DRAFT OUTLINE OF
OPPOSITION BRIEFS

Prepared by
Morrison & Foerster

The following briefs have been substantially incorporated into the outline as of June 3, 1987:

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Q02948 (12564/2)
9 Tribune The Tribune Company; The Florida Press Association; Gannett Co., Inc.; The Media General Broadcast Group; and the Florida Retail Federation
10 Sentinl Sentinel Communications Company and News and Sun-Sentinel Company
11 FABroad Florida Association of Broadcasters
12 MotnPic Florida Motion Picture and Television Association, Inc.
13 FlaBar The Florida Bar, Joseph J. Reiter, Renee Higgins, Victor Wade Howell, and Brenda L. Smith
14 CrimDef James M. Russ, Edward R. Shohat and Theodore Klein on behalf of Florida Criminal Defense Lawyers
15 Carver Frank J. Carver, Joseph B. Carr, Mahlon Hendley and Others
16 Fiserv Fiserv Tampa, Inc.
17 NAFinan North American Financial Services, Ltd.
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JURISDICTIONAL ISSUE

I. DOES THE FLORIDA SUPREME COURT LACK JURISDICTION TO RENDER AN ADVISORY OPINION ABOUT THE CONSTITUTIONALITY OF A STATUTE?

A. Article IV, Section 1(c) of the Florida Constitution should be construed to bar this Court from advising about the constitutionality vel non of a statute. [NatlAdv,10]

1. The court has frequently ruled against rendering advice to the executive about the constitutionality of legislative enactments. [NatlAdv,10]
   a. Older decisions construed Article IV to bar consideration of the constitutionally vel non of a legislative act. See, e.g., In re Advisory Opinion to Governor, 50 Fla. 169, 39 So. 187 (1905).
   b. More recently, the Court has advised the executive about the constitutionality of legislative enactments, but has not done so since 1979. See, e.g., In re Advisory Opinion to Governor, 374 So.2d 959 (Fla. 1979); In re Advisory Opinion to Governor Civil Rights, 306 So.2d 520 (Fla. 1975).

2. An advisory opinion on the constitutionality of Chapter 87-6 is unnecessary since acts of the legislature are presumed constitutional unless a court of competent jurisdiction decides otherwise. In re Advisory Opinion to Governor, 113 So.2d 703 (Fla. 1959). [NatlAdv,12]

3. A broad resolution of the statute's constitutionality is too important and complex an undertaking to be attempted without the aid of an adversary proceeding. In re Advisory Opinion to Governor, 113 So.2d 959, 972 (Fla. 1979) (Sundberg dissent). [NatlAdv,12-13;FABroad,21;Netwrks,12]
   a. Passing on the constitutionality of legislation outside of the traditional adversary context when the arguments attacking the statute's constitutionality are based on complex facts, does not allow precise development of the issues through responsive pleadings. [NatlAdv,12;FABroad,22]

4. The need for the Court to exercise restraint is particularly great because of the practical political effect of an advisory opinion. [NatlAdv,15]
a. A statement by this Court of its views, no matter how tentative, will affect the perceptions of the lower Florida courts in future litigation involving similar issues. See, In re Advisory Opinion to the Governor, 306 So.2d 520 (Fla. 1975). [Netwrks,14]

B. Article IV, Section 1(c) only empowers the Court to provide the Governor with an interpretation of a provision of the Florida Constitution which affects the executive powers or duties of the Governor. See In re Opinion of the Supreme Court, 39 Fla. 397, 22 So. 681 (1897). [PABroad,19;Netwrks,8]

1. The Governor seeks an opinion on the Constitutionality of Chapter 87-6, as it affects his duties under the Florida Constitution to insure sufficient revenue so that if the statute is unconstitutional he will be able to take action to balance the budget.

C. The Constitution does not require the Governor to balance the budget; that requirement is in Section 216.168(4), Florida Statutes.

D. This Court is without power to render an advisory opinion to the Governor regarding his statutory, as contrasted to his constitutional, powers and duties. In re Advisory Opinion to the Governor, 225 So.2d 512, 514 (Fla. 1969). [Netwrks,9]

1. The Court has never exercised its powers under Article IV, Section 1(c) to declare a statute constitutionally valid or invalid as applied to particular parties, or to otherwise prejudge disputes involving such parties.

E. The court lacks jurisdiction to give an advisory opinion about questions of federal constitutional law. [NatlAdv,10;ProprAs,6]

1. The plain language of Article IV, Section 1(c) limits advisory opinions to issues arising under the Florida Constitution. [ProprAs,6]

2. The legal precedents relied upon in the Governor's request do not support a ruling on federal constitutional questions in an advisory opinion. See, Advisory Opinion to the Governor, 157 Fla. 885, 27 So.2d 409 (1949); In re Advisory Opinion to the Governor, 150 So.2d 721 (Fla. 1963).
DELEGATION ISSUE

I. DO THE PROVISIONS OF CHAPTER 87-6 TAXING ADVERTISING IMPERMISSIBLY DELEGATE LEGISLATIVE AUTHORITY?

A. Article II, Section 3 of the Florida Constitution bars the legislature from assigning its constitutional duties to the executive branch. D'Alemberte v. Anderson, 349 so.2d 164, 169 (Fla. 1977). [NatlAdv,17;Tribune,5]

B. When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature, there has been an impermissible delegation. Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978). [NatlAdv,17]

1. The legislature must provide ascertainable standards or guidelines in the apportionment area. Orr v. Trask, 464 So.2d. 131 (Fla. 1985); Fla. Home Builders v. Div. of Labor, 367 So.2d 219, 220 (Fla. 79). [Tribune,19]

C. By attempting to tax, but failing to define "advertising", Chapter 87-6 delegates to the Department of Revenue authority to establish by rule what is to be taxed. [NatlAdv,20;Tribune,6]


2. There are no other statutory definitions of advertising or legislatively incorporated references to recognized measurements or standards in other Florida tax statutes that can be referred to by the agency. Miami Dolphins, Ltd. v. Metro Dade County, 394 So.2d 981 (Fla. 1981). [NatlAdv,22]

3. There is no common or industry usage to which the agency can turn to determine legislative policy. [NatlAdv,23]

D. Chapter 87-6 delegates to the Department of Revenue the task of defining by rule the measure of market coverage for print and broadcast media. [NatlAdv,23]

1. There is no commonly accepted definition, practice or usage to provide guidance in the context of an advertising service or use tax. [NatlAdv,24]

2. Total census figures are unrelated to either provision or reception of advertising service. For
example, Florida advertising is done both in English and Spanish. Florida's English population, which does not speak Spanish, is not part of the population served by Spanish advertisements, and vice versa. Yet the agency is delegated the duty to make the basic determination of how to assess demographics and thereby measure the tax. [NatlAdv, 24]

3. Similarly, with respect to print media, the measure of the tax is "average circulation", but there is no indication whether publishers will be required to audit circulation, or whether advertisers will have to pay the tax based entirely on the publisher's estimated circulation. [NatlAdv, 24]

E. Section 212.0595(4)(c) imposes a tax on advertising by "other than print or broadcast media" but delegates to the agency the measure of the tax as well as the definition of who is to be taxed. [NatlAdv, 25]

F. Section 212.0596(4)(c) delegates to the agency the task of determining a method for "fairly apportioning advertising" sales for "other than print or broadcast media" and does not articulate a standard against which to measure agency judgments of what is "fair". See, Conner v. Joe Hatton, Inc., supra, 216 So. 2d 209 (invalidated act which authorized executive agency to prohibit "unfair" trade practices.)

1. The Act empowers the Department of Revenue to make apportionment determinations with respect to advertising "consumed" in more than one state. [Tribune, 15]

2. The "cost price" of advertising is apportioned according to the "proportion of market coverage" within Florida to the total U.S. coverage for the most recent accounting year of the advertiser.

3. With no clear guidelines, the Department of Revenue has discretion to:
   a. allocate "cost price" in any manner
   b. define "market coverage" in any manner
   c. apportion non-print/broadcast advertising however it chooses.

G. Section 212.0591(9)(a)(3) permits the determination of what is taxable to turn on a demonstration "to the satisfaction of the Department" of where the benefit of a service is enjoyed, rendering the tax susceptible to arbitrary application, and therefore invalid for lack of guiding standards. Harrington & Co. Inc. v. Tampa Port
FIRST AMENDMENT ISSUES

I. IS THE ADVERTISING TAX AN UNCONSTITUTIONAL RESTRAINT ON SPEECH?


1. State efforts to place a flat tax on the exercise of First Amendment rights have been held unconstitutional. See e.g., Murdock v. Pennsylvania, supra, 319 U.S. 105 (a flat tax on door to door solicitation and selling of goods, including religious literature prohibited by the First Amendment); Follett v. McCormick, supra, 321 U.S. 573 (a tax on book agents applied to preachers invalidated as a tax on the exercise of First Amendment rights).

B. Advertising is protected speech under the First Amendment. [NatlAdv,28]


a. So long as advertisements are not misleading and concern a lawful activity, they are entitled to First Amendment protection. See, e.g., Central Hudson Gas & Elec. Corp. v. Public Service Comm'n, 447 U.S. 557, 564 (1980).

C. The advertising tax is a tax on the act of speech itself.

1. Like the flat taxes in Murdock v. Pennsylvania, supra, 319 U.S. 105 and Follett v. McCormick, supra,
319 U.S. 105, the advertising tax is a condition of speaking to the Florida public. [NatlAdv,36;FABroad,44;MotnPic,4]

2. State courts have found that because taxes on advertising can impact the press' revenues, such taxes are unconstitutional in some cases. See, e.g., City of Baltimore v. A.S. Abell Co., 218 MD. 273, 145 A.2d 111, 117 (1958); Greenfield Town Crier, Inc. v. Comm'r of Revenue, 385 Mass. 692, 433 N.E.2d 898 (1982). [ProprAs,16]

a. The increase in cost caused by the advertising tax will deter advertising. [NatlAdv,37]


D. The tax on advertising is an evil that the First Amendment was intended to prohibit. [NatlAdv,34]

1. In effect, the statute imposes a "knowledge tax" contrary to the intent of the framers of the First Amendment. [FAPress,9]


II. DOES CHAPTER 87-6 IMPOSE A TAX ON THE MEDIA WHICH IS NOT BORNE EQUALLY BY OTHER ENTERPRISES?

A. Under First Amendment—Equal Protection Analysis, the government may not selectively discriminate against the media. Minneapolis Star and Tribune Co. v. Minnesota Comm'r, 460 U.S. 575 (1983). [NYTimes,12]

B. The impact of the advertising tax will fall disproportionately on the media. [NYTimes,5;FABroad,27]

1. The advertising tax is imposed on advertisers irrespective of whether they own real or tangible personal property in the State. No sales of other
property or services are so extensively taxed.
[NatlAdv,42;FABroad,28]

2. The advertising tax utilizes an apportionment formula different than that used for apportionment of the tax on all other services. [FABroad,28]

   a. Because the legislature has tied advertising apportionment to census rather than to property, salaries and sales in the state, on its face the law could subject advertisers to a much heavier tax burden than if taxed under the formula used for other services.

   b. Advertising is the only intangible property taxed in Florida. [NatlAdv,42]

   c. The advertising sold in Florida is not a service, but rather the intangible copyrightable "content" used to attract readers and advertise goods. [NatlAdv,41]

   d. In the guise of taxing a service, the advertising tax actually singles out for taxation one kind of intangible personal property -- the only such property taxed in Florida. [NatlAdv,41]

C. The Florida Sales and Use Tax is Not a Regulation of General Applicability [FABroad,30]

1. The Supreme Court held in Minneapolis Star and Tribune Co. v. Minnesota Comm'r, supra, 467 U.S. 575, that taxes which are not of general applicability may not be applied against the press absent overriding state interests.

2. The Florida sales and use tax requires advertisers, and thus the press, to bear a substantially disproportionate burden of the "tax on the sale or use of services."

   a. The tax targets only 40 of the 94 categories of service providers, or 42.5% of service industries.

   b. Those services taxed will yield $702.7 million or 32.2% of total available tax dollars from services. The legislature has exempted $1.478 billion, or 67.8% of the potential revenue base.

   c. If the tax were "general", advertising would account for 4.1% of the revenues that could have
been raised. Instead, the revenue from the advertising tax comprises 13% of the total revenue raised by Chapter 87-6.

3. The Florida Sales and use tax is different from laws the press has challenged, but which the Supreme Court has upheld because of their equal impact on all enterprises.

a. In Citizen Publishing Co. v. United States, 394 U.S. 131 (1969), the Supreme Court rejected arguments that the antitrust laws abridge the First Amendment because they do not include "favored industries" exemptions.

b. In Breard v. Alexandria, 341 U.S. 622 (1951), the Supreme Court upheld a blanket prohibition on door to door solicitations where there were no exemptions to the statute.

c. The Supreme Court has also held that isolated exceptions to the general applicability of a law will not make it unconstitutional. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).

4. In the Florida tax, exemptions are the rule, not the exception and the law is not generally applicable.

III. DOES CHAPTER 87-6 TAX PUBLICATIONS AND ADVERTISING DIFFERENTIALLY ON THE BASIS OF CONTENT, FORMAT AND IDENTITY OF SPEAKER?

A. The statute singles out advertising for discriminatory treatment. [NatlAdv,40]

1. A tax which treats similar types of speech differently is unconstitutional. Arkansas Writers Project, Inc. v. Ragland, 55 U.S.L.W., 4522, 4524 (1987). [ProprAs;14]

2. The statute discriminates against advertising by including it in the taxable, rather than tax exempt, category of service. [NatlAdv,43]

a. Other forms of print and broadcast activity, e.g., entertainment programming, are not taxed.

b. A tax on advertising revenue has two constitutionally impermissible effects:

i. It curtails the amount of revenue from advertising, and

B. The statute discriminates based on the identity of the speaker.


3. The Florida advertising and newspaper sales taxes grant certain organizations an exemption e.g., religious and nonprofit organizations, while imposing the tax on similarly situated persons. The taxes enhance the ability of religious and not-for-profit and governmental entities to express themselves, thus giving these classes of speakers greater access to the field of ideas than other members of the general public.

4. The statute discriminates between speech by employees and independent contractors. [Herald, 3]

C. The statute discriminates on the basis of format.

1. No particular form of publication is entitled to a greater degree of First Amendment protection than any other. Thus, pamphlets, billboards, leaflets, etc., have all found identical protection, and the government may not limit access to one format merely because other formats are available. First National Bank of Boston v. Bellotti, 435 U.S., 765, 802 (1978). [NYTimes,21].

2. The Florida sales and service taxes on newspapers and advertising discriminate between different formats [NYTimes,7-8]:

a. Advertising services sold by religious media and churches, § 212.08(7)(o)(1)(1), or those which "assist ... customary activities of religious organizations," § 212.08(7)(o)(2)(a), non-profit organizations, § 212.08(7)(o)(1)(b), and governmental units, § 212.08(6) are exempt from tax. Advertising sold by other media are taxed. § 212.0595(1)
b. Services sold to churches, § 212.08(7)(o)(1)(a) or for production of motion pictures, § 212.0592(18), recording studios and tapes, § 212.08(12)(b)(1) are not taxed. Services sold to media for the production of advertising are taxed. §212.0595(1).

c. Advertising for the sale of motion picture production services is not taxed. § 212.0592(18), read in pari materia with §212.08(7)(c). Advertising for the sale of advertising is taxed.

d. A media provider is not required to collect the tax on advertising sold outside Florida, but used in Florida, § 212.0595(6), but is required to collect the tax on advertising sold in Florida. § 212.0595(6).

e. The sale of religious periodicals are exempt from the tax on tangible property, § 212.08(7)(o)(1)(a), 212.05 and 6, but secular newspapers are taxed.

D. The statute discriminates on the basis of content.

1. Regulation on the basis of the content of speech is prohibited under the First Amendment. Regan v. NYTimes, Inc., 468 U.S. 641, 648-49 (1984); Arkansas Writers Project, Inc. v. Ragland, supra, 55 U.S.L.W. at 4524. [NYTimes,24]

2. The Florida circulation tax imposes a tax on the sale of some publications but exempts others on the basis of content. Advertising sold to or by religious institutions and churches, § 212.08(7)(o)(1)(a), advertising sold to or by nonprofit charitable organizations, § 212.08(7)(o)(1)(b), and advertising sold to or by governmental units, § 212.08(b) is not taxed, but advertising sold to political candidates and commercial enterprises is taxed. § 212.0592(1).

3. The statute appears to exempt only certain categories of motion picture productions based on an assessment of their content. For example, movies for release in theaters are exempted as entertainment, but teasers (previews) might be taxable as advertisement. Music videos might be viewed as entertainment or as advertisement. [MotnPic,8]

4. The test to determine whether the government is discriminating on the basis of content is simple. If "enforcement authorities must necessarily examine the

5. Florida tax authorities must necessarily examine the content of the message conveyed by an advertisement to determine if it should be taxed.

E. The Florida advertising tax poses the same threat to press freedom as a Minnesota Tax which was held unconstitutional. [FABroad,36]

1. The U.S. Supreme Court in Minneapolis Star, supra, 460 U.S. at 585, identified three dangers posed by a use tax on newspapers: (1) the tax could be used to burden a selected group of taxpayers; (2) the tax could "operate as effectively" as a censor to check critical comment by the press; (3) the tax suggested that the goal of regulation was not unrelated to suppression of expression. [FABroad,36]

2. The Florida tax similarly creates three threats to press freedom.

a. By manipulation of exemptions, the Legislature is imposing a disproportionately burdensome tax on the media.

b. The power to create or repeal exemptions can be used as a threat against the media and may chill criticism, whether or not that effect is intended.

c. The use of a different method of taxation and the imposition of a disproportionate percentage of the tax on media through advertisers suggests that the Legislature may be seeking to obtain a presumptively unconstitutional goal.

F. Florida’s interest in raising revenue is insufficient to warrant the infringement on freedom of the press posed by the tax.

1. Differential treatment, unless justified by some special characteristic of the press, is presumed unconstitutional. Minneapolis Star, supra, 460 U.S. at 585. [NYTimes,28]

2. The advertising tax is more burdensome than necessary to serve the State’s interest in raising revenue. [ProprAs,12]
a. Restrictions on commercial speech must serve substantial governmental interests, must directly advance the interest asserted, and must not be more extensive than necessary to serve that interest. *Central Hudson Gas & Electric Corp. v. Public Service Comm’n*, 447 U.S. 557, 566 (1980). [ProprAs,11]

b. Here, although the State’s interest in raising revenue may be substantial, the tax may ultimately cause the state’s revenues to decline. Preliminary studies on the impact of the advertising tax suggest a potential net loss to the state in personal income and jobs. [ProprAs,13]

c. The tax is more extensive than necessary to serve the government interests asserted. Florida’s interest is therefore not sufficiently compelling to overcome the burden created by the presumption of unconstitutionality. [ProprAs,13];NYTimes,29

IV. IS THE ADVERTISING TAX UNCONSTITUTIONALLY VAGUE?

A. The statute is so unclear that potential advertisers do not have adequate notice of whether or not their speech will be subject to the tax. See *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976), quoting, *Smith v. California*, 361 U.S. 147, 151 (1959). [NatlAdv,49]

1. The statute taxes but does not define "advertising". [NatlAdv,52]

2. As in *Hynes*, the coverage of the law is unclear. For example, it is not clear whether a broadcast of an educational television program in which a sponsoring company is given credit, is taxable advertising. [NatlAdv,52]

3. Section 212.0595(18)(b) of the statute exempts services for certain film productions used "primarily for entertainment, industrial or educational purposes" but does not define the exempted purposes. A taxpayer cannot determine, prior to and with no control over its ultimate use, whether a film or video production will fall into an exempted category. [MotnPic,6]

4. The statute is vague in its mechanics. [NatlAdv,52]

   a. The terms "broadcast media" and "print media" are not defined, thus it is not clear whether,
for example, "print media" includes billboards or bumper stickers or whether "broadcast media" includes cable television or satellite broadcasts receivable in Florida by dish antenna. [NatlAdv,53]

5. The statute’s provisions identifying exemptions are imprecise. For example, the definition of charitable institutions exempt from the tax is vague. [NatlAdv,53]

B. The statute gives the agency an impermissible degree of discretion in enforcing the tax. [NatlAdv,49]

V. IS THE ELIMINATION OF THE EXEMPTION ON RETAIL NEWSPAPER SALES UNCONSTITUTIONAL?

A. The Supreme Court has construed the First Amendment to prohibit the direct taxation of privileges granted by the Bill of Rights. Grosjean v. American Press Co., supra, 297 U.S. 233; Follett v. McCormick, supra, 331 U.S. 573. [Tribune,31]

B. The First Amend. mandates that the States’ need to raise revenue be tempered by the people’s right to free speech without fear of government coercion or manipulation. Arkansas Writers’ Project, 55 USLW 4522 (1987) [Tribune,31]

C. The tax on circulation of newspapers fails to meet constitutional requirements of Arkansas Writers’ Project. [Tribune,33]

1. The circulation tax is not generally applicable because the print and communications media are singled out for taxation, while other media are exempt.

2. The State has no overriding interest sufficient to justify abridgement of First Amendment rights.

   a. The tax is not narrowly tailored to ensure the least restrictive impact on the press. [Tribune,31-33]
VI. IS THE SALES TAX ON FEES PAID BY NEWSPAPER PUBLISHERS TO "INDEPENDENT CONTRACTOR DELIVERY AGENTS" FOR DELIVERING NEWSPAPERS AND COLLECTING SUBSCRIPTION FEES UNCONSTITUTIONAL?

A. The First Amendment guarantee of freedom of the press protects not only the right to publish newspapers, but also the right to distribute newspapers. Lovell v. Griffin, 303 U.S. 444 (1938); Grosjean v. American Press Co., 297 U.S. 233 (1936); Miami Herald Publishing Co. v. City of Hallandale, 734 F.2d 666 (11th Cir. 1984); Bannett Satellite Info. Network v. Metropolitan Trans. Auth., 745 F.2d 767 (2d Cir. 1984); City of Tampa v. Tampa Times, 15 So.2d 612 (Fla. 1943). [Sentinel,4]


1. The right to distribute a newspaper is inextricably intertwined with the right to publish newspapers; a law which restrains the former directly hinders the latter. Philadelphia Newspapers, Inc. v. Borough Council, etc. Swarthmore, 381 F.Supp. 228 (E.D. Pa. 1974). [Sentinel,4-5]

C. A tax on fees paid by newspaper publishers to delivery agents under contract to deliver newspapers is unconstitutional.

1. The tax creates a restraint on newspaper distribution in violation of the First Amendment.


VII. DOES CHAPTER 87-6 UNCONSTITUTIONALLY REQUIRE ALL PERSONS OUTSIDE THE STATE TO REGISTER WITH THE DEPARTMENT OF REVENUE WHEN PLACING AN AD WHICH WILL BE CONSUMED IN FLORIDA?

A. A requirement of "registration" as a prerequisite to lawful exercise of First Amendment rights is unconstitutional. [Tribune,23]

1. The registration requirement created by the tax is without precedent; the Courts have been diligent in striking down statutes that require persons engaged in First Amendment activities to identify themselves. Talley v. California, 362 U.S. 60 (1960); see, A

2. Compelled identity exposure must be rejected because it has the practical effect of discouraging exercise of Constitutional rights. NAACP v. Alabama, 357 U.S. 449 (1958); Local 1814 Int. Longshoremen’s Assoc. v. New York Harbor, 667 F.2d 267 (2d Cir. 1981), etc.

B. Identification and registration requirements are unconstitutional regardless of whether they create a minimal burden because such statutes have a chilling effect on the exercise of free speech. [Tribune, 24]

1. By preventing anonymous communication, the statute is likely to inhibit free expression of ideas. Talley v. California, 362 U.S. 60 (1960).

COMMERCE CLAUSE ISSUES

I. DOES THE ADVERTISING TAX REACH TAXPAYERS BEYOND FLORIDA'S JURISDICTION?

A. The Florida tax must satisfy the test in Complete Auto Transit Inc. v. Brady, 430 U.S. 274, 279 (1979), for determining whether a tax is invalid under the commerce clause: (1) there must be a constitutionally significant nexus between the taxing state and the activity taxed, (2) the tax must fairly apportioned; (3) the tax must fairly relate to the benefits provided by the taxing state to the taxpayer, and (4) the tax cannot discriminate against interstate commerce.

B. The dissemination of advertising in Florida does not support the exercise of the State’s taxing power.


a. Some intrastate activity by the taxpayer itself, beyond mere advertising, is required for state taxation. Motorola, Inc. v. Green, 130 So.2d 65 (Fla. 1960); Scripto, Inc. v. Carson, 105 So.2d 775 (Fla. 1958), aff’d, 362 U.S. 207 (1960).

b. The authority of the state to impose a sales or use tax on services is territorially limited to services performed within the state. Western Livestock v. Bureau of Revenue, 303 U.S. 250, 260 (1938).
2. The statute is facially invalid because it fails to distinguish between advertisers who have a sufficient nexus with the state and those who do not, and thus creates an impermissible risk that speakers who are outside the State's jurisdiction will nonetheless curtail their speech to avoid or limit payment of a tax. [NatlAdv,60]

C. The advertising tax could result in multiple taxation and is unfairly apportioned

1. The possibility that a tax may subject an entity to a "cumulative tax burden" renders a tax on "interstate communication" invalid. Western Live Stock v. Bureau of Revenue, supra, 303 U.S. 261. [NatlAdv,66]


   a. For example, a tax could be imposed by the different states where an advertisement was purchased, or developed, or published, or transmitted by a national broadcaster for delivery to its affiliates or a national publication to its regional printing facilities. [NatlAdv,69]

3. The tax is not properly apportioned to assure that income attributed to the state is not "out of all proportion to the business transacted." Container Corp. of America v. Franchise Tax Board, 463 U.S. 159, 170 (1983). [FABroad,47]

   a. Broadcast advertisers' costs are allocated to Florida on the basis of annual evaluations of the individual broadcaster's "market coverage" in Florida, whereas advertising is sold on the basis of the actual audience reached. [NatlAdv,70]

   b. The apportionment formula inflates market coverage in Florida in proportion to market coverage in the rest of the country because it does not include foreign markets, i.e., Canada and Mexico. [NatlAdv,72]

D. The advertising tax is not "fairly related to services provided by the State". [NatlAdv,61]
1. The measure of the tax must be reasonably related to the extent of the taxpayer's contact with the State, since it is the activities or presence of the taxpayer in the state that may properly be made to bear a "just share of state tax burden." Commonwealth Edison Co. v. Montana, 453 U.S. 609, 626 (1981), quoting Western Live Stock v. Bureau of Revenue, supra, 303 U.S. at 254 (1938). [NatlAdv,61]

2. The services provided to a particular taxpayer and not to a general class of taxpayers must be the measure of whether a tax is "fairly related" to a State's services since a general inquiry could always be positively answered and thus would effectively eliminate the requirement that the state provide the taxpayer a benefit. [NatlAdv,62]

3. Florida provides nothing to the advertiser; the privilege of speaking to the people of Florida is granted by the Federal constitution, not Florida. [NatlAdv,62]

E. The statute discriminates against out-of-state taxpayers.


2. Because the Florida tax exempts certain organizations from the advertising tax and does not provide the same exemptions for similar out-of-state organizations, it impermissibly discriminates against interstate commerce. [NatlAdv,63]

a. The statute exempts Florida and its political subdivisions, but does not exempt other states and their political subdivisions.

b. Only nonprofit religious institutions "in this state" are exempted from the tax.

c. Only Florida corporations or federal tax exempt organizations providing special educational, cultural, recreational and social benefits to minors "in this state" are exempt.

d. The statutory exemption for state-tax supported or parochial, church and nonprofit private schools apparently applies only to Florida institutions.
e. Only nonprofit scientific organizations "in this state" are exempt from the tax.

f. Only nonprofit nursing homes licensed under Florida law are exempt from the tax.

3. The tax burdens interstate providers because it fails to require that they have any definite link to the state and fails to apportion the tax in a constitutional fashion. [FABroad,49]

II. DOES THE PROVISION OF CHAPTER 87-6 WHICH EXEMPTS A FLORIDA DATA PROCESSING SERVICE FROM TAXATION VIOLATE THE COMMERCE CLAUSE?

A. Exemption 35 of the statute exempts data processing services provided by federal and state savings and loan associations (S&Ls) and credit unions "having operations" in Florida from taxation, but taxes such services when they are provided by banks and other financial institutions. There is only one corporation that meets the exemption's definition, FIS, a Florida corporation owned by Florida S&Ls. [Fiserv,4]

B. Because it exempts a Florida service corporation but taxes service corporations that operate in interstate commerce, the statute is a form of economic protectionism and a per se violation of the Commerce Clause. See Philadelphia v. New Jersey, 437 U.S. 617 (1978).

1. The exemption imposed a direct burden on interstate commerce by taxing independent companies that are not owned by Florida S&Ls.

2. Economic protectionism can result from either discriminatory purpose or effect. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984). [Fiserv,18]

3. The data processing exemption is protectionist in purpose and effect. [Fiserv,20]

a. The purpose of the exemption is to give a Florida savings and loan-owned data processor an advantage over non-Florida data processors.

b. On its face, the statute exempts only a Florida data processing company; other data processing companies will not be able to take advantage of the exemption. The Supreme Court invalidated a North Carolina statute that had a similar practical effect. See Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977).
C. To determine whether tax statute burdens interstate commerce, the Court must ask (1) whether the statute regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so (3) whether the alternative means could promote the local purpose without burdening interstate commerce. Hughes v. Oklahoma, 441 U.S. 322, 336 (1979). [Fiserv, 21]

1. Exemption 35 does not regulate evenhandedly and creates more than an incidental burden on interstate commerce.

2. Exemption 35 does not serve a legitimate local purpose.
   
a. Promotion of a domestic business is not a legitimate purpose. Bacchus Imports, Ltd. v. Dias, supra, 468 U.S. 263.

3. Exemption 35 imposes an excessive burden on interstate commerce.

EQUAL PROTECTION AND DUE PROCESS ISSUES

I. DO THE ADVERTISING PROVISIONS OF THE TAX VIOLATE THE CONSTITUTIONAL RIGHT TO EQUAL PROTECTION BY IMPOSING AN UNEVEN APPLICATION OF THE SALES TAX AMONG MEMBERS OF THE SAME CLASS?

A. Chapter 87-6 violates Equal Protection by arbitrarily defining and exempting some services as "essential", while taxing others. [AGContr, 27]


2. The statute fails to adequately define "essential services" exempted from the tax, and arbitrarily classifies nonessential services as essential.

a. There exists no rational pattern among services designated as exempt "essential" services, and those taxed as nonessential.
b. Agricultural, educational and health services are exempted as essential, but so are production services for motion pictures, oil, gas and fuel services and beauty and barbershop services.

B. Chapter 87-6 violates Equal Protection by taxing some forms of speech and not others. See, Eagerton v. Dixie Color Printing Corp., 421 So.2d 1251, 1253-54 (Ala. 1982) (invalidating a tax on the sale of newspaper advertising supplements printed and sold to advertisers, where advertising supplements sold to newspapers were not taxed). See, Bayside Enterprises, Inc., v. Carson, 450 F.Supp. 696, 704 (M.D. Fla. 1978). [Herald,14]

1. The classification scheme in Chapter 87-6 exempts forty-one broad categories of services. Some forms of speech are exempted, e.g., "qualified motion picture[s]", while other forms of speech, e.g., advertising, are not exempted. [ProprAs,22]

2. Under Equal Protection analysis, a discriminatory tax on the fundamental right to speak is constitutional only if the state can show that the statute serves a compelling interest. [Herald,12]

3. The state cannot show a compelling interest in singling out the press from other essential services and thus the tax cannot pass constitutional muster. Arkansas Writers' Project v. Ragland, supra, 107 S.Ct. 151728. [Herald,12]

4. Under the rational basis standard, the classification of taxable and nontaxable advertising services is impermissible because it does not apply equally and uniformly to all persons within the class. See Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869 (1985); Williams v. Vermont, 105 S.Ct. 2465 (1985); Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985). [ProprAs,23;Herald,10]

a. There is no rational basis for the legislature's classification of some services as essential, e.g., health-related services, but not newspapers and newspaper advertising. [Herald,11]

b. There is no rational basis for classifying some services as essential and hence non-taxable, while taxing advertisement of such services. [Herald,11]

c. There is no rational basis for exempting services of employees while taxing services of independent contractors. [Herald,14]
d. There is no rational basis for taxing advertising published by an independent contractor, e.g., a newspaper, broadcaster, or other entity independent of the advertiser, but not taxing advertising prepared and disseminated by the advertiser itself.

C. As applied to criminal cases, the tax on legal services violates Equal Protection. [CrimDef,12]

1. The statute discriminates between the following similarly situated criminal defendants. [CrimDef,12]

   a. Persons exercising Sixth Amendment rights and those exercising rights guaranteed by the Fifth and Fourteenth Amendments.

   b. Persons who are actually prosecuted and are successful in their defense, and those who are suspects but who, via retained counsel, avoid prosecution.

   c. Those who are prosecuted and exonerated and those who are prosecuted and not exonerated.

   d. Those who are prosecuted and completely exonerated and those who are prosecuted and only partially exonerated.

2. The statutory distinction between successful and unsuccessful litigation is invalid under the standard of review for classifications implicating fundamental rights, under which the statute is subject to strict scrutiny and can only be sustained if suitably tailored to serve a compelling state interest. City of Cleburne v. Cleburne Living Center, 105 S.Ct. 3249, 3255 (1985). [CrimDef,12]

3. Because the exercise of Fifth and Fourth Amendment rights may be instrumental in convincing a prosecutor not to charge, these fundamental rights are implicated at the pre-charge stage, triggering strict scrutiny of the classification. [CrimDef,16]

   a. There is no compelling or rational reason to place a person who avoids prosecution because his lawyer shows he is innocent or that there is insufficient evidence in a worse tax position than the person who is prosecuted and successfully defends himself.

   b. The guilty/not guilty classification is irrational because it requires an unsuccessful
defendant to pay a tax as a kind of fine for the privilege of exercising his constitutional defense.

4. No compelling state interest supports taxing clients exercising fundamental rights under the Sixth Amendment, but not taxing those exercising rights under the Fifth Amendment, or the Equal Protection or Due Process clauses of the Fourteenth Amendment. [CrimDef,13]

a. The right to representation when life or liberty is at stake is as fundamental as the right to representation in a criminal case, thus, the legislative classification is not rational and serves no compelling interest.

b. The actual prosecution classification serves no compelling state interest.

D. The differential imposition of a sales and use tax on legal fees violates Due Process and Equal Protection. [FlaBar,11]

1. The right to legal counsel in both civil and criminal proceedings is a fundamental right guaranteed by the Federal Constitution. Powell v. State of Alabama, 287 U.S. 45 (1932) (in any case, civil or criminal, a refusal by a court to hear a party by counsel, would be a denial of due process.) [FlaBar,4]


3. The state can show no compelling interest justifying a tax which places unequal tax burdens on consumers of legal services.

a. For example, because the statute exempts services by an employee to an employer, a person who must hire independent legal counsel will be forced to pay the tax while his or her adversary will not be required to pay the tax if such adversary is a corporation with in-house counsel.

4. The exemption from the tax on legal fees for the first $500 incurred each year irrationally discriminates against the most severely injured consumers of legal services. [Carver,25]
a. For example, a person who recovers $4 million will, under the Florida Statute regulating contingency fees, pay her attorney one-third of the recovery up to $1 million. Only the first $1,500 of recovery will be exempt since that will generate the $500 in attorneys' fees exempt from tax. She will thus pay a service tax of over $50,000 due solely to the extent of her injuries.

5. Taxing for services for independent attorneys but not for services of employee attorneys is irrational. [Carver, 26]

a. Injured victims will be penalized due to the way their need for legal services arises, while defendants with employee layers who inflict the injury will pay no injury.

E. The sales tax as applied to construction industry employers amounts to double taxation in violation of due process. [AGConstr, 18]

1. Courts have recognized a constitutional right to be immune from double taxation when the same taxpayer is paying the same type of tax levied by the same governmental authority. See Ryder Truck Rental, Inc. v. Bryant, 170 So. 2d 822 (Fla. 1964); American Video Corp. v. Lewis, 389, So. 2d 1059 (Fla. 1st DCA, 1980); Klemm v. Davenport, 100 Fla. 471, 129 So. 904, 908 (1930).

2. The service tax imposes double taxation on the construction industry in violation of due process.

a. A prime contractor must pay sales taxes on the amounts included within the price charged by a subcontractor which include tangible products not incorporated into the product, e.g., equipment rental, but upon which a sales tax has already been paid.

b. In effect, the prime will pay taxes on the same product twice, first when it is considered goods, equipment or rental, and second, when it is considered services rendered by the subcontractor to the prime. See Section 212.0594(6), (7), (8).

c. The prime contractor will also pay sales tax on material, rental equipment and supplies for his own use in the project, and a further service tax will be levied on the cost of these items as
they are included in the prime contractor's "cost price." See Section 212.0594(8).

d. To the extent the construction industry employer is a corporation and already pays the authorized state income tax, the tax on services will, in effect, result in double taxation of income.

F. Exemption of data processing services performed for Florida S&Ls violates due process. [Fiserv, 27]

1. Under the "pole star" test in Department of Revenue v. Amrep Corp., 358 So.2d 1343 (Fla. 1978), Exemption 35, which, in effect, exempts a Florida data processing corporation, FIS, owned by Florida S&Ls, does not have a fair and substantial relation to the sales tax legislation and not all persons are treated alike under its provisions.

2. The tax gives FIS an unfair advantage and is grossly oppressive to Fisserv Tampa. State ex rel James v. Gerrell, 137 Fla. 324, 188 So. 812 (Fla. 1938). Since profits rarely exceed 5% of gross revenues in the data processing market, the sales tax will probably drive Fisserv out of the market.

II. DOES THE USE TAX ON ADVERTISING CREATE REVENUE SOURCES IN COMPLIANCE WITH THE REQUIREMENTS OF DUE PROCESS?

A. The Due Process Clause, which requires a nexus between Florida and the taxpayer, may be violated to the extent that a use tax is imposed on an out-of-state advertiser whose only direct contact in the transaction is with an out-of-state publisher or broadcaster. See National Bellas Hess, Inc. v. Dept. of Revenue, 386 U.S. 753 (1967). [BakHost, 6]

1. Traditionally, the end-user of a taxed good or service is a resident of the taxing state and clearly within its jurisdiction. The Florida use advertising tax, however, imposes a use tax on end-users that will not, in most cases, be Florida residents.

2. Unlike the typical use tax, there is not necessarily any direct link or nexus between the nonresident end user liable for the use tax and the taxing state.

B. The Due Process Clause may also be violated if the apportionment formula used for advertising services includes in the taxing state a portion of the tax base that is not attributable to transactions within the jurisdiction of the taxing state. [BakHost, 7]
1. There is no case authority requiring that a use tax base -- in this case, the advertising cost price -- apportioned to Florida must also be related to values connected to Florida.

2. Due process challenges to the reasonableness of the apportionment formula must await application of the advertising use tax to a specific set of facts.

3. The possibility of such challenges is so apparent, however, that the Court cannot reasonably assure the Governor as to the constitutional validity of the use tax.

FLORIDA INCOME TAX ISSUE

I. IS THE SALES TAX ON SERVICES AN INCOME TAX PROHIBITED BY ARTICLE VIII, SECTION 5 OF THE FLORIDA CONSTITUTION?

A. Compensation for services had traditionally been considered to be income. Sections 220.01, 220.02(a), Fla. Stat. (Florida Income Tax Code) [AGContr,8]

B. The economic impact of the tax is such that it is essentially a tax on gross income. [AGContr,10]

1. Although the Court has upheld a gross business receipts tax against Article VII challenge, see Volusia County Kennel Club v. Haggard, 73 So.2d 884 (Fla. 1954), it has never ruled on a broad service tax.

2. The court should reconsider its prior rulings upholding gross receipt taxes in light of the pervasiveness of the service tax and the Court’s role as guardian of constitutional guarantees. See Volusia County Kennel Club v. Haggard, supra, 73 So.2d 885,886; Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950).

C. The character of the tax, determined by its operation, practical results and incidence, and not by its "label" shows that it is an income tax. State v. Keller, 140 Fla. 346, 191 So. 542 (1939); Owens v. Fosdick, 153 Fla. 80, 13 So.2d 700 (1943); City of Deland v. Florida Public Service Co., 119 Fla. 804, 161 So. 735 (1935). [AGContr, 15-16]

1. Particularly where a gross receipts tax cannot be passed on to an ultimate consumer, it is in all practical respects an income tax. City of Deland, supra, 161 So. at 737-38.
a. Here, a prime contractor who pays a tax on the sale of services by subcontracts, will not be able to pass the tax on to the ultimate consumer.

b. Unlike a license or occupation tax which does not fluctuate depending on income, the amount of service tax will fluctuate depending on income or receipts of a business.

D. By taxing access of Floridians to courts for lost wages or alternate remedies, the service tax encroaches on the constitutional security of Florida citizens against a state income tax. [Carver,13]

1. Such wage losses may be substantial, See e.g., Schwab v. Tolley, 345 So.2d 747 (Fla. 4th DCA 1977) (lost wages of $1.3 million sought).

2. Since most suits for loss wages are pursued on a contingency basis, the tax would be paid directly out of the recovered damages.

SIXTH AMENDMENT ISSUE

I. IS THE TAX ON LEGAL SERVICES AN UNCONSTITUTIONAL BURDEN ON THE RIGHT TO COUNSEL?

A. A tax on legal services burdens the fundamental right to legal counsel. [CrimDef,8]

B. The tax is facially a surtax on the right of access to the courts. [Ervin,3]

C. State laws which impinge on personal rights protected by the Constitution are subjected to strict scrutiny and will be sustained only if tailored to service a compelling governmental interest. City of Cleburne v. Cleburne Living Center, 105 S.Ct. 3249, 3255 (1985).

1. The tax is not supported by a compelling governmental interest and is not the least restrictive means of achieving the asserted interest. [CrimDef,10]

2. Standing alone, the raising of revenue is not a sufficiently compelling reason to burden the exercise of a fundamental right. Minneapolis Star v. Minnesota Commissioner of Revenue, supra, 460 U.S. at 586.
SALE OF JUSTICE ISSUE

I. IS IMPOSITION OF A SALES OR USE TAX ON LEGAL SERVICES BARRED BY ARTICLE I, SECTION 21 OF THE FLORIDA CONSTITUTION WHICH PROHIBITS THE SALE OF JUSTICE?

A. Imposition of a sales or use tax on legal services is barred by Article I, Section 21 of the Florida Constitution which prohibits the sale of justice. [FlaBar,2]

B. Fees and costs may be imposed only if they are directly related to the administration of justice. Flood v. State, ex. rel. Homeland Co., 95 Fla. 1003, 117 So.385 (1928) (a docket fee used for the establishment of a law library held unconstitutional); Farabee v. Board of Trustees, Lee County Law Library, 254 So.2d 1 (1971) (upholding validity of a filing fee to be used for law libraries, and distinguishing Flood where the balance of funds remaining after furnishing of the library were to be used for general purposes). [FlaBar,17]

C. The sales tax on legal services is a tax on the right to have assistance of counsel and to have access to Florida's courts, and is thus prohibited by the Sale of Justice provision. [FlaBar,18]

SUPREMACY CLAUSE ISSUE

I. IS IMPOSITION OF A SALES AND USE TAX ON LEGAL FEES FOR REPRESENTATION BEFORE FEDERAL COURTS AND AGENCIES A VIOLATION OF THE SUPREMACY CLAUSE?

A. Imposition of a sales and use tax on legal fees for representation before federal courts and agencies is a violation of the Supremacy Clause. [FlaBar,12]


2. This immunity extends to an agency or instrumentality which is so closely connected to the federal government that the two cannot be viewed as separate entities. [FlaBar,12]

3. An attorney appearing before a federal court becomes a part of the judicial branch and a federal instrumentality. [FlaBar,12]

B. A tax on legal services is impermissible because the taxed entity is "connected with the exercise of a power or the performance of a duty" by the government, and the
tax is a "direct interference with the functions of government." United States v. Mexico, 455 U.S. 736. [FlaBar,13]

C. The U.S. Congress has never authorized taxation of any aspect of the operation of Federal District Courts. [FlaBar,14]

THE SINGLE SUBJECT REQUIREMENT

I. DOES CHAPTER 87-6 UNCONSTITUTIONALLY LEGISLATE ON MORE THAN ONE SUBJECT?

A. Article III, Section 6 of the Florida constitution provides that "every law shall embrace but one subject . . . ." [Herald,23]

B. Chapter 87-6 embodies provisions from two separate prior tax acts; the sales tax act (Ch. 212, Florida Statutes) and the gasoline tax (presently Ch. 206, Florida Statutes), and concerns several subjects, including sales and use tax, fuel taxes, estate taxes, taxes on intangible property, tax on production of oil and gas, corporate income tax, excise tax on documents, gross receipts taxes, and tax on operation of commercial motor vehicles.

C. As there is no natural and logical connection between many of the provisions of Chapter 87-6, it violates the single subject requirement. See, Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950).