IN THE SUPREME COURT
OF FLORIDA

CASE NO. 70,533

In Re:

Advisory Opinion of the Governor Request of May 12, 1987

BRIEF OF THE NEW YORK TIMES COMPANY FLORIDA NEWSPAPERS

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BRIEF OF THE NEW YORK
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Pursuant to this Court's invitation, parties who contend Chapter 87-6, Laws of Florida, is unconstitutional, are to file briefs on the question. (Interlocutory Order May 13, 1987). This Brief responds to that request. In the interest of judicial economy this brief addresses only the First Amendment issues raised by the discriminatory imposition of a tax on advertising under Section 6 of 87-6, Laws of Florida, and the tax on the sale of selected newspapers and periodicals imposed by Sections 212.05 and 6 Florida Statutes (1986 Supp.) which become effective July 1, 1987. The other contentions raised in the briefs filed by the Florida Association of Broad- casters, The National Association of Broadcasters, The Tampa Tribune Company, the News-Press Publishing Company, The Florida Press Association, the Media General Broadcast Group, the Boca Raton

News, Inc., and the Miami Herald Publishing Company, a division of Knight-Rider Inc., are adopted and incorporated herein by reference.

PARTIES SUBMITTING BRIEF

The parties submitting this brief are the New York Times Company Florida Newspapers. The New York Times Company Florida Newspapers are: The New York Times Company, publisher of the Sarasota Herald-Tribune; Gainesville Sun Publishing Company, publisher of the Gainesville Sun; Lake City Reporter, Inc., publisher of the Lake City Reporter; Lakeland Ledger Publishing Corporation, publisher of the Lakeland Ledger; Leesburg Daily Commercial, Inc., publisher of the Leesburg Daily Commercial; Ocala Star Banner Corporation, publisher of the Ocala Star-Banner; the Palatka Daily News, Inc., publisher of the Palatka Daily News, the Marco Island Eagle and the Fernandina Beach News-Leader; Sebring News-Sun, Inc., publisher of the Sebring News-Sun and the Avon Park Sun.

INTRODUCTION

The Florida Advertising Tax is a Discriminatory Tax in Violation of Article I, Section 4, of the Florida Constitution

Chapter 87-6 Laws of Florida selectively imposes the burden of a discriminatory tax on the media which is not borne equally by other enterprises, Chapter 87-6, §212.0595, §6, Laws of Florida. Article I, Section 4 of the Florida Constitution contains the same guarantees as the First Amendment to the United States Constitution, Department of Educ. v. Lewis, 416 So.2d 445, 461 (Fla. 1982), Florida Canners Ass'n v. State Dept. of Citrus, 371 So.2d 503, 517 (Fla. 2nd DCA 1979), affirmed, 406 So.2d 1079 (Fla. 1981), appeal dismissed, 456 U.S. 1002 (1982) ["the two (constitutional guarantees) are the same."] Therefore the federal authorities interpreting the First Amendment govern the construction of the Florida constitutional provision. ("Florida courts tend to merge the two limitations to the point that federal and state cases are cited interchangeably." Id. at 517.)

The United States Supreme Court has uniformly condemned as unconstitutional taxes which burden rights protected by the First Amendment and which serve as prior restraints on the freedom of the press.[1/] In 1936, the United States Supreme

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1/ The Florida advertising tax is not the first attempt by a state government to raise revenue through a tax which

(Footnote Continued Next Page)

Court invalidated a direct tax on the advertising revenues of newspapers because the Court found that a selective tax on the press infringes upon the freedom of the press, Grosjean v. American Press Co., 297 U.S. 233 (1936). More recently, on April 22, 1987, the Court condemned a statute which placed a discriminatory tax on the media and which discriminated between different mediums and formats of communication, Arkansas Writers' Project, Inc. v. Ragland, _____ U.S. ______, 55 U.S.L.W. 4522 (1987). The Florida advertising tax, and the selective tax on the sales of certain publications, suffer from all of the same constitutional infirmities which compelled the United States Supreme Court to invalidate these taxes.

The print and broadcast media are the primary conduits of paid political, social and commercial expression. The Florida advertising tax levies a tax on all such speech and imposes an obligation on the media to collect the tax on behalf of the State. The "real impact" of the tax is imposed selectively on the media.[2/] In addition, the 1986 Florida Legislature

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Footnote 1/ Continued

singles out the media. Grosjean v. American Press Co., 297 U.S. 233 (1936), Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983), Arkansas Writers' Project, Inc. v. Ragland, ____ U.S. ____, 55 U.S.L.W. 4522 (1987).

2/ The Court in Miller v. City of Milwaukee, 272 U.S. 713 (1927) held that the test of constitutionality is whether a special burden is imposed on the protected activity, and

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enacted HB 1307 effective July 1, 1987 amending Section 212.08 Florida Statutes (1986 Supp.) removing the former exemption for the sale of secular newspapers in Section 212.08(6), but retaining and expanding the exemption for the sale of religious publications and newspapers, Section 212.08(7)(o)(1)(a) Florida Statutes (1987). This tax on the circulation of one format for protected activity, while exempting another, unconstitutionally discriminates on the basis of format and content.

The selective taxation of the media with the advertising tax however, is not the only unconstitutional discrimination established by that statute. Despite its breadth, like the circulation tax on secular newspapers, the advertising tax is also not levied evenly upon various classes of protected expression. Numerous exemptions create unconstitutional

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Footnote 2/ (Continued)

not who happens to pay the tax. Mr. Justice Holmes stated for a unanimous court that the test is not the legal incidence of the tax but its indirect burden. Here, the burden of the Florida advertising tax, and the tax on newspaper sales, falls squarely on the protected activity. The media is directly liable for both taxes whether collected from its purchaser or not. Section 212.07(2) Florida Statutes (1985). See, City of Baltimore v. A.S. Abell Co., 145 A.2d 111 (Md. Ct. App. 1958) ("these [advertising] taxes are so single in their nature and the range of their impact is so narrow -- 90% to 95% thereof falling upon the newspaper and the stations -- that their effect makes them constitute a restraint on the freedoms of speech and of the press guaranteed by the First and Fourteenth Amendments and Article 40 of the Maryland Declaration of Rights"), see also, Sears Roebuck & Co. v. State Tax Comm., 345 N.E.2d 893, 896 (Mass. 1976) ("A tax on the advertising revenue of newspapers could have a devastating effect on First Amendment freedoms.")

discriminations in the application of the advertising tax to the media. These exemptions take two forms: exemptions based upon the medium or format of communication and exemptions based upon the content of the communication.[3/] For example, with

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3/ The following are provisions of the tax which treat formats for protected expression differentially and discriminate on the basis of the content of the expression.

FORMAT BASED DISCRIMINATION

	Not Taxed	Taxed
1.	Advertising sold by religious media and churches §212.08(7)(o)(1)(a), [services 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)	Advertising sold by other media §212.0595(1)
2.	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)	Services sold to media for the production of advertising or other protected expression §212.0595(1)
3.	Advertising for the sale of motion picture production services. §212.0592(18) read in pari material with §212.08(7)(c) [see footnote 4]	Advertising for the sale of advertising or other protected expression §212.0595(1)
4.	Media provider not required to collect the tax on advertising sold outside Florida, but used in Florida §212.0595(6)	Media provider required to collect the tax on advertising sold in Florida §212.0595(5)

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respect to format of communication, services for the production of motion pictures,[4/] recording studios and tapes are treated more favorably than services for the production of print and broadcast media advertising. With regard to the content of communication, the Florida advertising and newspaper sales taxes enhance the First Amendment rights of certain segments of society at the expense of others. Thus, advertisements offered

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Footnote 3/ Continued

5. Sale of religious periodicals are exempt from the tax on tangible personal property §212.08(7)(o)(1)(a) §212.05 and 6.	secular newspapers must bear the burden of the tax on tangible personal property

CONTENT BASED DISCRIMINATION

Not Taxed	Taxed
Advertising sold to or by religious institutions and churches §212.08(7)(o)(1)(a), advertising sold to or by non-profit charitable organizations §212.08(7)(o)(1)(b) and advertising sold to or by governmental units §212.08(b)	Advertising sold to political candidates and commercial enterprises §212.0592(1)

4/ Section 212.0592(18); unlike the exemption for "film rentals" which expressly provides "this exemption shall not be construed to exempt the sale or use of advertising" Section 212.08(7)(e), the exemption for production of motion pictures contains no such language. It is therefore probable that advertising for "qualified production services is exempt from taxation." See also Florida Department of Revenue proposed Emergency Rule 12-ER-87-11(16).

by religious organizations, institutions or leaders[5] are exempt, whereas political and commercial advertisements must bear the burden of the tax. Similarly, sales of religious publications are exempt, while sales of other newspapers are taxed. Both forms of discrimination render the Florida taxes unconstitutional. Minneapolis Star and Tribune v. Minnesota Commissioner, 460 U.S. 575 (1983); Arkansas Writers', Id.

Economic regulation of the advertising media and freedom of speech mandate strict constitutional scrutiny.[6] Although the states and the federal government may subject the media to generally applicable economic regulations, they may not, without compelling and narrowly tailored justification, impose a direct or discriminatory tax upon the advertising revenues and sales of the media.[7] Since the Florida advertising and newspaper sales taxes impose the three classic forms of discrimination on the expression of protected speech condemned in Arkansas Writers' and Minneapolis Star, the tax fails to pass strict constitutional scrutiny.

5/ Sections 212.0592 (31) and 212.08(7)(o); 12 ER-87-11(29) Florida Department of Revenue proposed Emergency Rules.

6/ "A tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest." Minneapolis Star and Tribune Co. v. Minnesota Commissioner, 460 U.S. 575 (1983).

7/ Grosjean v. American Press Co., 297 U.S. 233 (1936).

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Summary of the Argument

A tax scheme which imposes a selective burden on the media or discriminates against certain publications within the media is facially unconstitutional. Arkansas Writers' Project, Inc. v. Ragland, ____ U.S.____, 55 U.S.L.W. 4522 (1987). In Arkansas Writers', the Supreme Court reiterated that discrimination against the media and between different media formats infringes on rights protected by the First Amendment. Id. at 4573. The Court identified three forms of impermissible discrimination. First, the Court reiterated that a sales tax which selectively taxes the media, by treating the media differently from other enterprises, is unconstitutional. Second, the Arkansas tax was found to discriminate unconstitutionally between the exercise of First Amendment rights through different formats. Finally, the Court ruled that the tax unconstitutionally discriminated between formats based on the content of the speech itself. The Florida advertising and circulation taxes are similarly unconstitutional because they are guilty of all three classes of prohibited discrimination and the State has identified no compelling interest which would justify such discrimination.

A. The Advertising and Newspaper Sales Taxes Unconstitutionally and Selectively Tax the Media.

Arkansas Writers' is only the most recent of a series of cases which place a heavy burden upon the State to justify

differential economic regulation of the media.[8] In Grosjean v. American Press Co., 297 U.S. 233 (1936), representatives of the press challenged the constitutionality of a tax on the advertising revenue of Louisiana newspapers. In ruling that the tax abridged the rights of the free press, Justice Sutherland established that the right of the press to be free of discriminatory taxation went "to the heart of the natural right of the members of an organized society . . . to impart and acquire information about their common interests." Id. at 243. Justice Sutherland concluded that "freedom of the press" not only consisted of immunity from censorship, but also precluded the government from adopting any form of previous restraint upon the media. Id. at 249. The Court identified stamp taxes or advertising taxes as forms of prior restraints.[9] The Court further ruled that a tax based on

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8/ The United States Supreme Court has repeatedly recognized the potentially devastating effects which may accompany use of the taxing power, beginning with the oft-quoted phrase from McCulloch v. Maryland, 4 Wheat 316, 431 (1819): "the power to tax involves the power to destroy." See also Massachusetts v. United States, 435 U.S. 444, 455-56 (1977) ("a tax is a powerful regulatory device; a legislature can discourage or eliminate a particular activity that is within its regulatory jurisdiction simply by imposing a heavy tax on its exercise"); Speiser v. Randall, 357, U.S. 513, 518 (1958) ("It is settled that speech can be effectively limited by the exercise of the taxing power").

9/ "[B]y the First Amendment it was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting any form of previous restraint upon printed publications, or their circulation, including that which had theretofore been effected by these two well-known and odious methods." Id. at 249.

advertising revenue had two constitutionally impermissible effects: first, it curtailed the amount of revenue from advertising, and second, it had a tendency to restrict the circulation of newspapers. Therefore, the Court declared the advertising tax discriminatory and unconstitutional.

In 1983, the Court reiterated and expanded the rule of Grosjean in holding that a tax, which selectively discriminated against the media and between different formats within the media, was unconstitutional. Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983). In Minneapolis Star, the Supreme Court ruled that:

> [D]ifferential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional.

Id. at 585. (citations omitted.) The Court distinguished laws of general applicability which may subject newspapers to economic regulation from laws which specifically tax the press. The latter, it ruled, are unconstitutional. Like the tax on ink and paper, the Florida advertising and circulation taxes impose a substantial discriminatory burden directly on the media.

The historical repugnance to tax schemes which selectively tax the media stems from the attempts to use such devices to control the free press. By the beginning of the eighteenth century, the English Crown employed such taxes on

the press in an attempt to retain control over a burgeoning free press. In 1712, parliament imposed a tax on all newspapers and advertisements. The main purpose of these "taxes on knowledge" was "to suppress the publication of comments and criticisms objectionable to the Crown." In Grosjean, the Court described the long struggle against such advertising taxes:

> "[I]n the adoption of the . . . [taxes] the dominant and controlling aim was to prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect of their governmental affairs . . . . The aim of the struggle [against those taxes] was . . . to establish and preserve the right of the English people to full information in respect of the doings or mis-doings of their government. Upon the correctness of this conclusion, the very characterizations of the exactions as 'taxes on knowledge' sheds a flood of corroborative light. In the ultimate, an informed and enlightened public opinion was the thing at stake. . . ."

Id. at 247.

The Framers institutionalized the historical repugnance to prior restraints on the media through the First Amendment.[10/] The constitutional abhorrence for such taxes

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10/ The Court in Grosjean cited an attempt by a state legislature to tax newspapers in 1785 as one of the historical events with which the Framers of the Constitution were cognizant and which "did much to bring about the adoption of the [First] amendment." 297 U.S. at 248. As James Madison's original draft of the First Amendment reflects "freedom of the press, [is] one of the great bulwarks of liberty". I Annals of Cong. 451 (1789).

did not depend upon improper censorial motives.[11] Instead, taxes which discriminate against or especially burden the media are deemed unconstitutional because of their potential for abuse. The Supreme Court articulated the preventive nature of this rule in Arkansas Writers'.

> This is because selective taxation of the press - either singling out the press as a whole or targeting individual members of the press - poses a particular danger of abuse by the state.

Id. at 452. This point was earlier explained in Minneapolis Star.

> A power to tax differentially, as opposed to a power to tax generally, gives the government a powerful weapon over the taxpayer selected. When the State imposes a generally applicable tax there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by a burdensome taxation if it must impose the same burden on the rest of its constituency. When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government.

Id. at 585 (footnotes and citations omitted).

11/ "Illicit legislative intent is not the sine qua non of a violation of the First Amendment." The Court added, "We need not and do not impugn the motives of the Minnesota legislature." Minneapolis Star, at 579-580, 592.

There can be little doubt that an advertising tax singles out the media and "speech" for special treatment. Because of the close nexus between advertising and the media, advertising taxes have been a preferred tool of the opponents of a free press. American courts analyzing "advertising taxes" have established that such taxes impose a direct, differential and heavy burden upon the print and broadcast media. City of Baltimore v. A.S. Abell Co., 145 A.2d 111 (Md. Ct. App. 1958).[12] In City of Baltimore, the Court declared unconstitutional an "advertisement tax" which levied a 4% tax upon the gross sales price of advertising. The Court found that the print and broadcast media bore 90 to 95% of the impact of the advertising taxes and declared the ordinance unconstitutional.

> The root of the evil in these [advertising taxes] lies not merely in the fact that they curtail the dollars received by the newspapers and the stations, but in the fact that being entitled to the advantages granted by the First Amendment, they are singled out and required to pay a special tax that is not required of business in general or some broad portion thereof.

Id. at 118-119.

12/ In Tampa Times Co. v. City of Tampa, 29 So.2d 368 (Fla. 1947), this Court upheld a municipal license tax measured on gross sales. Unlike the Florida advertising tax however, this tax was general in its application and the media did not bear the primary burden of collection of the tax. The Tampa tax also did not discriminate between different formats of expression, nor was the incidence of the tax dependent on the content of the advertising. Accordingly, the analysis in Tampa Times is inapplicable, since it addressed an entirely different system of taxation.

The similarities and distinctions between the Baltimore tax and the Florida advertising tax are revealing. Both taxes are facially neutral and purport to tax advertising from any source. Both taxes, by their nature, target the print and the broadcast media which are the primary sellers of advertising. The taxes, in their application, place nearly the entire burden of the advertising tax on constitutionally protected media enterprises. However, despite the similarities, the Florida advertising tax is even more objectionable than the Baltimore tax because it discriminates between different classes of advertisers and between different mediums of communication.

The Florida advertising tax singles out the media and imposes a special burden which is not required of business generally. The effects of the "singling out" of the Florida tax resemble those which the Supreme Court deemed objectionable in Grosjean. The revenue of the media, 90% of which is derived from advertising, will be curtailed and circulation diminished. The "political constraints that prevent a legislature from passing crippling taxes" are absent where a tax is applied only or substantially on the media.

B. The Florida Advertising and Newspaper Sales Taxes Discriminate Based Upon the Identity of the Speaker and Discriminate Against Certain Media Formats.

In a number of recent decisions, the United States Supreme Court has held that the First Amendment "both fully protects and implicitly encourages" all types of "discussion of 'matters of public concern'" irrespective of the medium of transmission or the identity of the speaker.[13] Discrimination based upon the medium of transmission or the identity of the speaker constitutes a constitutionally impermissible enhancement of the speech of some elements of society at the expense of others. Buckley v. Valeo, 424 U.S. 1 (1976).[14]

13/ Pacific Gas & Electric Co. v. Public Utilities Comm'n of California, 475 U.S. 1, (1986) (public utility's newsletter, the content of which ranged from energy-saving tips to stories about wildlife conversation and from billing information to recipes) (Powell, J., announcing judgment of the Court in which Burger, C.J., and Brennan and O'Connor, J.J., concurred); Consolidated Edison Co. v. Public Service Comm'n of New York, 447 U.S. 530 (1980) (same); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978). See also City of Los Angeles v. Preferred Communications, Inc., _____ U.S. _____, 54 U.S.L.W. 4542, 4543 (1986) (expressing the view that "'the business of cable television, like that of newspapers and magazines,'" "plainly implicate[s] First Amendment interest[s]"); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, (1985) (holding that constitutional protections against libel and slander actions protect all speech regarding matters of public concern).

14/ "A tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action," Minneapolis Star at 592-93.

(i) The Florida Constitution Forbids Discrimination Based Upon the Identity of the Speaker.

It is well settled that government may not inhibit the dissemination of ideas based upon the identity of a speaker. In Buckley, the Court applied this principle in striking down provisions of the Federal Election Campaign Act which restricted the ability of certain groups and individuals to influence elections by their contributions. The Court stated:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"

Id. at 49 (emphasis added; citations omitted). This holding was explicitly reaffirmed two years later in First National Bank of Boston v. Bellotti, 435 U.S. 765, 790-91 (1978), where the Court struck down a statute which prohibited political contributions to referendum measures by businesses or corporations.[15/] As a corollary to this rule, government cannot treat users of the same medium differentially. For example, the Court upheld the right of Jehovah's Witnesses to use a city park where others were permitted to speak. Niemolko v. Maryland, 340 U.S. 268 (1951).

15/ This issue was raised, but not addressed by the Court, in Minneapolis Star. 460 U.S. at 593 n.17.

The Florida advertising and newspaper sales taxes have precisely this effect. They grant certain organizations an exemption from the tax while imposing the tax on similarly situated persons. The advertising and newspaper sales taxes clearly enhance the ability of religious organizations, not-for-profit organizations and, most fundamentally, governmental entities, to express themselves by exempting them from the taxes. Sections 212.0592(31), 212.08(7)(o) and 212.08(b) Florida Statutes (1987); 87-6, Laws of Florida. These exemptions give these classes of speakers greater access to the field of ideas than the other members of the general public. Thus, the exemption "enhances the voice" of religious institutions, not-for-profit groups and the government at the "expense" of other speakers who must bear a cost not imposed on the exempted organizations.

(ii) The Florida Advertising and Newspaper Sales Taxes Unconstitutionally Discriminate Between Media Formats.

The First Amendment does not permit differential governmental treatment within the media. The United States Supreme Court articulated this doctrine over three decades ago in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1951).[16/]

16/ Lower federal and state courts have consistently applied this doctrine to strike down regulations which were applied differentially to different media. See, e.g., Community-Service Broadcasting of Mid-America, Inc. v. Federal

(Footnote Continued Next Page)

The defendants there argued that even though prior restraints against newspapers were unconstitutional, they were constitutional against motion pictures. The Supreme Court easily rejected this argument:

> Each method [of expression] tends to present its own peculiar problems. But the basic principles of freedom of speech and of the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule.

343 U.S. at 503 (emphasis added).

No particular form of publication is entitled to a greater degree of First Amendment protection than any other.

Footnote 16/ cont'd.

Communications Commission, 593 F.2d 1102, 1123 (D.C. Cir. 1978) (striking down FCC regulations which required certain administrative actions to be taken by non-commercial, but not commercial, broadcasters); Greater Fremont, Inc. v. City of Fremont, 302 F. Supp. 652, 663 (N.D. Ohio 1968), aff'd sub nom, Wonderland Ventures, Inc. v. Sandusky, 423 F.2d 548 (6th Cir. 1970) (invalidating a municipal ordinances which applied different regulations to a community antenna television system than those applied to other broadcasters); City of Alameda v. Premier Communications Network, Inc., 156 Cal. App. 3d 148, 202 Cal. Reptr. 684, cert. denied, 469 U.S. 1073 (1984) (invalidating a municipal tax ordinance which placed a higher tax burden on subscription television services than was placed on other businesses). This reasoning is clearly applicable here. The "basic principles of freedom of speech and of the press" apply equally to magazines, newspapers, and all other media, e.g., television stations, books, and radio stations. Differential taxation of different types of media therefore is unconstitutional absent a compelling state justification.

Pamphlets,[17] magazines,[18] newspapers,[19] billboards[20] and leaflets[21] have all found identical protection under the First Amendment. The government may not limit access to one format of expression merely because other formats are available. Arkansas Writers' at 4524. The government must grant equal access through all formats unless there is a compelling reason to do otherwise.

> Because the First Amendment was meant to guarantee freedom to express and communicate ideas, I can see no difference between the right of those who seek to disseminate ideas by way of a newspaper and those who give lectures or speeches and seek to enlarge the audience by publication and wide dissemination. . . . In short, the First Amendment does not 'belong' to any definable category of persons or entities: It belongs to all who exercise its freedoms.

First National Bank of Boston v. Bellotti, 435 U.S. 765, 802 (1978) (Burger, J. concurring).

A state statute which differentiates between identical forms of speech, taxing secular advertising and the sale of publications, but permitting advertising in and sales of religious publications to go free, violates the First Amendment.

17/ Lovell v. City of Griffin, 303 U.S. 444 (1938).

18/ Hannegan v. Esquire, Inc., 327 U.S. 146 (1946).

19/ New York Times v. Sullivan, 376 U.S. 254 (1964).

20/ Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

21/ Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971).

This Court has previously ruled that discrimination based on media format is unconstitutional. City of Tampa v. Tampa Times, 15 So.2d 612 (1943). In City of Tampa, this Court held that an ordinance imposing a license tax graduated according to the volume of circulation on newspapers was unconstitutional.[22/] The tax was invalidated because it discriminated against larger newspapers.

The exemption of services rendered for the production and distribution of motion pictures also grants that medium a significant economic advantage over the general media. Print and broadcast media must bear the burden of the tax on identical production services. The exemption of religious publications from the sales tax, but taxing the sale of secular newspapers, likewise grants religious periodicals a significant advantage. Such discrimination undermines "equality in the field of ideas" by granting preferential status based on the format of the publication. See City of Chicago v. Mosley, 408 U.S. 92 (1972). Such advantages for one format of protected expression over another are clearly unconstitutional.

The Florida advertising tax further discriminates between different media, based on the location of the publisher or broadcaster. Section 212.0595(5) Florida Statutes (1987)

22/ "We rest our decision today solely upon the proposition that any license tax based on volume of circulation and graduated by scale is void as impairing the freedom of the press. . . ." Id. at 613.

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expressly requires advertising sold inside Florida to be "collected and remitted by the advertising media provider." However, with regard to advertising sold outside Florida but "used in this State, the advertiser shall self-accrue the use tax . . .," Section 212.0595(6). These sections obviously discriminate against Florida advertising media by imposing the collection duties of the State upon them. This co-opting of media engaged in activity protected by the First Amendment as an arm of the State for one class of "speaker", but exempting another, is precisely the type of discrimination "within the press" prohibited by the First Amendment, Arkansas Writers'; at 4524. Because the Florida "advertising" tax treats some media "less favorably than others, it suffers from the second type of discrimination identified in Minneapolis Star." Id.

C. The Florida Advertising and Newspaper Sales Taxes Are Not Applied Evenly To All Advertising And Advertisers and Sales of all Publications.

In the Florida advertising and sales taxes, exemptions[23] are the rule and not the exception.[24] These

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23/ The advertising tax has 41 separate exemptions to its applicability. The Florida Bar has described the Florida sales tax as a "Law by exemption," Fla. State & Local Taxes Vol I ¶14.03 [4] (Fla. Bar 1984). The Court in Minneapolis Star rejected the state's argument that the media "cannot successfully challenge regulations on the basis of exemption of other enterprises". 460 U.S. at 585, n.5. The Court pointed out, "the exempt enterprises in Oklahoma Press were isolated exemptions and not the rule".

24/ As explained in Members of City Council of City of Los

(Footnote Continued Next Page)

taxes contain a particularly invidious form of discrimination uniformly condemned by the United States Supreme Court; discrimination based upon the content of the publication, Arkansas Writers', at 4524. There is no longer any doubt that an advertisement, whether commercial or non-commercial, constitutes protected "speech." Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981). Regulation of speech based upon content is repugnant to and will not be tolerated under the First Amendment. Regan v. Time, Inc., 468 U.S. 641, 648-649 (1984).

In Arkansas Writers', the Supreme Court held a state sales tax unconstitutional because it was content based.

> Indeed, the instant case involves a more disturbing use of selective taxation than Minneapolis Star, because the basis on which Arkansas differentiates between magazines is particularly repugnant to First Amendment principles: a magazine's tax status depends entirely on its content. 'Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its contents.' Police Department of Chicago v. Mosley, supra, at 95. See also Cary v. Brown, supra, at 462-463.

Id. at 4524.

Footnote 24/ Continued

Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984), "To create an exception for appellee's political speech and not these other types of speech might create a risk of engaging in constitutionally forbidden content discrimination." Id. at 816.

The Florida circulation tax imposes a tax on the sale of certain publications, but exempts others based on the content of the publication. The Florida advertising tax, likewise, discriminates based upon the "speech" contained within the advertisement. This is accomplished by carving out preferential treatment for expressions on certain subject matters or through certain formats by exemption. The statute exempts advertisements purchased by religious groups and organizations for religious services;[25/] but taxes advertisements expressing political beliefs and for commercial purposes purchased by private individuals. The circulation tax

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25/ It is well settled that religious expression is on an equal constitutional footing with secular expression. Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

> That organization and its ritual of Sankirtan have no special claim to First Amendment protection as compared to that of other religions who also distribute literature and solicit funds. . . . Nor for present purposes do religious organizations enjoy rights to communicate, distribute, and solicit . . . superior to those of other organizations having social, political, or other ideological messages to proselytize.

Id. (emphasis added), see also West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), Murdock v. Pennsylvania, 319 U.S. 573 (1944), Follett v. Town of McCormick, 321 U.S. 157 (1944), Widmar v. Vincent, 454 U.S. 263 (1981), West, The Free Exercise Clause and the Internal Revenue Code's Restrictions on the Political Activity of Tax-Exempt Organizations, 21 Wake Forrest L. Rev. 395, 422 (1986).

taxes the sales of secular newspapers, but exempts sales of religious periodicals.

In City of Chicago v. Mosley, 408 U.S. 92 (1972), the United States Supreme Court explained the prohibition on content based regulation of speech as follows:

> Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should uninhibited, robust and wide-open."

Id. at 96. (citations omitted).

The test to determine whether government may discriminate on the basis of the content of a message is straightforward and simple. If "enforcement authorities must necessarily examine the content of the message that is conveyed," the regulation impermissibly classifies the exercise of First Amendment rights by content. Arkansas Writers' at 5424; FCC v. Legal Women Voters of California, 468 U.S. 364, 383 (1984).

The result of this test as applied to the Florida advertising and circulation taxes is clear. Florida taxing authorities cannot determine whether an advertisement or sale of a particular publication is taxable without examining the content of the advertisement or publication to determine if it is purchased or sold by a religious or secular organization, or

relates to a religious "service".[26] As the Court explained in Arkansas Writers',

> "If articles in Arkansas Times were uniformly devoted to religion . . . the magazine would be exempt from the sales tax under §84-1904(j). However, because the articles deal with a variety of subjects (sometimes including religion and sports), the Commissioner has determined that the magazine's sales may be taxed. In order to determine whether a magazine is subject to sales tax, Arkansas' "enforcement authorities must necessarily examine the content of the message that is conveyed . . . ." FCC v. League of Women Voters of California, 468 U.S. 364, 383 (1984). Such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press.

Id. at 4524. Similarly here, advertisements placed in any media by "churches" or advertising sold "by churches" and sales of religious publications are exempt.[27] Florida taxing authorities will therefore have to examine the content of each advertisement or publication to determine if the specific exemptions apply.

26/ In Regan v. Time Inc., 468 U.S. 641 (1984) the Court struck down a regulation which excepted certain classes of expression for certain purposes. The "purpose" test in the exemption was held to be an unconstitutional content-based discrimination.

27/ Advertising relating to the production of motion pictures is also arguably exempt. Section 212.0592(18) Florida Statutes (1987), 87-6, §6 Laws of Fla., see footnote 4 supra.

D. The Discriminatory Nature of the Florida Advertising and Circulation Taxes Gives Rise To a Presumption of Unconstitutionality.

The Florida advertising tax clearly contains three separate types of unconstitutional discrimination. These infirmities establish a presumption that the advertising tax is unconstitutional.

> [D]ifferential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumed unconstitutional.

Minneapolis Star, 400 U.S. at 585. (citations omitted). In light of the presumption of unconstitutionality, Florida must demonstrate a counterbalancing interest of compelling importance which it cannot achieve without differential taxation. Id. at 585.

Florida's primary interest for imposing the differential tax on the media is to raise revenue. (See Governor's Request For Advisory Opinion dated May 12, 1987) However, the Supreme Court has established that raising revenue, standing alone, cannot justify discriminatory treatment of the media. Minneapolis Star, at 591, 592. The Supreme Court has reiterated the following holding from Minneapolis Star in Arkansas Writers':

> In that context, we noted that an interest in raising revenue, "[s]tanding alone, . . . cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising

> concerns under the First Amendment is clearly available: the State could raise revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax that singles out the press." (Citations omitted). The same is true of a tax that differentiates between members of the press.

Arkansas Writers', at 4525.

The primary interest of Florida in imposing the discriminatory advertising and newspaper sales taxes is merely to raise revenue. This interest is not sufficiently compelling to overcome the burden created by the presumption of unconstitutionality established by the differential treatment of the media and the discrimination against or among competing First Amendment interests or formats. Accordingly, the Florida advertising and circulation taxes unconstitutionally discriminate among various expressions of "speech" and are prohibited by Article I, Section 4 of the Florida Constitution.

Conclusion

For the foregoing reasons, this Court should declare Section 212.0592, Florida Statutes, 87-6, §6, Laws of Florida, and Sections 212.05 and 6 Florida Statutes (1987), as they relate to the sale of certain newspapers and periodicals, unconstitutional.

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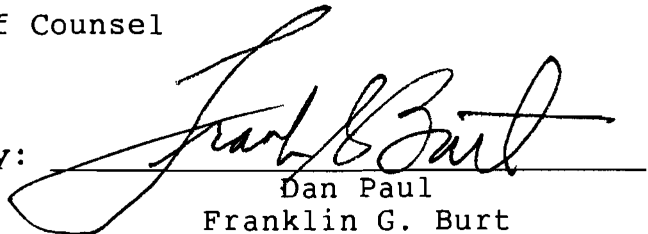

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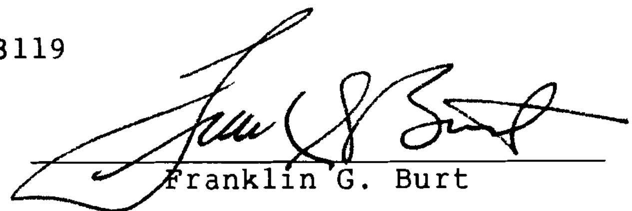

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