replies to the two editorials. Appellant refused and appellee filed a civil complaint seeking injunctive relief and punitive damages. (The Fla SC and appellee also state that appellee sought declaratory relief.)

Fla. Stat. 104.38 reads as follows:

§ 104.38 Newspaper assailing candidate for election; space for reply. -- If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.083.

A candidate "shall mean any person who has filed his qualification papers, and paid his qualifying fees as required by law." Fla. Stat. 97.021(18).

This statute, passed in largely the same form as it exists now in 1913, was held constitutional by the Fla SC as a means to increase the flow of information to make a more and better informed electorate. The SC noted the increasing concentration of the ownership of the mass media into fewer and fewer hands, which fact jeopardizes the ability of the public to make enlightened choices concerning public controversies. The SC relied heavily in ^{the} its decision on Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969), and stated that it could take into consideration the principles enunciated therein since "dissemination of news other than purely local is transmitted over telegraph wires or over air waves." App. 18. The SC held the statute not vague or overbroad, and restricted "any reply," to one that is wholly responsive to the charges made in the paper and which is not libelous,

slanderous, vulgar or profane. App. 16. Contrary to the impression of appellant, J.S., p. 8, the Fla SC did not, it appears, approve, at least in the instant case, the appropriateness of an injunction issuing under 104.38:

Neither appellant nor appellee takes issue with the holding of the trial court that it lacked jurisdiction to enjoin an alleged violation of Florida Statute 104.38. This provision is criminal in nature and absent special circumstances equity will usually not enjoin commission of a crime. (App. 13) (footnote omitted)

no prior restraint

The Fla SC also seems to have attempted to restrict its holding as to the constitutionality of the statute to whatever civil remedies may be possible thereunder, although this is unclear. In its opinion on the petn for rehearing, the Fla SC (per curiam, with Boyd dissenting without opinion) stated that since no criminal penalty was being imposed, its validity vel non "is not here involved." App. 26. Yet the SC immediately thereafter defends the constitutionality of the statute in its entirety, and, at App. 27, states (by negative implication) as a finding of the SC that the statute is "sufficiently definite and specific to support a criminal penalty."

3. CONTENTIONS:

(a) Appellant contends that the issue of the constitutionality of this statute is important and novel. The statute violates appellant's First Amendment rights. Compelling a newspaper to publish that which it would otherwise not print is as much of an unconstitutional fetter on press freedom under the First Amendment as any prohibition as to what the paper can print. Appellant relies principally on Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973). Red Lion Broadcasting v. F.C.C., supra, must be limited to broadcasters.

Appellee agrees that the First Amendment issues here present significant federal questions: does the right of reply statute implement or impede the effectuation of freedom of speech? Appellee's position is that right of reply statutes advance the cause of free speech. Appellee further asserts that any incidental infringement on freedom of speech by Florida's right of reply statute is outweighed by the state's exercise of its police power to aid political expression and insure the integrity of the electoral process.

(b) Appellant claims that the statute is vague and ambiguous, and so fails to properly inform persons of those acts which might be held illegal under the enactment.

Appellee disagrees. The Fla SC has adequately defined the statute in its opinions in this case. At any rate, criminal penalties are not herein involved, and the Fla SC has indicated that the criminal penalty is a severable part of the statute.

(c) Appellant contends that

the opinion and judgment of the Florida Supreme Court are final for purposes of 28 U.S.C. § 1257(2). The Florida Supreme Court conclusively decided the controlling constitutional issue, and its decision, which is binding upon the trial court, is therefore reviewable by this Court. . . . (J.S., p. 3, cases omitted.)

Appellee, relying principally on Mills v. Alabama, 384 U.S. 214 (1965), contends that the decision is final only if statutory construction and factual defenses which might be asserted by appellant on remand are conceded. Appellant has not conceded these defenses and appears to be reserving them

for the further proceedings to be had in state trial court. While in Mills, appellant conceded that the only defense he had was a constitutional one, appellant here appears to reserve a variety of nonconstitutional defenses.

"Appellee believes that it is necessary for Appellant to make a further statement on the question of whether they [sic] are reserving a variety of independent defenses of a factual and statutory construction nature."

Response, p. 7. Appellee apparently believes that injunctive relief is still available in the case. Ibid.

(d) Amici have filed eight briefs in support of the jurisdictional statement, all basically tracking the arguments set out by appellant. Amici are Dow Jones & Co., New York Times Co., New York News, Inc., American Newspaper Publishers Assoc., Times Mirror Co., American Civil Liberties Union, ACLU of Florida, Washington Post Co., Reporters Committee for Freedom of the Press Legal Defense and Research Fund, Art Buchwald, Horance G. Davis, Jr., James J. Kilpatrick, Anthony Lewis, Robert D. Novak, Carl T. Rowan, Hugh Sidey, Thomas G. Wicker, Jules J. Whitcover, Chicago Tribune Company, Gore Newspapers Company, and Sentinel Star Company.

4. DISCUSSION: Many of the opinions in CBS v. DNC have language critical of such regulation as is here under attack. See, 412 U.S., at 117-118 (Opinion of Burger, C.J.); 144-145 (Stewart, J., concurring); 150-153 (Douglas, J., concurring in judgment); 182 n. 12 (Brennan, J., dissenting). But, see Rosenbloom v. Metromedia, 403 U.S. 29, 47 n. 15 (Opinion of

Brennan, J.). The First Amendment issues presented by this case appear to be of importance.

U The jurisdictional problem does seem to be a significant barrier to the noting of this case at the present time. Appellant has not conceded his non-constitutional defenses on remand, and if this Court were to rule that the Fla statute was constitutional, there is nothing now to prevent appellant from returning to the Fla courts and defeating appellee's action on the non-constitutional merits of the case. Appellee appears to be mistaken, though, in assuming that appellant's concessions would require appellant to print appellee's reply or replies. Injunctive relief appears to have been ruled out in this case by the Fla SC. See, supra. Appellant would probably have to concede liability for punitive damages. Even then the judgment would not be final unless the appellant and appellee agreed as to the amount of damages which would be due. "[T]he requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up -- for example, where liability has been determined and all that needs to be adjudicated is the amount of damages." Republic Gas Co. v. Oklahoma, 334 U.S. 62, 68 (1948). Appellee has provided no indication of willingness to settle on a figure of damages for purposes of allowing appellant to claim jurisdiction in this Court. It seems highly unlikely that the parties could stipulate punitive damages or that this Court could devise procedures for causing such to happen. Appellee apparently believes that he is not required to take any steps for jurisdiction to obtain.

There is a response.

Fergenson

Fla SC and Circuit Ct
Ops in J.S. appx

1/2/74

JA

NOTE: Although this case is "straight-lined" with No. 73-751 on the
Conference List, the two cases have nothing whatsoever to do with each
other.

Conf. 1/11/74

Court Fla. Supreme Ct.

Voted on....., 19...

Argued, 19...

Assigned, 19...

No. 73-797

Submitted, 19...

Announced, 19...

THE MIAMI HERALD PUBLISHING COMPANY, A DIVISION OF KNIGHT NEWSPAPERS, INC., Appellant

vs.

PAT L. TORNILLO, JR.

11/19/73 - Appeal filed.

Note but

Postpone
jurisdiction

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		AB- SENT	NOT VOT- ING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
.....						✓								
Rehnquist, J.														
Powell, J.				✓										
Blackmun, J.				✓										
Marshall, J.														
White, J.						✓								
Stewart, J.				✓										
Brennan, J.				✓										
Douglas, J.				✓										
Burger, Ch. J.														

Postpone
Postpone jurisdiction
Postpone
Postpone
Postpone
Want of Juris (Not final judge)

We reserved jurisdiction.

Paul (for Appellant)

Statute applies to news stories, columns
editorials. Immaterial whether true
or false. Criminal statute (al tho this is
civil suit)
no legislative history
Fla. A/G conceded invalidity of statute.

Resp., when he demanded eq. space,
did not aver that editorials ^{were} false
- nor did he request a retraction.

as to
juris

Relies on Mills v Ala ^{*} to establish
"case or controversy" here. The decision
of state ct. inhibits 1st Amend. R.B. Also
relies on N/Dakota Pharmacy.

Examine in feasibility to send case back to
litigate non-const. ^{state} issues.

Paul (cont)

Freedom of press is what 1st Amend. guarantees. It does not deal with Fairness.

Fla law ~~is~~ applies to outstate press as well as Fla press.

Newspaper could be compelled to publish to false reply.

Employer Mills v Ala (see Appellants Pt 12, 24, 38; 41).

Statute is void on face.

Barron (for Appellee)

Relies primarily on Rosebloom 403 U.S. 29, 47

Only person censured or denied free speech in Tornillo

"Criminal penalty" provision of Fla Op (Appendix 40) is separable from remainder of statute. All that is before this Court is a civil suit to compel right of reply.

Reg. of Press is permissible if necessary to further a leg. police power.

Fla statute is compatible with N.Y. Times case.

This case doesn't relate to a const. right to reply. It relates merely to validity of this statute which affords right.

Barn (cont)

It is not beyond power of state to provide for a person who has been defamed to have some right of reply.

(J Marshall noted that statute allows only candidates to have this right. Non-candidates have no ~~such~~ such right)

"Chilling effect" (whatever it means) comes from Dombroski in a racial prosecution case. This is a "world away" from saying that a newspaper ~~is~~ will be chilled ~~from~~ ^{by} the fear that a ~~candidate~~ candidate may demand an exercise of free speech.

The Chief Justice Reverie

The TV case may have some relevancy.

But assuming that some form of "right to reply" statute is valid, the Fla. one goes too far.

Telling a paper what to publish is not too different from saying what not to publish.

after Douglas' op. in U. Dakota ~~the~~ the case & in view of Mills, there is no doubt as to our juris.

Douglas, J. Reverie

Agree with C.J.

Brennan, J. Reverie

Agree with C.J.

Stewart, J. Reverie

There is a difference between right of free speech & right of free press.

As to electronic media, Red lion established special rules. The premise of Fed. reg. & control is now being challenged by scientists - frequencies are not limited.

The worry today is that economics - not physics - have resulted in limited number of newspapers.

But this would lead ~~to~~ Patten not to control press but to de-control electronic media

White, J. Reverie

Marshall, J. Reverie

Blackmun, J. Reverie

Powell, J. Reverie

There might be a
very narrowly drawn
"right to reply" statute
that I could support
- related say only to
candidates to public
office.

But, this statute
is hopeless.

Rehnquist, J. Reverie

Supreme Court of the United States,
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 3, 1974

Dear Chief:

Please join me in your opinion in
73-797, MIAMI HERALD PUB. CO. v. TORNILLO.

W
WILLIAM O. DOUGLAS

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 4, 1974

No. 73-797 - Miami Herald Publishing Co.
v. Tornillo

Dear Chief,

I am glad to join your opinion for the Court in this case. It is possible that I may write a brief concurring opinion.

Sincerely yours,

P.S.
/

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 4, 1974

Dear Chief:

Re: No. 73-797 - Miami Herald
Publishing Co. v. Tornillo

Please join me.

Sincerely,

Harry

The Chief Justice

Copies to the Conference

Disregard First Draft

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell ✓
Mr. Justice Rehnquist

2nd DRAFT

From: The Chief Justice

SUPREME COURT OF THE UNITED STATES

Directed: _____

Recirculated: JUN 5 1974

No. 73-797

The Miami Herald Publishing
Company, A Division of
Knight Newspapers,
Inc., Appellant,
v.
Pat L. Tornillo, Jr.

On Appeal from the Su-
preme Court of Florida.

[June —, 1974]

MR. CHIEF JUSTICE BURGER delivered the opinion of
the Court.

The issue in this case is whether a state statute grant-
ing a political candidate a right to equal space to reply to
criticism and attacks on his record by a newspaper, vio-
lates the guarantees of a free press.

I

In the fall of 1972, appellee, Executive Director of the
Classroom Teachers Association, apparently a teachers'
collective-bargaining agent, was a candidate for the
Florida House of Representatives. On September 20,
1972, and again on September 29, 1972, appellant printed
editorials harshly critical of appellee's candidacy.¹ In

¹ The text of the September 20, 1972, editorial is as follows:

"The State's Laws And Pat Tornillo

"LOOK who's upholding the law!

"Pat Tornillo, boss of the Classroom Teachers Association and
candidate for the State Legislature in the Oct. 3 runoff election, has
denounced his opponent as lacking the knowledge to be a legislator,

*Reviewed
6/6
join*

2 MIAMI HERALD PUBLISHING CO. v. TORNILLO

response to these editorials appellee demanded that appellant print verbatim his replies, defending the role of the Classroom Teachers Association and the organization's accomplishments for the citizens of Dade County. Appellant declined to print the appellee's replies, and appellee brought suit in Circuit Court, Dade County, seeking declaratory and injunctive relief and actual and punitive damages in excess of \$5,000. The action was

as evidenced by his failure to file a list of contributions to and expenditures of his campaign as required by law.'

"Czar Tornillo calls 'violation of this law inexcusable.'

"This is the same Pat Tornillo who led the CTA strike from February 19 to March 11, 1968, against the school children and taxpayers of Dade County. Call it whatever you will, it was an illegal act against the public interest and clearly prohibited by the statutes.

"We cannot say it would be illegal but certainly it would be inexcusable of the voters if they sent Pat Tornillo to Tallahassee to occupy the seat for District 103 in the House of Representatives."

The text of the September 29, 1972, editorial is as follows:

"FROM the people who brought you this—the teacher strike of '68—come now instructions on how to vote for responsible government, i.e., against Crutcher Harrison and Ethel Beckham, for Pat Tornillo. The tracts and blurbs and bumper stickers pile up daily in teachers' school mailboxes amidst continuing pouts that the School Board should be delivering all this at your expense. The screeds say the strike is not an issue. We say maybe it wouldn't be were it not a part of a continuation of disregard of any and all laws the CTA might find aggravating. Whether in defiance of zoning laws at CTA Towers, contracts and laws during the strike, or more recently state prohibitions against soliciting campaign funds amongst teachers, CTA says fie and try and sue us—what's good for CTA is good for CTA and that is natural law. Tornillo's law, maybe. For years now he has been kicking the public shin to call attention to his shakedown statesmanship. He and whichever acerbic prexy is in alleged office have always felt their private ventures so chock-full of public weal that we should leap at the chance to nab the tab, be it half the Glorious Leader's salary or the dues checkoff or anything else except perhaps mileage on the staff hydrofoil. Give him public office, says Pat, and he will no doubt live by the Golden Rule. Our translation reads that as more gold and more rule."

premised on Florida Statute § 104.38, a "right of reply" statute which provides that if a candidate for nomination or election is assailed regarding his personal character or official record by any newspaper, the candidate has the right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges. The reply must appear in as conspicuous a place and in the same kind of type as the charges which prompted the reply, provided it does not take up more space than the charges. Failure to comply with the statute constitutes a first-degree misdemeanor.²

Appellant sought a declaration that § 104.38 was unconstitutional. After an emergency hearing requested by appellee, the Circuit Court denied injunctive relief because, absent special circumstances, no injunction will lie against the commission of a crime, and that § 104.38 was unconstitutional as an infringement on the freedom of the press as protected by the First and Fourteenth Amendments to the Constitution. *Tornillo v. Miami Herald Publishing Co.*, 38 Fla. Supp. 80 (1972). The Circuit Court concluded that dictating what a newspaper must print was no different from dictating what it must not print. The Circuit Judge viewed the statute's vagueness as serving "to restrict and stifle protected expres-

² "104.38 Newspaper assailing candidate in an election; space for reply—If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in § 775.082 or § 775.803."

4 MIAMI HERALD PUBLISHING CO. v. TORNILLO

sion." 38 Fla. Supp., at 83. Appellee's cause was dismissed with prejudice.

On direct appeal, the Florida Supreme Court reversed holding that ~~the Circuit Court and held~~ § 104.38 did not violate constitutional guarantees. *Tornillo v. Miami Herald Publishing Co.*, 287 So. 2d 78 (1973).³ It held that free speech was enhanced and not abridged by the Florida right of reply statute, which in that court's view, furthered the "broad societal interest in the free flow of information to the public." 287 So. 2d, at 82. It also held that the statute was not impermissably vague; the statute informs "those who are subject to it as to what conduct on their part will render them liable to its penalties." 287 So. 2d, at 85.⁴ Civil remedies, including damages, were held to be available under this statute; the case was remanded to the trial court for further proceedings not inconsistent with the Florida Supreme Court's conclusions.

We postponed decision on jurisdiction pending consideration of the merits. — U. S. — (1974).

II

Although both parties contend that this Court has jurisdiction to review the judgment of the Florida

³ The Supreme Court did not disturb the Circuit Court's holding that injunctive relief was not proper in this case even if the statute were constitutional. According to the Supreme Court neither side took issue with that part of the Circuit Court's decision. 287 So. 2d, at 85.

⁴ The Supreme Court placed the following limiting construction on the statute:

"[W]e hold that the mandate of the statute refers to 'any reply' which is wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slanderous of the publication nor anyone else, nor vulgar nor profane."

287 So. 2d, at 86.

Supreme Court, a suggestion was initially made that the judgment of the Florida Supreme Court might not be "final" under 28 U. S. C. § 1257.⁵ In *North Dakota State Board of Pharmacy v. Snyder's Drug Stores*, — U. S. — (1973), we reviewed a judgment of the North Dakota Supreme Court, under which the case had been remanded so that further state proceedings could be conducted respecting Snyder's application for a permit to operate a drug store. We held that to be a final judgment for purposes of our jurisdiction. Under the principles of finality enunciated in *Snyder's Drug Stores*, the judgment of the Florida Supreme Court in this case is ripe for review by this Court.⁶

III

A

The challenged statute creates a right to reply to press criticism for a candidate for nomination or election. The statute was enacted in 1913 and this is only the second recorded case decided under its provisions.⁷

⁵ Appellee's Response to Appellant's Jurisdictional Statement and Motion to Affirm the Judgment Below or, in the Alternative, to Dismiss the Appeal, at 4-7.

⁶ Both appellant and appellee claim that the uncertainty of the constitutional validity of § 104.38 restricts the present exercise of First Amendment rights. Brief for Appellant, at 41. Brief for Appellee, at 79. Appellant finds urgency for the present consideration of the constitutionality of the statute in the upcoming 1974 elections. Whichever way we were to decide on the merits, it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture of § 104.38 could only further harm the operation of a free press. *Mills v. Alabama*, 384 U. S. 214, 221-222 (1966) (DOUGLAS, J., concurring). See also *Organization for a Better Austin v. Keefe*, 402 U. S. 415, 418 n. (1971).

⁷ In its first court test the statute was declared unconstitutional, *State v. News-Journal*, 36 Fla. Supp. 164 (Volusia County J. Ct., Fla.

6 MIAMI HERALD PUBLISHING CO. v. TORNILLO

Appellant contends the statute is void on its face because it purports to regulate the content of a newspaper in violation of the First Amendment. Alternatively it is urged that the statute is void for vagueness since no editor could know exactly what words would call the statute into operation. It is also contended that the statute fails to distinguish between critical comment which is and is not defamatory.

B

The appellee and supporting advocates of an enforceable right of access to the press vigorously argue that Government has an obligation to ensure that a wide variety of views reach the public.⁸ The contentions of access proponents will be set out in some detail.⁹ It is urged that at the time the First Amendment to the Constitution¹⁰ was enacted in 1791 as part of our Bill of Rights the press was broadly representative of the people it was serving. While many of the newspapers were intensely partisan and narrow in their views, the press collectively presented a broad range of opinions to readers. Entry into publishing was inexpensive; pamphlets and books provided meaningful alternatives to the

1972). In neither of the two suits, the instant action and the 1972 action, has the Florida Attorney General defended the statute's constitutionality.

⁸ See generally Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967).

⁹ For a good overview of the position of access advocates see Lange, the Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment, 52 N. Car. L. Rev. 1, 8-9 (1973) (hereinafter "Lange").

¹⁰ "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

MIAMI HERALD PUBLISHING CO. v. TORNILLO 7

organized press for the expression of unpopular ideas and often treated events and expressed views not covered by conventional newspapers.¹¹ A true marketplace of ideas existed in which there was relatively easy access to the channels of communication.

Access advocates submit that although newspapers of the present are superficially similar to those of 1791 the press of today is in reality very different from that known in the early years of our national existence. In the past half century a communications revolution has seen the introduction of radio and television into our lives, the promise of a global community through the use of communications satellites, and the spectre of a "wired" nation by means of an expanding cable television network with two-way capabilities. The printed press, it is said, has not escaped the effects of this revolution. Newspapers have become big business and there are far fewer of them to serve a larger literate population.¹² Chains of newspapers, national newspapers, national wire and news services, and one-newspaper towns,¹³ are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and changes the course of events. Major metropolitan

¹¹ See Commission on Freedom of the Press, *A Free and Responsible Press* 14 (1947) (hereinafter "Commission").

¹² Commission 15. Even in the last 20 years there has been a significant increase in the number of people likely to read newspapers. B. Bagdikian, *Fat Newspapers and Slim Coverage*, *Columbia Journalism Review*, Sept./Oct. 1973, at 16.

¹³ "Nearly half of U. S. daily newspapers, representing some three-fifths of daily and Sunday circulation, are owned by newspaper groups and chains, including diversified business conglomerates. One newspaper towns have become the rule, with effective competition operating in only 4 percent of our large cities." A Balk, *Background Paper*, Twentieth Century Fund Task Force Report for a National News Council, *A Free and Responsive Press* 18 (1973).

8 MIAMI HERALD PUBLISHING CO. v. TORNILLO

newspapers have collaborated to establish news services national in scope.¹⁴ Such national news organizations provide syndicated "interpretative reporting" as well as syndicated features and commentary, all of which can serve as part of the new school of "advocacy journalism."

The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper being owned by the same interests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public.

The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion.¹⁵ Much of the editorial opinion and commentary that is printed is that of syndicated columnists distributed nationwide and, as a result, we are told, on national and world issues there tends to be a homogeneity of editorial opinion, commentary, and interpretative analysis. The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires. In effect, it is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues. The monopoly of the means of communication allows for little or no critical

¹⁴ Report of the Task Force, Twentieth Century Fund Task Force Report for a National News Council, A Free and Responsive Press 4 (1973).

¹⁵ "Local monopoly in printed news raises serious questions of diversity of information and opinion. What a local newspaper does not print about local affairs does not see general print at all. And having the power to take initiative in reporting and enunciation of opinions, it has extraordinary power to set the atmosphere and determine the terms of local consideration of public issues." B. Bagdikian, *The Information Machines* 127 (1971).

analysis of the media except in professional journals of very limited readership.

"This concentration of nationwide news organizations—like other large institutions—has grown increasingly remote from and unresponsive to the popular constituencies on which they depend and which depend on them." Report of the Task Force, The Twentieth Century Fund Task Force Report for a National News Council, A Free and Responsive Press, at 4 (1973).

Appellees cite the report of the Commission on Freedom of the Press, chaired by Robert M. Hutchins, in which it was stated, as long ago as 1947, that "The right of free public expression has . . . lost its earlier reality." Commission on Freedom of the Press. A Free and Responsible Press 15.

The obvious solution, which was available to dissidents at an earlier time when entry into publishing was relatively inexpensive, today would be to have additional newspapers. But the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers,¹⁶ have made entry into the marketplace of ideas served by the print media almost impossible. It is urged that the claim of newspapers to be "surrogates for the public" carries with it a concomitant fiduciary obligation to account for that stewardship.¹⁷ From this premise

¹⁶ The newspapers have persuaded Congress to grant them immunity from the antitrust laws in the case of "failing" newspapers for joint operations. 15 U. S. C. § 1801 *et seq.*

¹⁷ "Freedom of the press is a right belonging, like all rights in a democracy, to all the people. As a practical matter, however, it can be exercised only by those who have effective access to the press. Where the financial, economic and technological conditions limit such access to a small minority, the exercise of that right by that minority takes on fiduciary or quasi-fiduciary characteristics." A. MacLeish in W. Hocking, Freedom of the Press, at 99 n. 4 (1947).

10 MIAMI HERALD PUBLISHING CO. v. TORNILLO

it is reasoned that the only effective way out of this dilemma and to provide for some accountability and for accuracy is for government to take affirmative action. The First Amendment right of the public to be informed is said to be in peril; the "marketplace of ideas" is today a monopoly controlled by the owners of the market.

Proponents of guaranteed access to the press take comfort from language in several of this Court's decisions, language which suggests that the First Amendment acts as a sword as well as a shield, that it imposes obligations on the owners of the press in addition to protecting the press from government regulation. In *Associated Press v. United States*, 326 U. S. 1, 20 (1945), the Court, in rejecting the argument that the press is immune from the antitrust laws by virtue of the First Amendment, stated:

"The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." (Footnote omitted.)

MIAMI HERALD PUBLISHING CO. v. TORNILLO 11

In *New York Times Co. v. Sullivan*, 376 U. S. 254, 270 (1964), the Court spoke of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." It is argued that the "uninhibited, robust" debate is not "wide-open" but open only to a monopoly in control of the press. Appellee cites the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U. S. 29, 47 & n. 15 (1971), which he suggests seemed to invite experimentation by the States in right to access regulation of the press.¹⁸

Access advocates note that MR. JUSTICE DOUGLAS a decade ago expressed his deep concern regarding the effects of newspaper monopolies:

"Where one paper has a monopoly in an area, it seldom presents two sides of an issue. It too often hammers away on one ideological or political line

¹⁸ "If the States fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern."¹⁵ . . .

¹⁵ Some states have adopted retraction statutes or right-of-reply statutes

"One writer, in arguing that the First Amendment itself should be read to guarantee a right of access to the media not limited to a right to respond to defamatory falsehoods, has suggested several ways the law might encourage public discussion. Barron, *Access to the Press—A New First Amendment right*, 80 Harv. L. Rev. 1641, 1666-1678 (1967). It is important to recognize that the private individual often desires press exposure either for himself, his ideas, or his causes. Constitutional adjudication must take into account the individual's interest in access to the press as well as the individual's interest in preserving his reputation, even though libel actions by their nature encourage a narrow view of the individual's interest since they focus only on situations where the individual has been harmed by undesired press attention. A constitutional rule that deters the press from covering the ideas or activities of the private individual thus conceives the individual's interest too narrowly."

12 MIAMI HERALD PUBLISHING CO. v. TORNILLO

using its monopoly position not to educate people, not to promote debate, but to inculcate its readers with one philosophy, one attitude—and to make money The newspapers that give a variety of views and news that is not slanted or contrived are few indeed. And the problem promises to get worse" The Great Right (Ed. by E. Cahn), at 124-125, 127 (1963).

They also claim the qualified support of Professor Thomas I. Emerson, who has written that "[a] limited right of access to the press can be safely enforced," although he believes that "[g]overnment measures to encourage a multiplicity of outlets, rather than compelling a few outlets to represent everybody, seems a preferable course of action." T. Emerson, *The System of Freedom of Expression* 671 (1970).¹⁹

IV

However much validity may be found in these arguments, at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual.²⁰ If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First

¹⁹ Professor Emerson would apparently consider regulation of the nature of § 104.38 to be constitutionally enforceable, *Id.*, at 670-671,

²⁰ The National News Council, an independent and voluntary body concerned with press fairness, was created in 1973 following the publication of the Twentieth Century Fund's Task Force Report for a National News Council, *A Free and Responsive Press*. The Background Paper attached to the Report dealt in some detail with the British Press Council, seen by the author of the paper as having, of the press councils in Europe, the most interest to the United States.

Amendment and the judicial gloss on that amendment developed over the years.²¹

The Court foresaw the problems relating to government enforced access as early as its decision in *Associated Press v. United States*, *supra*, 326 U. S., at 20 n. 18. There it carefully contrasted the private "compulsion to print" called for by the Association's Bylaws with the provisions of the District Court decree against appellants which "does not compel AP or its members to permit publication of anything which their 'reason' tells them should not be published." In *Branzburg v. Hayes*, 408 U. S. 665, 681 (1972), we emphasized that the cases then before us "involve no intrusions upon speech and assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold." In *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U. S. 94, 117 (1973), the plurality opinion observed:

"The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers."

An attitude strongly adverse to any attempt to extend a right of access to newspapers was echoed by several Members of this Court in their separate opinions in that case. 412 U. S., at 145 (STEWART, J., concurring); 412 U. S., at 182 n. 12 (BRENNAN, J., dissenting). Recently, while approving a bar against employment advertising

²¹ Because we hold that § 104.38 violates the First Amendment's guarantee of a free press we have no occasion to consider appellant's further argument that the statute is unconstitutionally vague.

14 MIAMI HERALD PUBLISHING CO. v. TORNILLO

specifying "male" or "female" preference, the Court's opinion in *Pittsburg Press Co. v. Human Relations Commission*, *supra*, 413 U. S., at 391, took pains to limit its holding within narrow bounds:

"Nor, *a fortiori*, does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists, or its contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial."

Dissenting in *Pittsburgh Press*, MR. JUSTICE STEWART joined by MR. JUSTICE DOUGLAS expressed the view that no "government agency—local, state, or federal—can tell a newspaper in advance what it can print and what it cannot." *Id.*, at 400. See *Associates & Aldrich Company v. Times Mirror Company*, 440 F. 2d 133, 135 (CA9 1971).

We see that beginning with *Associated Press*, *supra*, the Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print. The clear implication has been that any such a compulsion to publish that which "reason" tells them should not be published" is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.

Appellee's argument that the Florida statute does not amount to a restriction of appellant's right to speak because "the statute in question here has not prevented the *Miami Herald* from saying anything it wished"²² begs the core question. Compelling editors or publishers

²² Brief for Appellee, at 5.

to publish that "which 'reason' tells them should not be published" is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant from publishing specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers. *Grosjean v. American Press Co.*, 297 U. S. 233, 244-245 (1936). The Florida statute exacts a penalty on the basis of the content of a newspaper. The first phase of the penalty of the compelled printing of a reply is exacted in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print. It is correct, as appellee contends, that a newspaper is not subject to the finite technological limitations of time that confront a broadcaster but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines the readers should have available.²³

Appellant argues that, faced with the severe penalties that would accrue to any newspaper that published news

²³ "However, since the amount of space a newspaper can devote to 'live news' is finite,³⁹ if a newspaper is forced to publish a particular item, it must as a practical matter, omit something else.

³⁹ The number of column inches available for news is predetermined by a number of financial and physical factors, including circulation, the amount of advertising, and, increasingly, the availability of newsprint. . . ."

Note, 48 Tulane L. Rev. 433, 438 (1974) (footnote omitted).

Another factor operating against the "solution" of adding more pages to accommodate the excess matter is that "increasingly subscribers complain of bulky, unwieldy papers." Bagdikian, *Fat Newspapers and Slim Coverage*, *Columbia Journalism Review*, Sept./Oct. 1973, at 19.

or commentary arguably within the reach of the right of access statute, editors might well conclude that the safe course is to avoid controversy and that, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced.²⁴ Government enforced right of access, appellant argues, inescapably "dampens the vigor and limits the variety of public debate," *New York Times Co. v. Sullivan*, *supra*, 376 U. S., at 279.

Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forego publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising.²⁵ The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials—whether fairly or unfairly done—constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time. Accordingly, the judgment of the Supreme Court of Florida is reversed.

It is so ordered.

²⁴ See the description of the likely effect of the Florida statute on publishers, in Lange, 52 N. C. L. Rev., at 70-71.

²⁵ "[L]iberty of the press is in peril as soon as the government tries to compel what is to go into a newspaper. A journal does not merely print observed facts the way a cow is photographed through a plate-glass window. As soon as the facts are set in their context, you have interpretation and you have selection, and editorial selection opens the way to editorial suppression. Then how can the state force abstention from discrimination in the news without dictating selection?" 2 Z. Chafee, *Government and Mass Communications* 633 (1947).

June 6, 1974

No. 73-797 Miami Herald v. Tornillo

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 6, 1974

Re: No. 73-797 - Miami Herald v. Tornillo

Dear Chief:

Please join me in the opinion for the Court you have prepared in this case.

Sincerely,

WHR

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 10, 1974

Re: No. 73-797 - Miami Herald v. Tornillo

Dear Bill:

Please join me in your concurring opinion in this case.

Sincerely,



Mr. Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 13, 1974

Re: No. 73-797 -- The Miami Herald Publishing Co. v. Tornillo

Dear Chief:

Please join me.

Sincerely,

T.M.
T.M.

The Chief Justice

cc: The Conference

[illegible]