In the

Supreme Court of the United States

THE MIAMI HERALD PUBLISHING COMPANY, A DIVISION OF KNIGHT NEWSPAPRES, INC., Appellant	)	
vs.	)	Docket No. 73-797
PAT L. TORNILLO, JR., Applee	)	

Pages 1 thru 38

Washington, D. C.

April 17, 1974

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Appellant	:	No. 73-797
v.		
PAT L. TORNILLO, JR.,		
Appellee		

Washington, D. C.

Wednesday, April 17, 1974

The above-entitled matter came on for argument at 2:14 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

DANIEL P. S. PAUL, ESQ., Paul & Thomson, 1300 First National Bank Bldg., Miami, Florida 33131, for the Appellant.

JEROME A. BARRON, ESQ., George Washington University National Law Center, Washington, D. C. 20006, for the Appellee.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 73-797, Miami Herald against Tornillo.

You may proceed whenever you are ready, Mr. Paul.

ORAL ARGUMENT OF DANIEL P. S. PAUL

ON BEHALF OF THE APPELLANT

MR. PAUL: Mr. Chief Justice, and may it please the Court: This case is here on an appeal by the Miami Herald from a decision of the Florida Supreme Court which sustained the constitutionality of section 104.38, Florida Statutes. This appeal involves the constitutionality of that statute on its face under the First and the Fourteenth Amendments.

This statute involves the question of whether a newspaper under the First Amendment may be compelled by the Florida legislature to print the political statements of a candidate which it does not desire to print.

The facts of this case arose when the appellee, Mr. Tornillo, became a candidate from Dade County to the Florida legislature in the 1972 State election. In 1913 the Florida legislature had enacted a criminal statute which is reproduced in the appendix in full at the top of page 47. That statute requires a newspaper to give a political candidate free space to reply to any criticism of the political candidate published by a newspaper. The statute on its face applies to criticism of a candidate whether published in news articles, columns, or

editorials. The truthfulness or fairness of the criticism is irrelevant under the statute. And the violation of that statute is a crime punishable by up to one year in jail and a fine up to $1,000. There is no legislative history of the statute; it was adopted as part of the State Corrupt Practices in Elections Act. And there is no record of its use for almost 60 years.

It's first judicial test was in 1972 in State v. News-Journal. In that case --

QUESTION: I gather even though on the face of it it might be read as applicable only to assailing a person running for a nomination who is already in office. It has been given a broader application than that, has it?

MR. PAUL: I think the statute actually is broader because the definition of candidate includes a person who qualifies. A person who is already in office --

QUESTION: In this case has the Florida Supreme Court given it that --

MR. PAUL: Yes, the Florida Supreme Court in interpreting this statute in this case said that it applied to editorials and other articles.

QUESTION: Was Mr. Tornillo an officeholder?

MR. PAUL: No, he was a candidate for an office in the State legislature.

In the first judicial test of this statute in Florida

courts in 1972 in State v. News-Journal, the mayor of Daytona Beach had the newspaper arrested for refusing to print the mayor's reply to an article critical of the mayor. The lower court held the statute violated free press and due process guarantees of the U.S. and the Florida Constitutions and dismissed the criminal proceeding. That decision is reproduced in the appendix at page 51.

At that time the Florida Attorney General conceded the invalidity of the statute and refused to appeal the decision.

Mr. Tornillo became a candidate for the legislature some seven months later. That election was scheduled for October 4, 1972. On September 20, fourteen days before that election, the Herald printed an editorial critical of Mr. Tornillo's candidacy. That editorial appears at page 5 of the appendix. It referred to Mr. Tornillo criticizing his opponent for violating the election law. The editorial pointed out Mr. Tornillo was the same one who had led an illegal teacher's strike, and the editorial concluded by saying it would be inexcusable if the voters elected Mr. Tornillo to the legislature.

Mr. Tornillo waited a week, and on September 27 submitted a statement he entitled "Pat Tornillo in the CTA Record." He demanded that the Herald print that statement pursuant to the Florida statute which carries criminal sanction.

Mr. Tornillo in his statement did not claim that the editorial was not truthful, and he did not seek a retraction under the Florida retraction statute. He claimed that the Herald was dwelling on past history and he listed his own accomplishments during the past four years.

The Herald did not print that statment of candidate Tornillo. The Herald printed a second editorial on September 29 which appears in the appendix at page 8. Mr. Tornillo submitted a second statement the next day and demanded that it be printed. That statement appears at page 10. Again, there was no claim that the editorial was false. The Herald did not print Mr. Tornillo's statement.

The next day, on October 1, Mr. Tornillo filed suit in the Dade County Circuit Court seeking actual and punitive damages and a mandatory injunction to print his two statements. In his complaint Mr. Tornillo alleged that by this Florida statute, Florida had established "a fairness doctrine in enacting this compulsory publication statute."

At Mr. Tornillo's request, an emergency hearing was held on the next day, October 2nd. The Florida Attorney General was present since a statute of the State's constitutionality would be questioned, and he advised the court that he would not defend the statute as he had done in the prior case involving the Daytona Beach News-Journal.

The court denied Mr. Tornillo's request for an

injunction and declared the statute was unconstitutional because it violated the First Amendment and the due process guarantees of the Constitution.

Mr. Tornillo then advised the court that he elected not to proceed further in that case, and the case was therefore dismissed with prejudice.

Mr. Tornillo appealed directly to the Florida Supreme Court, and on July 10th of this year in a per curiam opinion, one Justice dissenting, the Florida Supreme Court reversed the lower court and held the statute did not violate either the First nor the Fourteenth Amendment or the due process guarantees of the Constitution. That opinion of the Florida court is in the appendix at page 15.

A rehearing was denied in a second per curiam opinion of the Florida Supreme Court on October 10, which is also in the appendix.

The Herald appealed directly to this Court. On January 14 the Court agreed to hear the appeal on the merits, postponing decision on appellee's jurisdictional claim until the hearing on the merits.

Appellee has subsequently abandoned his claims that this Court does not have jurisdiction of this appeal.

The Florida statute that is before the Court today --

QUESTION: Mr. Paul, whether or not the appellee has abandoned the claim, it's nonetheless one we will have to

decide, I suppose. Do you read the Florida Supreme Court's opinion as conferring any civil right upon Tornillo when the case goes back to the Circuit Court of Dade County in his right to civilly proceed against your client?

MR. PAUL: Yes. I think the Florida Supreme Court said that there was no injunction remedy under the statute, but they did imply, despite the fact that it was a criminal statute, a right for civil damages.

QUESTION: You cite in your brief to pages 16 and 17 of the Appendix the Florida Supreme Court opinion. There certainly is no language as such of the Florida Supreme Court that says he can recover damages, is there?

MR. PAUL: Yes, I think that the Florida Supreme Court in that opinion specifically said that the fact that this was a criminal statute did not mean that a civil right could not be implied in that decision. That appears in the Florida Supreme Court opinion. I don't have the page right at hand.

QUESTION: Don't take up your time.

MR. PAUL: It's page 40, I believe, in the appendix, that particular statement. Pages 39 and 40.

QUESTION: Bottom line of page 40, it says it establishes a civil right to damages.

MR. PAUL: Yes. "...can easily be severed and deleted and still leave a complete legislative expression

establishing a civil right to damages." The bottom of page 40.

QUESTION: That, however, doesn't answer the jurisdictional question, that is, the question of finality.

MR. PAUL: No. The Court, of course, has to examine that question. I think, though, that the issue in this case is the constitutionality on its face of the Florida statute, and that issue has been fully litigated in the Florida court. There are no nonconstitutional issues remaining in this case and the constitutional issue is ripe for determination.

QUESTION: If the statute is constitutional, the paper concedes liability?

MR. PAUL: No, the paper does not concede liability.

QUESTION: There must be an issue then left.

MR. PAUL: The remaining issues would be issues solely of Florida law as to the remedy and as to the amount of damages.

QUESTION: You may win. You may win.

MR. PAUL: That possibility is --

QUESTION: We may never have to face it.

MR. PAUL: I think, though, under the principles laid down by this Court in Mills v. Alabama, this constitutional question is now ripe for decision and threatens basic First Amendment rights, the Florida Supreme Court holding the statute constitutional.

QUESTION: And this constitutional issue has been

finally settled in the Florida courts.

MR. PAUL: Finally settled in the Florida courts, and a Florida election is scheduled within a few months, and this statute would seriously inhibit the exercise of First Amendment rights in the decision of the Florida Supreme Court which is toward the exercise of those rights. And I think under the principles laid down in Mills v. Alabama, this case is ripe for decision.

To sanction the Florida --

QUESTION: Am I wrong in recollecting that in Mills v. Alabama the newspaper conceded that it had no other defenses? And here you have just told my brother White that you do have defenses based upon Florida law, and as he suggested, you might win and that would be the end of the case; there would no longer be a case or controversy.

MR. PAUL: Except that the decision of the Florida Supreme Court from the point of view of inhibiting the exercise of First Amendment rights in Florida would still stand even if the nonconstitutional issues should provide success for the Miami Herald in this case.

QUESTION: But you have won this case, and this Court is here just to decide cases or controversy. That is the extent of our power under Article III.

QUESTION: How would you be inhibited? You haven't printed anything yet that you didn't want to and you're not

about to, I suppose.

MR. PAUL: The Florida Supreme Court has held this statute constitutional and, of course, the Herald, in the absence of a reversal by this Court, would have to abide by the constitutional ruling of the highest court in its State. It would therefore vitally affect not only the Herald's rights but many other newspaper rights in Florida who would be guided by that decision in the exercise of their editorial discretion to determine whether or not to print the replies of political candidates.

As Mr. Justice Douglas pointed out in his concurring opinion in Mills v. Alabama, it's not necessary that the nonconstitutional issues remaining in the case all be resolved when the decision of the State court inhibits the exercise of First Amendment rights. And to sanction the Florida statute, this Court would have to make a fundamental revision of the First Amendment.

QUESTION: I notice in your reply brief, at least, you also rely on North Dakota Pharmacy Board.

MR. PAUL: Yes.

QUESTION: Where we decided the constitutional question, notwithstanding there were State laws.

MR. PAUL: Correct. I think both of those --

QUESTION: That one was not a First Amendment case.

MR. PAUL: No, it was not a First Amendment case.

Of course, again, it seems really an exercise in futility to send this case back to decide the nonconstitutional issues and then have it wind its way back in a long and tortuous process from the constitutional issue which obviously in the light of the Florida Supreme Court opinion will have to be decided.

QUESTION: If you win, the case wouldn't come back. It would be the end of it. You would be the victor.

MR. PAUL: This case wouldn't, but another case raising the same issue would come back because the Florida Supreme Court's decision would still stand. We would not win on the basis of our constitutional rights. And I think that that issue will inhibit the exercise of those rights in Florida until it is settled.

QUESTION: Before the North Dakota case, do you think you might have had some serious troubles on jurisdiction here?

MR. PAUL: Yes, I think we might.

QUESTION: You rest on that very firmly, I noticed, in your reply brief.

MR. PAUL: Yes.

Compelling a newspaper to print is the same as telling it what not to print. It is censorship forbidden by the First Amendment. There is a national policy that has been expressed in the First Amendment that newspapers should

not be deterred in printing what they choose, particularly about political candidates.

As Mr. Justice Stewart pointed out in his opinion in the CBS case, the First Amendment protects newspapers from the intrusive editorial thumb of Government. If there is any area where the role of the press under the First Amendment must remain unfettered, it is criticism of political candidates of the very kind expressed in this case. One of the chief roles of the press is vigorous criticism of candidates and of public officials. Newspapers historically in this country have been in the business of grinding axes, particularly political ones. Editorial discretion and judgment must mean freedom to choose what to print and what not to print.

As Mr. Chief Justice Burger pointed out in the Columbia Broadcasting case, editing is what editors are for and editing is the selection and choice of material.

The only restraints on the autonomy of the press which this Court sanctioned in the Columbia Broadcasting case in its nonbusiness aspects are the restraints imposed by its readers and by its journalistic integrity. The attempts at regulation of fairness or balance of newspapers strikes at the very core of the First Amendment. As Professor Barron concedes in his writings, it would lead to the press being treated as a public utility and licensing of the press would be the result, and there would be a return to the conditions

which led to the adoption of the First Amendment to begin with.

Freedom of the press, not fairness, is what the First Amendment is concerned with. Fairness has been left to the editors. As Mr. Justice Stewart points out in his opinion in the CBS case, fairness is too fragile a commodity to be left to the Government to decide.

Although the Florida statute is vague and ambiguous, it is certainly broad in scope. It may be invoked by any candidate who has filed for local, State, or Federal office. In fact, it may be invoked by an incumbent public official as soon as he qualifies for reelection and becomes a candidate. It applies to any criticism of a candidate published in the newspaper. It's not limited to editorial criticism. It applies, at the very least, to news articles, to syndicated columns, to cartoons. In fact, the statute could be triggered by a news article in which one candidate assails another, a reply is demanded, the other candidate demands a counter reply, and an entire round-robbin ad infinitum could be set up in the newspaper. One article which criticized several candidates would trigger as many replies as there were candidates criticized; each under the statute would be entitled to his separate reply. It would apply to newspapers whether or not they were published in Florida.

QUESTION: What would happen if they published an editorial against all of the candidates of one political party?

Would each one of them have an answer?

MR. PAUL: Under the Florida statute, each of the candidates would have an answer. A New York Times story, for example, on Florida politics would trigger the statute and the New York Times under penalty of criminal sanctions would be required to accept replies of Florida candidates.

And again I emphasize this statute applies without regard to the truth or the falsity or the fairness of the original article, regardless of whether there was any malice involved. In fact, this statute stands the libel standards of the New York Times v. Sullivan on its head. Newspapers which publish something which is true may be required to publish a totally false reply.

As I said, the statute carries criminal penalties. The editor could be put in jail for up to a year and fined a thousand dollars in addition to the civil remedies which have been implied by the Florida Supreme Court.

Now, the appellee seeks to justify this sweeping incursion on the First Amendment on the ground that the State has an interest in fair elections and that this justifies this abridgement.

We submit that such an argument ignores this Court's holding in Mills v. Alabama which interestingly is not cited in the Florida Supreme Court opinion or in appellee's brief. In the Mills case, it was argued in defense of that Alabama

statute that purity of elections justifies this ever-so-slight abridgement of the First Amendment made by the statute not to publish anything critical of a candidate on Election Day. Nevertheless, the Court struck that statute down on the ground that the State's interest in fair elections could not justify an abridgement of the First Amendment.

Secondly, we are told by appellee that the statute is justified by the economic concentration of the media. However, there is nothing in the record to justify appellee's argument that the media is now one vast monolith. The facts are that there is much more diversity in the media and in the number of media than at the time the First Amendment was adopted. But again the Court has found in the Associated Press case that even antitrust violations do not justify infringement of the First Amendment.

Of course, the press has power. It's obvious that the press has to have power to assure its editorial independence and to assure that it can fulfill its role under the First Amendment.

Interestingly enough, the argument made in this case for this statute and the benefits it theoretically would provide, the statute would have exactly the opposite effect. Newspapers, particularly small ones, with space limitations would be deterred in publishing political criticism for fear of triggering the statute. Publications, for example, with

a distinct editorial viewpoint would have the greatest dilemma of all. Will the twelve black newspapers serving the black community in Florida have to give equal time to George Wallace to reply as a candidate despite the views of the particular editor of that newspaper and the community which it serves?

There are many other examples, but we submit that an examination of this statute on its face dictates that the opinion of the Florida Supreme Court must be reversed.

I would like to save the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Barron.

ORAL ARGUMENT OF JEROME A.. BARRON

ON BEHALF OF THE APPELLEE

MR. BARRON: Mr. Chief Justice, and may it please the Court: My name is Jerome Barron, and I am counsel for appellee, Pat Tornillo.

The first thing I think I would like to do is to answer a question, and that question is who is Pat Tornillo. As I read the host of briefs filed in this case on the other side, I had to scratch my head sometimes to remember who Tornillo was, because as I read the briefs, it sounded like he was some high official in the Government.

Pat Tornillo is the executive director of the Classroom Teachers Association of Dade County, Florida, and he is a very controversial fellow, and he intends to remain being

a very controversial fellow. Mr. Tornillo led the school teachers of Florida in a strike which angered the Governor of Florida, and it also angered the Miami Herald as we are reminded in these editorials in the appendix in this case. That is everybody's right to be angered and to say what they please under our Constitution.

What Mr. Tornillo wanted, however, when he read these editorials was to fulfill his role, to use a phrase in the New York Times v. Sullivan, this Court's own phrase, he wanted to serve a role as a citizen critic of Government.

Mr. Tornillo had an advantage over other people who had had media problems. First of all, he lived in a State which has and has had a right of reply statute since 1913. Secondly, he had the advantage of this Court's plurality opinion in Rosenbloom v. Metromedia. And in that case, if there is any quotation that is important in this case, any particular portion of the opinion that's in Rosenbloom that is important, it is the passage which is very short, but I would like to bring it to the Court's attention, in 403 U.S. 29, page 47, Mr. Justice Brennan joined by Mr. Justice Blackmun and Chief Justice Burger, said this:

"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 insuring their ability to respond rather than in stifling public discussion of

matters of public concern."

To me the paradox of this case is that we have mountains of print in this case about censorship and the only person who has been censored in this proceeding is Pat Tornillo.

The question before the Court, the question presented by the statute is if a candidate during the course of an election is editorially attacked by a daily newspaper in his community, may a State statute afford him a reply of similar amount of space? That is the question before the Court.

QUESTION: Or to put it another way, for instance, you cannot reply to an editorial,by merely becoming a candidate automatically gets that right.

MR. BARRON: That's right, Mr. Justice Marshall. In other words, the position, of course, is that generally there are no access rights to the media. That is the law. You are quite right, Mr. Justice Marshall. The point is that if one becomes a candidate and one is attacked, then --

QUESTION: If the editorial is written against Joe Doakes calling him anything and really condemning him to high heaven and Joe Doakes says, "I know how to fix him. I'll become a candidate." But under this statute, even if a man does that deliberately, this statute covers it.

MR. BARRON: Not quite, Mr. Justice Marshall, because the media would still have the upper hand because if they have

attacked him prior to the time he became a candidate and then he becomes a candidate, they still would be able to deny him forum, under the statute, as long as they don't editorially attack him.

QUESTION: Well, let me put it another way. If he is an ordinary citizen and he is attacked, he can get no redress unless he becomes a candidate.

MR. BARRON: And is attacked.

QUESTION: Well, after that, if he hadn't become a candidate, he could still be attacked, couldn't he?

MR. BARRON: Yes, he could be attacked.

QUESTION: So to insulate him from attack he becomes a candidate.

MR. BARRON: Yes. But my point --

QUESTION: And the statute would cover it.

MR. BARRON: I don't believe that the statute goes quite that far, Mr. Justice Marshall. As I read the statute, the attack would have to come after he has become a candidate.

QUESTION: That's what I'm saying.

MR. BARRON: If that's what you are saying, I agree with you.

QUESTION: Then he's insulated from then on.

MR. BARRON: He is insulated from not being able to respond.

QUESTION: That's right.

MR. BARRON: Correct. Yes, sir.

There has been considerable discussion in the argument of the appellant about the criminal features of the statute. In the complaint that was filed in this case, no criminal sanctions were ever asked for. Moreover, in the petition for rehearing when the same parties in amici who are here made the same argument about the criminality of the statute 104.38, the Florida Supreme Court on page 39 in its petition for rehearing said that no criminal penalty is sought in the case sub judice. They emphasize that; they said that very clearly on page 39. And therefore, the validity vel non of the criminal penalty is not here involved.

Now, obviously the court only wanted to pass upon the case before them. But they certainly prepared the way for the future in case there was a criminal proceeding because they said on the very next page, page 40 of the appendix, anticipating a criminal penalty, they said, 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.

That language has to be read in conjunction with the second paragraph on page 39 -- I believe these two pages of the decision below are very fundamental for an understanding of this case. If you look at paragraph two on page 39, what they talk about is the fact that what was sought by Tornillo

was the publication of a reply. That is all that is before this Court is a simple proceeding to enforce a reply. We quite understand the reason and the drive to have this considered as a criminal penalty in hopes of invalidating. But that simply is not this procedure, that is not this proceeding at all.

This statute can be justified on two very familiar propositions of constitutional law. The first is that some regulation, some regulation of the press is permissible so long as it serves an overriding police power purpose.

Along with our brief in the merits to this Court, we submitted an appendix, our own appendix of 146 pages, reciting various kinds of State statutes which restrict the press. The primary motivation in preparing that appendix which collects statutes about restricting electioneering at the polls and reporting boycotts in newspapers and in reporting the names of rape victims in newspapers, and so on. The point of that was not to glory in regulation at all. It was because we thought the statute that we are defending is so much superior.

Why did we think it was so much superior? Because unlike the legislation that I am talking about, this statute does not detract from expression one iota. What it does is it adds to the realm of discretion. So that this statute has the unique feature of both responding to a police power purpose in free and fair and honest elections and implementing one of

the grand ideas in this Court's opinion in New York Times v. Sullivan when this Court said that it considered that famous case against a profound commitment, national commitment, to debate vigorous, free and wide open.

QUESTION: Nothing in this Court's opinion in the New York Times, though, suggested that one person would have a right to comandeer somebody else's printing press and make his expression that way, did it?

MR. BARRON: Mr. Justice Rehnquist, let me answer your question this way. In the rich case law that has developed since the Supreme Court's decision in New York Times v. Sullivan in 1964, for example, if you take the cases that go from New York Times v. Sullivan to Rosenbloom v. Metromedia in 1971, I think you see the breakdown of an implied premise in New York Times v. Sullivan. The case talks -- and I just gave the word -- the case talks about the word "debate". And I think the assumption of this Court was that if the media are free, as perhaps they should be, from the spectre of heavy damage suits that can put them out of business, that then we would have vigorous criticism of governmental institutions, and of public issues as was finally held in result of this Court in Rosenbloom. However, by the time the New York Times v. Sullivan fact situation was extended, first from elected public officials to nonelected public officials, to public figures, and finally in Rosenbloom just to anyone involved in a public issue, what

happened was, as this Court pointed out in its plurality opinion in Rosenbloom, the situation arose or the conclusion developed that it may not be true that debate will come merely by removing newspapers from heavy libel suits for damages. That is why in the plurality opinion it was suggested, not that damages revisited was the answer, but rather that the answer might be to allow some kind of reply.

Florida, with profound judgment has precisely the statute geared to fulfill that purpose, to let New York Times v. Sullivan live but yet to have debate.

QUESTION: What if Mr. Tornillo, in the course of his campaign, had announced after this editorial attack that on next Friday night he was going to take care of the Miami Herald and had announcements throughout the week in advertising to build up an audience on that conflict and that on Wednesday the Miami Herald said they wanted equal time and would like to have one of their editors or someone present to answer him. Do you think Mr. Tornillo would have to yield half of the time on the platform in the hall he had rented for that occasion?

MR. BARRON: He would not, Mr. Chief Justice, because Florida --

QUESTION: The statute doesn't apply to him.

MR. BARRON: The statute does not apply to him.

May I just speak a little further to your point,

because I think again it's a fundamental point in this case. This case has occasioned apparently a good deal of interest. Yet, again as I had to struggle as I read through the briefs of the amici and so on to remember who Mr. Tornillo was, I also had to struggle to remember what this case was about. This case has nothing to do with the establishment as a matter of constitutional case law of a right of reply with all the problems of establishing parameters that that would involve. This case raises a much more narrow and a much more conventional constitutional question, and that question is if a State by statute fulfilling a police power purpose, a purpose that goes directly to implementing the Electoral Code, if a State passes a statute which also happens to respond to the interests of public debate, New York Times v. Sullivan, is such a statute constitutional? And it seems to me, Mr. Chief Justice, that is a much more limited and a much more familiar task for constitutional adjudication.

QUESTION: Now, one step further in my question, I had only a preliminary, suppose Florida had a statute which required a candidate for office who attacks a newspaper to give equal time in the place and setting in which he made the attack on the newspaper, would you then have an approximate parallel to this statute?

MR. BARRON: No, Mr. Chief Justice, I do not believe you would for this reason: From Marsh v. Alabama to many

First Amendment cases ever since, one of the insistent themes of this Court has been are there alternative avenues of communication?

I am not frankly worried about the access problems of the Miami Herald with a circulation of 350,000, the dominant paper in the State of Florida with 82 percent of the circulation in Dade County. The other newspaper, the Miami News, has only about 80,000 in circulation. So that under this Court's own principle in terms of alternative means, in terms of restriction on free expression, it seems to me that the constitutional case for this statute would be much greater than a statute governing that situation.

It is not our position here, it is not our position here that we wish the newspapers of this country to say anything in their editorials that they do not wish to say. Let them say what they please. But what we have is a situation which perhaps none of us wanted. I do not see any conspiracy of the press. To the contrary, we live here in the 20th century where economics and technology have given us a world perhaps we did not want. And what our task is is to try to make an adjustment so that freedom of speech and press as we understand it and as we believe in it can endure. That's our problem. It seems to me that we can get guidance from this case in terms of what the First Amendment is all about and how this statute responds to that, from Mr. Justice Brandeis'

great and eloquent concurring opinion in Whitney v. California. And what Mr. Justice Brandeis said there was in a couple of famous pages, he said that liberty could be a means as well as an end, and that is why I respectfully disagree with the appellants and all the sincere people I do not doubt on the other side. I do not believe it is completely beyond the power of the State to say that if someone is attacked to the point of destruction, he cannot reply. I do not believe the First Amendment means that.

QUESTION: But you can attack to destruction anybody in Florida except a candidate.

MR. BARRON: That is true, your Honor, and it is a situation I regret, but it is a fact. But we make progress in life incrementally, and I believe that the sustaining of this statute would be progress in terms of the First Amendment.

Now, I would like just to say a couple of other things with regard to Mr. Justice Brandeis' opinion in Whitney v. California because I really think it is terribly dispositive and helpful to this proceeding. Mr. Justice Brandeis asked two questions, and after all this is a person who himself had studied the press, Mr. Justice Brandeis. The most famous of all Law Review articles is his article on the right of privacy in the Harvard Law Review. And Mr. Justice Brandeis said two things as to why we have First Amendment protection.

First of all, he said we have First Amendment

protection because public discussion is a political duty. What did he mean by public discussion is a political duty? He meant that public discussion is a political duty in the sense of what we talk about today in our contemporary language, the public's right to know.

Then he said something else, which I think is equally responsive and significant in trying to ascertain the validity of this legislation. Mr. Justice Brandeis said, opportunity to air supposed grievances is the path of safety. Opportunity to air supposed grievances is the path of safety. What did he mean by that? Obviously, what he meant by that is that if we are going to have things like freedom of speech and press, if we are going to have a free society, then people have to have a sense of justice about existing institutions. He believed that if they could reach an audience, that if we could have what this Court has always talked about, debate, then our institutions,our free institutions would be secure.

It seems to me that 104.38, the Florida right of reply statute, both permits the airing of supposed grievances -- notice how artfully Mr. Justice Brandeis wrote. He didn't say they were legitimate grievances; he said supposed grievances. I find it shocking that the people on the other side should say, well, they can publish a false reply. This Court -- and I have no quarrel with it -- has given the media the opportunity to write false replies in the sense -- false editorials, rather,

in the sense that we are not interested whether ultimately in the eye of eternity something is true or false. Unless we can show calculatedly that it is false, from a First Amendment point of view, we are not interested because we know that in the hurly-burly of free debate we cannot stop and pause to verify the statement. But by the same law and doctrine that gives that latitude to the Miami Herald, should not Tornillo, if a State statute has given it to him, should he not have also the same remedy, the same right?

QUESTION: Professor Barron --

MR. BARRON: Yes, Justice Blackmun.

QUESTION: Your eloquence prompts me just to ask one question. Perhaps you can help me over the hurdle. For better or for worse, we have opted for a free press, not for free debate.

MR. BARRON: Well, Mr. Justice Blackmun, I hope that is not so. I hope that we have, we can work out an accommodation between the two. It seems to me it is not necessary to change any of our ideas about what should be in the content of editorials. On the other hand, in terms of the realities that I adverted to before, I think it is possible for us to have both. I think it is possible if we go with a statute that is careful enough and a situation that cries out for some redress of injustice as this one does, it seems to me we can have both.

Now, it may be that we could have situations where the two would be incompatible. I do not believe that this is such a case.

I would like to address myself to another argument that has been made here. That is the so-called chilling effect argument. I am a teacher of constitutional law. I am supposed to know what chilling effect means, whether I do or not. But in any case chilling effect comes from Dombrowski v. Pfister. What was Dombrowski v. Pfister all about? Dombrowski v. Pfister was a case where civil rights workers wanted to engage in activity and expression that was unquestionably protected and they were faced with a situation where law enforcement people said in effect, "We will prosecute you; we don't care whether we win or not; we will prosecute you, we will fix your First Amendment rights." So that the spectre of prison was a threat to the implementation of free expression.

Is that this case? The Florida court, it seems to me, has done all that any State court can do, in a case that did not involve a request for criminal sanctions, to exclude the possibility of criminal prosecution. It seems to me that the chilling effect that was talked about in Dombrowski is a world away from the cry we have heard in this case, which is that if we must give our opponents a forum, we would rather say nothing. To call that chilling effect, I think we have to ask a question: Who, then, is putting the chilling effect

on the expression of constitutional rights?

QUESTION: Of course, the only entity that the First Amendment is directed against is the Government. I take it the Miami Herald can chill anybody's rights to their heart's content and they are not violating the Constitution.

MR. BARRON: Mr. Justice Rehnquist, that would be true absent the statute, that if we had a request, as Mr. Justice Marshall is suggesting, by a private citizen absent the statute, then -- and I think this is what your question was addressed to, then we would have a State action problem.

QUESTION: No, that isn't what my question is addressed to. What you are saying is in effect that the real chilling here comes from the Miami Herald.

MR. BARRON: That is correct.

QUESTION: Well, there is nothing in the Constitution that prevents a private person from chilling anybody's First Amendment right.

MR. BARRON: But I would suggest, Mr. Justice Rehnquist, that since this Court has held time without number that the First Amendment is not an absolute, that a State statute imposes some duties on the Miami Herald changes that situation.

QUESTION: Then you come down to the question whether a State statute can impose. You are back to your --

MR. BARRON: Exactly, Mr. Chief Justice, that is the

question. The question is whether this statute is consistent with the First Amendment. And our position is a twofold one. It's a very simple position. First, that it is justified by an overriding police power purpose, First Amendment and police power ideas; and secondly, and this is what we believe to be the unique feature of the case, that since it adds to expression rather than detracts from expression, that what it does really is instead of offending the First Amendment, it implements it, at least under this statute and with these facts.

QUESTION: What's the difference between the State saying you shall publish A and the State saying you shall not publish A under the First Amendment?

MR. BARRON: Mr. Justice Marshall, I believe there is a great difference. To respond directly to your question, if the State shall say, "You shall not publish," then I think we are by anyone's reckoning, anyone's view of the First Amendment, in the historic area of censorship. Whereas if you say that a State -- if a State says you shall publish a reply, then you are not telling the newspaper it may not print something or even that it must take a position that it dislikes.

QUESTION: You said would not make them take a position they dislike.

MR. BARRON: That's right.

QUESTION: The Miami Herald didn't want to publish it.

MR. BARRON: That is correct. What I mean --

QUESTION: You might start over again.

MR. BARRON: I'm sorry. What I mean by that, Mr. Justice Marshall, is that institutionally they are still free, if this statute is sustained, every paper in Florida will still be free editorially to attack anyone they wish.

QUESTION: And then publish what they don't want to publish.

MR. BARRON: That is correct.

QUESTION: And that is not governmental control.

MR. BARRON: I would suggest that it is not governmental control of a degree that is anywhere larger than any of the statutes that restrict the press that we have called to your attention.

QUESTION: Not like this one.

MR. BARRON: Well, you take, if a statute says that a newspaper cannot mention the name of a rape victim in the paper, that, of course, is something they cannot say. Now, --

QUESTION: It was cited that --

MR. BARRON: This Court has a case before it now Cox v. Cohn Broadcasting which raises that very question, and there again you have just as in this case, Mr. Justice Marshall, you have really competing constitutional claims.

QUESTION: Suppose the State says that every newspaper must publish any material that can be classified as debate by

any politician who offers it? Would that be constitutional?

MR. BARRON: I would have great doubt about the constitutionality.

QUESTION: That sure would build up the debate you have been talking about.

MR. BARRON: No, because -- no, Mr. Justice Marshall, I don't believe it would because --

QUESTION: You don't believe it would? If you gave a politician a right to print something in the newspaper?

MR. BARRON: We are not sure that we have responsiveness. The whole idea of the right of reply is to responsiveness. If we have attack and reply, then it seems to me we are in a debate.

QUESTION: I see.

MR. BARRON: So I think that differs from your hypothetical that you suggest.

But may I just in the remaining time that I have and adverting to the facts of Cox v. Cohn Broadcasting before this Court, it seems to me that what we have there of course is a right of privacy problem against a free press problem. The fascinating thing about this case, of course, is that we have competing First Amendment interests in conflict. Unless you take the view that the only people who are protected by freedom of the press are those who work in media and own stock in it, unless you take that view --

QUESTION: Is that such a naive view?

MR. BARRON: It is not a naive view, Mr. Justice Rehnquist, but it seems to me it is an inadequate view, for this reason: I think that just in view of the inability to respond, as this Court talked about in Rosenbloom, that it is a danger really to free expression if exhaust the free expression right of the American people with the property rights of those who own communication facilities. This is not to say that those who own and work in such facilities do not have First Amendment rights; of course they do. The question is can we afford some modicant, some slight legislative aid to make the debate we have all been talking about a reality. And it is my position that the sustaining of the statute would lead precisely to that.

Now, if the argument is that, as Mr. Justice Marshall pointed out, one could be presented with statutes which would raise grave problems. Then the answer to that, as this Court has said again time and time without number, it is part of the task and the obligation of constitutional adjudication to draw lines and to say beyond this point we will not go. But we have not reached that point, we have far from reached it in this case.

Your Honor, I think I have said all that I wish to say. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Do you have anything further, Mr. Paul?

REBUTTAL ORAL ARGUMENT OF DANIEL P. S. PAUL

ON BEHALF OF THE APPELLANT

MR. PAUL: Mr. Chief Justice, and may it please the Court: Just briefly I would like to clear up two misstatements by Professor Barron in reference to the statute. He refers to the statute as applying only to criticism published in a newspaper published in the same community where the candidate is. There is no such limitation in the statute. As I said, it would apply to the New York Times if it happened to publish something about a particular Florida election and the candidates involved. And it's not correct to say that the criminal penalty can be detached from the statute. The Florida Supreme Court has left the criminal penalty standing, but there is no way that any candidate can get a reply under this statute by any other way than the criminal penalty because the Florida Supreme Court has knocked out the mandatory injunction penalty, on the old common law theory that equity will not enjoin a crime, a rule which is followed in Florida. So without the criminal penalty, this would not provoke any reply.

Mr. Barron keeps talking about Mr. Tornillo being censored. There is absolutely nothing in this record to support any such assertion that Mr. Tornillo didn't get his message across. Mr. Barron describes Mr. Tornillo as a public

figure and as a controversial man. We would have to be very naive to think that Mr. Tornillo was relying entirely on a paragraph statement in the Miami Herald in order to get his message across in his campaign. There is nothing that shows that he was muzzled.

But I think the nub of it comes down to the conclusion remarks that Professor Barron made when he says that this cases poses competing First Amendment interests in conflict. There are no competing First Amendment interests in conflict here. There is no First Amendment right to use the press. There is no right of a citizen to be interviewed by the press. There is no right to have a letter that a citizen may write to the press to have that letter printed. As Mr. Justice Stewart pointed out yesterday in the prison cases, the editor might just as well throw that letter in the wastebasket if he determines that he does not desire to print it. A judicial inquiry into the editorial discretion and the editorial function is not permissible under the First Amendment. Compulsion is the same as censorship and there is no difference between saying that you shall publish and you shall not publish under the First Amendment.

As Mr. Justice Blackmun pointed out, our founding fathers in writing the First Amendment opted for a free press not a fair press. They decided fairness was too fragile an issue for them to deal with. It's the only First Amendment we

have, as pointed out in the Columbia Broadcasting case and it is not the function of the Court to rewrite that amendment. The issue is really who decides what gets into the newspaper, the Government, the Florida legislature, or the editor of a free newspaper? There is no constitutional right for the Florida legislature to regulate the fairness of political criticism without violating the First Amendment.

I understand that Professor Barron says this is a noble concept, but motherhood is, as one editor pointed out, also a noble condition, but motherhood under compulsion is the product of rape and it begets illegitimacy. And to force an editor to put in his editorial judgment what he does not desire and his conscience does not wish to print or he may think is not true is a clear violation of the First Amendment.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 3:10 p.m., the oral argument in the above-entitled matter was concluded.]