I. THE SALES AND USE TAX ON SERVICES CLEARLY WITHSTAND ANY
FACIAL ATTACKS BASED UPON THE DUE PROCESS AND COMMERCE
CONSTRAINTS ON STATE TAXATION.

The constitutionality of the familiar sales and complementary use tax scheme has long been established. General Trading Co. v. State Tax Commission, 322 U.S. 335 (1944); Henneford v. Siles Mason Co., 300 U.S. 577 (1937). While such taxing schemes have
historically been confined largely to the sale of tangible personal property, the constitutional foundations upon which they
rest are equally applicable to the sale or use of services. Just as the state may tax the sale or use within the state of tangible personal property either because a transaction occurs within the state or because the purchaser has "exercise[d] any right or power" over the property in the state, F.S. s.
212.02(27), so may the state tax the sale or use within the state of services either because a transaction—the sale of the service—occurs within the state or because the purchaser has "exercise[d] any right or power" over the service in the state.

Nothing said in the three briefs that raise Due Process/Commerce Clause issues suggests that the State of Florida cannot constitutionally enact a sales and complementary use tax on services. Indeed, the absence of a broad facial attack on the Tax is underscored by the narrow and particularized nature of the attacks set forth in these three briefs, which is limited essentially to one "service" as defined by the Tax, media advertising, has its case on Due Process/Commerce Clause grounds.

At most what these briefs which raise Due Process/Commerce Clause issues argue is that in some specific applications the Tax as applied to media advertising might contravene the Due Process
or Commerce Clauses of the U.S. Constitution. Putting to one side the fact that many examples offered by Opponents are based on fanciful fact patterns, the fact that specific applications of a taxing levy might contravene constitutional requirements hardly can provide the basis for overturning the tax on its face given the undeniable fact that the vast majority of applications are entirely appropriate and constitutional. Indeed, the intent of the Legislature not to contravene constitutional strictures is underscored by numerous statutory provisions designed to assure that the statute is implemented consistent with constitutional constraints. E.g. F.S. 212.059(3)(b) (use tax remittance obligation conditioned on tax nexus with Florida); F.S. s. 212.0591(2) (sales and use tax measure limited to sales or cost price that can constitutionally be taxed by Florida).

Even the limited Due Process/Commerce Clause challenges leveled by the three briefs against the Tax cannot withstand analysis. Barring contrived and hypothetical applications of the Tax, Florida clearly has the requisite nexus with the media advertising transactions it is seeking to Tax so as to satisfy the requirements of the Due Process and Commerce Clauses. By the same token, the Tax has been carefully crafted to assure that its application to media advertising will satisfy the Commerce Clause requirements that a tax be fairly apportioned and nondiscriminatory.

A. The Sales and Use Tax on Services Satisfies the Nexus Requirements of the Due Process and Commerce Clauses

With respect to the "activities of an interstate business," the Due Process Clause requires that "no tax may be imposed,

The short and dispositive answer to any possible contention that Florida's tax on services on its face imposes a levy on an activity without a "minimal connection" or a "substantial nexus" with Florida is that F.S. s. 212.059(3)(b) provides: "If the sale of a service is outside this state, any applicable use tax shall be remitted by the purchaser of the service, if the purchaser of the service has nexus for tax purposes with this state." (Emphasis supplied.) Moreover, the specific provisions applicable to advertising similarly provide: "If advertising is not sold in this state, but is used in this state, the advertiser shall self-accrue the use tax imposed by this section and remit the tax directly to the department, if the advertiser has nexus for tax purposes with this state . . . ." F.S. s. 212.0595(6) (emphasis supplied). The plain language of the statute makes it clear that the service tax simply does not apply to any transaction with which Florida lacks sufficient nexus. The Legislature could hardly have done more to manifest its intent that the service tax apply only to those transactions that are within Florida's constitutional taxing power.

Although the language of the statute constitutes a complete
response to the claim that Florida is asserting its taxing power over transactions with which it has insufficient contact, opponents are clearly incorrect when they state that advertising in Florida, no matter how extensive or systematic, can never subject them to the taxing jurisdiction of Florida. Opponents rely upon the outdated notion that the Due Process and Commerce Clauses require the physical presence of the taxpayer in the jurisdiction—either through property or employees—before he can be subjected to the coercive power of a state. This anachronistic requirement of physical presence rooted in the discredited thinking underlying Pennoyer v. Neff, 95 U.S. 714 (1878) and its progeny, was unequivocally repudiated by the Supreme Court in Shaffer v. Heitner, 433 U.S. 186 (1977). As the Supreme Court declared in Burger King v. Rudzewicz, 471 U.S. 462, 476 (1985):

"[I]t is an escapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a state in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another state, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction."

Thus, at least where an advertiser has sought systematically and extensively to exploit the Florida market, thereby "purposefully direct[ing] its efforts] toward residents of another state," Burger King, supra, that taxpayer can be subjected to a Florida use tax related to its exploitation of the market just as that taxpayer can be subjected to jurisdiction of the Florida courts from any claim arising out of his purposeful exploitation of the market. See Hartman, Collection of Use Tax on Out-of-State Mail-Order Sales, 39 Vand. L. Rev. 993 (1986); McCray, Overturning

The principal cases cited by Opponents for the proposition that advertising in a state does not provide the requisite nexus for a state to assert its tax jurisdiction over an out-of-state business are National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967) and Miller Bros. v. Maryland, 347 U.S. 340 (1954).* Whatever vitality these cases may have after Shaffer v. Heitner and Burger King, they do not stand as an absolute bar to Florida's imposition of a tax on the use of services, such as advertising, in the state by an out-of-state taxpayer. Indeed, state supreme courts have routinely sustained state taxes upon out-of-state taxpayers relying largely on advertising directed to the local market over taxpayers' Due Process and Commerce Clause objections. Rowe-Generaux, Inc. v. Vermont Department of Taxes, 411 A.2d 1345 (Vt. 1980) (no property or personnel in the state, 15% of total radio advertising budget and 21% of total newspaper budget directed to Vermont); Good's Furniture House, Inc. v. Iowa State Board of Tax Review, 382 N.W.2d 145 (Iowa 1986), cert. denied, 107 S.Ct. 76 (1986) (intensive television advertising); Copey-Bentz v. Lindley, 419 N.E.2d 1087 (Ohio 1981) (advertising "directed . . . to reach citizens of this state in order to induce them to buy" out-of-state; distinguishing Miller Brothers); cf. South Dakota v. American Bankers Ins. Co., 474 N.W.2d 609 (S.D. 1985) (absence of physical contacts no bar to

* All of Opponents' contentions based on Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938), are addressed at pp. ___ infra.
state taxation, citing Burger King).

In any event, none of Opponents' arguments on advertising goes to the facial validity of the sales tax on services. There will be sufficient time to assay the continuing force of National Bellas Hess and Miller Brothers in an actual case in which the Department of Revenue is asserting a use tax against an out-of-state advertiser.

B. The Sales and Use Tax on Services Satisfies the Fair Apportionment, Nondiscrimination, and Fair Relation Requirements of the Commerce Clause.

A state tax will pass muster under the Commerce Clause so long as "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State." Complete Auto Transit Inc. v. Brady, 430 U.S. 274, 279 (1977). We have addressed Opponents' nexus contentions in the preceding section. In this section, we address Opponents' other Commerce Clause claims.

1. The Sales and Use Tax on Services Withstands Any Facial Attack Based on the Contention that the Tax Is Unfairly Apportioned or Results in Multiple Taxation.

Again, as was the case with Opponents' contention that the tax on services imposes a levy on taxpayers lacking nexus with Florida, the short answer to Opponents' facial attack based on fair apportionment and multiple taxation lies in the language of the statute itself. First, in extending the sales tax to services, the Legislature explicitly provided the same protection against multiple taxation that is accorded to tangible personal property.
The provisions of this chapter do not apply in respect to the use or consumption of tangible personal property or services, or distribution or storage of tangible personal property or services for use or consumption in this state, upon which a like tax equal to or greater than the amount imposed by this chapter has been lawfully imposed and paid in another state.

F.S. s. 212.06(7). Under this provision, the problem of multiple taxation simply cannot arise. If the purchaser of a service in another state has lawfully been subjected to a tax on the sale or use of services in that state, he effectively receives a full credit against his Florida tax liability for the tax paid on those services. Indeed, the Supreme Court has recognized that the credit mechanism "avoids the possibility" of multiple taxation, see Henneford v. Silas Mason Co., 300 U.S. 577, 587 (1937); International Harvester Co. v. Department of Treasury, 322 U.S. 340, 349-62 (1944) (Opinion of Rutledge, J.), even though the Court has reserved judgment on "the question whether a State must credit a sales tax paid to another against its own use tax." Williams v. Vermont, 105 S.Ct. 2465, 2474 (1985). Florida has thus gone beyond its constitutional duty in assuring that any tax imposed on the use of services within the state will not be taxed by Florida to the extent that such services have been subjected to a sales or use tax in another state. Any suggestion that Florida is required to go even further and grant credit for general business income or gross receipts taxes that may be measured by the receipts from services has no basis in federal constitutional law.

Wholly apart from the crediting provision, the statute provides for apportionment of the sales and use tax in certain circumstances when the service is consumed by...
multistate business. When the purchaser is a multistate business, and the service does not directly relate to real property, tangible personal property with a business situs, or to the purchaser's local market, F.S. s. 212.0591(9)(b)4 provides for apportionment of the sales or use tax on services. The statute adopts the corporate income tax apportionment formula, the traditional measure of the extent of a multistate enterprise's presence in the state. More particularized apportionment formulas are also provided for advertising services and for transportation services. F.S. ss. 212.0595(4), 212.0595(5)(b). It bears emphasis that the Supreme Court has never required apportionment of retail sales and use taxes in the sense that the measure of the tax must be divided among different jurisdictions. Thus, Florida has again gone the extra mile in assuring fairness to multistate businesses, far beyond anything the Due Process or Commerce Clause requires, in order to avoid unfair apportionment or multiple taxation. Beyond their generalized claims that the tax fails to avoid unfair apportionment and multiple taxation, Opponents cite Western Live Stock v. Bureau of Revenue, supra, for the bald assertion that "[t]he authority of the state to impose a sales or use tax on services is territorially limited to services performed within the state." NatlAdv Pr. 57; see also MagPub 15. Of all the misstatements made in Opponents' briefs, this is among the most egregious. Western Live Stock, far from limiting state tax power, is the seminal case underlying the broad expansion of state taxing power over the past 50 years. Western Live Stock
destroyed the pre-New Deal framework that barred "direct" taxes on interstate commerce and replaced it with the modern principle that "interstate commerce must pay its way." 303 U.S. at 254.

In *Western Live Stock*, the Court upheld a tax on amounts received from the sale of advertising space by a publisher of a magazine distributed in various states. In so holding, the Court declared that the activities associated with the publisher's sale of advertising space, upon which the tax was imposed, could not be taxed by other states because all of those activities occurred in New Mexico. From this, Opponents make a quantum leap in asserting that this somehow prevents another state from imposing under any circumstances a tax on the advertiser's use of those services. This is no different from asserting that because all the activities associated with the sale of a car occurring in Georgia, upon which a tax is imposed, Florida may not under any circumstances impose a tax on the use of the car when it is sold in another state and registered in Florida. This is simply not the law. The absurdity of this position is revealed when one considers the case of a car purchased in a state such as Oregon or Montana, which has no sales tax. Florida can and does impose its use tax upon the use of such a car that has not previously been subjected to sales tax. But Florida can and does impose its use tax upon the use of such services by some other jurisdiction. However, Florida may freely impose its use tax upon services consumed in
the state, and nothing Western Live Stock is to the contrary.

Given the presence in the statute of both crediting and apportionment provisions, and given the absence of a constitutional requirement for either, any facial constitutional attack based upon multiple burden or unfair apportionment collapses. Opponents specific arguments as to the apportionment formula for advertising are thus reduced to disagreements as to the Legislature's policy choice on how to measure market coverage. If any Due Process or Commerce Clause issues should arise in the application of the crediting and apportionment provisions, there will be time enough to resolve those issues in a concrete case in which a tax has been assessed against an actual taxpayer.

2. The Sales and Use Tax on Services is Fairly Related to Services Provided by the State

The so-called "fourth prong" of Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) provides that a state tax must be "fairly related to services provided by the state." Id. at 279. Despite some initial doubts over the precise meaning of this phrase, the Court in Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) made it clear that

the relevant inquiry under the fourth prong of the Complete Auto Transit test is not, as appellants suggest, the amount of the tax or the value of the benefits allegedly bestowed as measured by the costs the State incurs on account of the taxpayer's activities. Rather, test is closely connected to the first prong of the Complete Auto Transit test. Under this threshold test, the interstate business must have a substantial nexus with the State before any tax may be levied on it. . . . Beyond the threshold requirement, the fourth prong of the Complete Auto Transit test imposes the additional limitation that the measure of the tax must be reasonably related to the extent of the contact, since it is the activities of the taxpayer in the State that may properly be made to bear a "just share of tax burden."
Florida's sales and use tax on services unmistakably passes this test. The tax on services is measured by the "sales price" of the sale of a service or the "cost price" of the use of a service, F.S. ss. 212.02(21), 212.02(5), as apportioned in certain instances to the taxpayer's enjoyment of the benefit of the service in the state. See pp. __ supra. The fit between the measure of the tax and the taxpayer's contact with the state could not be closer. If the sale of the service is in the state, the tax is measured by the sales price; if the use of the service is in the state, the tax is measured by the cost price; and if the sale or use of the service is partly within and partly outside the state, the tax is measured by an apportioned share of the sales or use price. As Justice Blackmun observed, dissenting in Commonwealth Edison on the ground that the Court had "emphasize[d] the fourth prong," any "proportional" or "ad valorem" tax "will satisfy the fourth prong." 453 U.S. at 645 (Blackmun, J., dissenting). Under any view of the "fourth prong," Florida's sales and use tax on services satisfies its requirements.

Given the futility of any attack on the service tax based on the fourth prong, it is not surprising that only one of the many briefs filed by Opponents has had the temerity to raise it. The National Advertisers assert that Florida has given "nothing" to businesses that advertise in the state, and that the sales tax on services therefore fails the "fourth prong" test with regard to advertisers. NatlAdv Br. 61-63. First, this contention simply ignores the scope of the fourth prong inquiry dictated by Commonwealth Edison. The inquiry is not whether the state has provided
the taxpayer with specific benefits such as fire and police protection, as the National Advertisers suggest (Nat'l Adv Br. 61), but rather whether the measure of the tax is related to the extent of the taxpayer's contact with the state. As noted above, the tax on services passes this test. See p. __ supra. Moreover, even if the National Advertisers' were right in their view of what the fourth prong required, the service tax would pass their test. As indicated above, the sales and use tax on services will not be imposed unless a taxpayer has nexus with the state for tax purposes. See pp. ___ supra. By virtue of that nexus, the taxpayer is presumed to be enjoying, as a matter of federal constitutional law, benefits for which the state may ask recompense. See Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 445 (1979) (fourth prong satisfied by services "that include not only police and fire protection, but also the benefits of a trained work force and the advantages of a civilized society"); Association of Washington Stevedoring Cos., v. Department of Revenue, 435 U.S. 734, 764 (1978).

3. The Tax Does Not Discriminate Against Out-of-State Taxpayers

In enacting Chapter 87-___, the Legislature addressed any possible contention that the exemptions from the sales and use tax which preceded enactment of Chapter 87-6 discriminated against out-of-state organizations in violation of the Commerce Clause. Specifically, the Legislature repealed the phrase "in this state" where it appeared in F.S. ss. 212.08(7)(a)2(a), 212.08(7)(c)2(d); 212.08(7)(n). All that remains is the National Advertisers' frivolous contention that Florida lacks the
constitutional power to exempt itself and its cities and counties from its sales tax and use tax to which no response is required.