IN THE

SUPREME COURT OF FLORIDA

CASE NO. 70,533

IN RE

ADVISORY OPINION OF THE GOVERNOR

REQUEST OF MAY 12, 1987

INITIAL BRIEF OF SENTINEL COMMUNICATIONS COMPANY AND NEWS AND SUN-SENTINEL COMPANY CHALLENGING THE CONSTITUTIONALITY OF CHAPTER 87-6, LAWS OF FLORIDA

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STATEMENT OF THE CASE AND THE FACTS

This matter is now before the Court pursuant to the Interlocutory Order entered May 13, 1987 and involves proceedings under Article IV, Section 1(c), Florida Constitution. SENTINEL COMMUNICATIONS COMPANY ("Sentinel") and NEWS AND SUN-SENTINEL COMPANY ("Sun-Sentinel"), publishers of The Orlando Sentinel and The Fort Lauderdale News and Sun-Sentinel, respectively, file this Initial Brief as interested parties who contend that a portion of Chapter 87-6, Laws of Florida, is unconstitutional. This Brief is limited to the following issue:

> WHETHER IT IS CONSTITUTIONAL FOR THE STATE TO IMPOSE A SALES TAX ON FEES PAID BY A NEWSPAPER PUBLISHER TO INDEPENDENT CONTRACTOR DELIVERY AGENTS FOR DELIVERING NEWSPAPERS AND COLLECTING SUBSCRIPTION FEES.

The newspaper delivery systems of both Sentinel and Sun-Sentinel include the use of independent contractor delivery agents who, in return for a fee paid by the newspaper publisher, distribute newspapers to paying subscribers and collect subscription fees. Under this arrangement, the delivery agents never take title to the newspapers delivered. Title to the newspapers passes directly from the publisher to the subscribers. The delivery agent system in use at Sentinel and Sun-Sentinel is not in use at the other major newspapers in Florida. Other major publishers utilize employees to deliver newspapers or sell newspapers to distributors for re-sale to subscribers. Therefore, the impact, if any, of Chapter 87-6 on independent contractor newspaper delivery agent systems is of particular interest to Sentinel and Sun-Sentinel.

Under Florida Statute §212.02(22), enacted by the Florida Legislature as part of Chapter 87-6, Laws of Florida, services involved in the delivery of newspapers are not specifically enumerated as services to be taxed by amended §212.05(1)(j) or §212.059. It is the position of Sentinel and Sun-Sentinel that such services do not fall within the definition of taxable services under Chapter 87-6 and are not taxable. We submit that such position is that of the State Legislature. On their best information and belief, Sentinel and Sun-Sentinel believe that newspaper circulation will be considered and discussed in hearings before the Florida Department of Revenue commencing Tuesday, June 2, 1987. Nevertheless, since this issue may be raised by other parties; since at this time there are no Department of Revenue regulations in place; and since the Governor has requested a broad opinion on the constitutionality of Chapter 87-6, Sentinel and Sun-Sentinel submit this Brief to challenge the constitutionality of Chapter 87-6 to the extent that Chapter 87-6 may be construed or interpreted to impose a tax on the consideration paid by publishers to independent contractor newspaper delivery agents.

SUMMARY OF ARGUMENT

The guarantee of freedom of the press contained in the Federal and Florida Constitutions protects not only the right to publish newspapers, but also the right to distribute newspapers. A tax on the right to distribute newspapers is a tax on the privilege of engaging in constitutionally protected activity, and as such, is unconstitutional because a state may not impose a charge for the enjoyment of a right granted by either the Federal or the Florida Constitutions. A tax imposed on the act of delivering newspapers, which must be paid as a condition precedent to the exercise of first amendment activity, is to be contrasted with a tax on the income derived from the exercise of first amendment activity. The latter may, in certain circumstances, be validly taxed; however, the former may not be taxed to raise general revenue because the tax operates as a prior restraint on newspaper distribution. To the extent that Chapter 87-6 may be construed to tax the payments made by Sentinel and Sun-Sentinel to have their newspapers delivered, it is unconstitutional.

ARGUMENT

IT IS UNCONSTITUTIONAL FOR THE STATE TO IMPOSE A SALES TAX ON FEES PAID BY NEWSPAPER PUBLISHERS TO INDEPENDENT CONTRACTOR DELIVERY AGENTS FOR DELIVERING NEWSPAPERS AND COLLECTING SUBSCRIPTION FEES

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, 58 S.Ct. 666, 82 L.Ed. 949 (1938); Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936); Miami Herald Publishing Co. v. City of Hallandale, 734 F.2d 666 (11th Cir. 1984) (right to distribute newspapers by means of newsracks is protected by the first amendment); Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority, 745 F.2d 767 (2d Cir. 1984) (same); City of Tampa v. Tampa Times, 15 So.2d 612 (Fla. 1943). The U.S. Supreme Court has emphasized that "[l]iberty of circulating is as essential to [freedom of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value." Lovell v. Griffin, supra at 452, 58 S.Ct. at 669.

Thus, the right to distribute newspapers is inextricably intertwined with the right to publish newspapers, and a law which places a restraint on the former directly hinders the latter. As one court stated, "without circulation, freedom of publication is a mockery." Philadelphia Newspapers, Inc. v. Borough Council, etc., Swarthmore, 381 F.Supp. 228, 240 (E.D. Pa. 1974) (ordinance regulating newsracks held invalid), citing Lovell v. Griffin, supra; Grosjean v. American Press Co., supra;

Ex parte Jackson, 96 U.S. 727, 24 L.Ed. 877 (1878). Assuming arguendo that Chapter 87-6, Laws of Florida, places a tax on the consideration paid by newspaper publishers to delivery agents under contract to deliver newspapers to subscribers, the tax is unconstitutional because, as a restraint on newspaper distribution, it violates freedom of the press as guaranteed by the first amendment to the United States Constitution[1], and by Article I, Section 4 of the Florida Constitution.

The crucial distinction to be made about a tax on newspaper distribution is that it is a tax which is exacted for the privilege of engaging in first amendment activity, as opposed to a tax imposed on the income derived by one engaging in first amendment activity. See e.g. Jacobsen v. United States Postal Service, 624 F.Supp. 520, 522 (D. Ariz. 1986) (income tax imposed by federal government on proceeds derived from newspaper distribution held valid). To the extent that a law requires a publisher to pay a tax on fees paid to newspaper delivery agents, the law makes payment of the tax a condition precedent to distribution of the newspapers. Under such a law, before a publisher can distribute its newspapers to subscribers, which the publisher has a constitutionally protected right to do, the publisher must pay a tax to the state. This is unconstitutional because "[a] state may not impose a charge for the enjoyment of a right granted by the Federal Constitution." Murdock v. Pennsylvania,

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[1]Freedom of the press is a fundamental right protected by the fourteenth amendment from state infringement. See Lovell v. Griffin, supra at 450, 58 S.Ct. at 668.

319 U.S. 105, 113, 63 S.Ct. 870, 875, 87 L.Ed. 1292 (1943), Hull v. Petrillo, 439 F.2d 1184, 1185-1186 (2d Cir. 1971). See also State v. Woodruff, 13 So.2d 704 (Fla. 1943) (City license tax on sale of religious literature is unconstitutional under Federal and Florida Constitutions as denying freedom of the press and freedom of religion).

Both the United States Supreme Court and this Court have long recognized that the power to tax the exercise of a constitutional privilege is the power to control or suppress its enjoyment. Murdock, 319 U.S. at 112, 63 S.Ct. at 874; Woodruff, 13 So.2d at 706. Indeed, as this Court stated in Woodruff, to confer the free exercise of a constitutional right and then levy a tax on the performance of that right is contrary to the letter and spirit of the Declaration of Rights embodied in the Florida Constitution. id.

In contrast to a tax on fees paid to delivery agents which is imposed on the actual exercise of a constitutional right are taxes imposed on the income derived by one engaging in first amendment activity. Thus, in Tampa Times Co. v. City of Tampa, 29 So.2d 368 (Fla. 1947) ("Tampa Times II"), this Court upheld a tax on a newspaper publisher's gross receipts. The tax was valid because it did not single out newspaper publishers and was unrelated to newspaper circulation. The United States Supreme Court has stated that "our cases have consistently recognized that nondiscriminatory taxes on the receipts or income of newspapers would be permissible." Minneapolis Star and Tribune Company

v. Minnesota Commissioner of Revenue, 460 U.S. 575, 586 n. 9, 103 S.Ct. 1365, 1372-1373 n. 9, 75 L.Ed. 2d 295 (1983), citing Branzburg v. Hayes, 408 U.S. 665, 683, 92 S.Ct. 2646, 2657, 33 L.Ed.2d 626 (1972) (dictum); Grosjean v. American Press Co., 297 U.S. 233, 250, 56 S.Ct. 444, 449, 80 L.Ed. 660 (1936) (dictum); cf. Follett v. Town of McCormick, 321 U.S. 573, 578, 64 S.Ct. 717, 719, 88 L.Ed. 938 (1944) (preacher subject to taxes on income or property) (dictum); Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 112, 63 S.Ct. 870, 874, 87 L.Ed. 1292 (1943) (same) (dictum). The difference, of course, is that a tax on newspaper distribution is not a tax on the publishers' income or receipts; it is a tax on payments being made by the publishers to agents for the purpose of having their newspapers delivered. As such, it is comparable to the license taxes which were struck down in Murdock and Woodruff. In Murdock, the Court clarified this distinction, stating:

> We do not mean to say that religious groups and the press are free from all financial burdens of government. See Grosjean v. American Press Co., 297 U.S. 233, 250, 56 S.Ct. 444, 449, 80 L.Ed. 660. We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon.

319 U.S. at 112, 63 S.Ct. at 874.

As applied to newspaper distribution, this distinction was recognized by the court in Jacobsen, supra, which held valid

an income tax imposed on the proceeds derived from newspaper sales on Federal property. 624 F.Supp. at 522. The court carefully distinguished the fact that the tax in that case did not "impose a licensing fee on newspaper distribution for the privilege of engaging in first amendment activity on Federal property." id. Imposition of a fee on the right to distribute newspapers violates freedom of the press by acting as a license on the right to distribute printed material. New Times, Inc. v. Arizona Board of Regents, 519 P.2d 169, 175 (Ariz. 1974). In that case, in contrast to the tax on income held valid in Jacobsen, the University of Arizona promulgated a regulation which made payment of a $2.00 distribution fee a condition to a newspaper publisher's exercise of his right to distribute newspapers on the university campus. The Arizona Supreme Court held that "the imposition of any fee on the right to distribute [newspapers] is constitutionally impermissible." id.

In his letter to the Justices of this Court, Governor Martinez stated that the tax imposed on the sale and use of services by Chapter 87-6 is a new revenue source to meet the requirements of this fast growing state, of which he specifically enumerated "correctional, educational, health and other infrastructure needs." It is obvious that the revenue derived from this tax will be general revenue to be used as the Governor and Legislature see fit. However, a government cannot raise general revenue under the guise of defraying its administrative costs by imposing taxes on the exercise of a first amendment right. See Gannett Satellite

Information Network, Inc. v. Metropolitan Transportation Authority, 745 F.2d 767, 774 (2d Cir. 1984), citing Murdock v. Pennsylvania, 319 U.S. at 112-115, 63 S.Ct. at 874-876 (license tax on right to solicit door-to-door); Eastern Connecticut Citizens Action Group v. Powers, 723 F.2d 1050, 1056 (2d Cir. 1983) (fee to demonstrate on abandoned railroad bed); Hull v. Petrillo, 439 F.2d 1184, 1185-1186 (2d Cir. 1971) (ordinance prohibiting sale of goods, including newspapers, without town license). In Gannett, the court upheld a licensing fee imposed by a transportation authority on newsracks placed in New York rail stations because the transportation authority's management of the train facilities was a proprietary, as opposed to a governmental, function, and because revenue raised by the authority did not go into the state's general coffers but was used for operation of the train facilities. 745 F.2d at 774-775. The court stated that a government cannot profit by imposing licensing or permit fees on the exercise of a first amendment right, but distinguished several cases which had reached that holding because, in those cases, the government was acting in a governmental capacity and was raising general revenue under the guise of defraying its administrative costs. id. at 774. In the Gannett case, said the court, the transportation authority was not acting in a traditional governmental capacity. id.

Should Chapter 87-6 be construed or interpreted as levying a tax on fees paid for the delivery of newspapers, the Legislature will have done exactly what the Gannett court stated was forbidden: imposing a tax, for the purpose of raising general state revenue,

as a condition of exercising the constitutional right to distribute newspapers. Similar taxes which restrain newspaper circulation have uniformly been held unconstitutional by the courts as an "odious method" of previous restraint upon newspaper circulation. Grosjean, 297 U.S. at 249, 56 S.Ct. at 449; City of Tampa v. Tampa Times Co., 15 So.2d 612, 613 (Fla. 1943) ("Tampa Times I").

In both Grosjean and Tampa Times I taxes were imposed on newspaper publishers based upon the volume of newspaper circulation. The United States Supreme Court, in an extensive discussion of the history of the first amendment's freedom of the press clause, stated that first amendment protection against restraints on the press reaches not only censorship, but any form of previous restraint on the press, including taxes that have such an effect. 297 U.S. at 245-249, 56 S.Ct. at 447-449. Thus, in Grosjean, the Court struck down a Louisiana state law which imposed a tax which was based on newspaper circulation figures on gross receipts derived from newspaper advertisements, stating that the tax had a "direct tendency to restrict circulation." id. at 244-245, 56 S.Ct. at 447. Based upon Grosjean, the Florida Supreme Court held invalid a City of Tampa license tax which was assessed against newspapers based upon their volume of circulation. 15 So.2d at 612, 613.

It is apparent that any tax which affects newspaper circulation is inherently suspect. While the need for additional State revenue is no doubt pressing, the imposition of a tax on the exercise of a constitutionally protected right is a clearly

impermissible way of generating such funds. If the law were otherwise, the State could raise general revenue by taxing all forms of information distribution, even speaking. It is ludicrous to suppose that the State would argue that it could tax a public speaker for giving a speech, or a pamphleteer for handing out pamphlets on a public street, for the purpose of raising money for State coffers. Nevertheless, if Chapter 87-6 is so construed, that is exactly the kind of tax which would be imposed on Sentinel and Sun-Sentinel each time they pay an agent to deliver their newspapers. Moreover, if the tax is valid, it can be increased to such a rate that it could literally destroy newspaper circulation. See Grosjean, 297 U.S. at 245, 56 S.Ct. at 447.

In Tampa Times II, this Court stated that a newspaper is not immune from the burden of taxation to maintain government. As corporations which have, for instance, paid hundreds of thousands of dollars in property taxes over the years, Sentinel and Sun-Sentinel do not dispute this proposition. However, to paraphrase the Court in Follett v. McCormick, to say that newspaper publishers like other citizens may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the first amendment, as well as Article I, Section 4 of the Florida Constitution, has made a high constitutional privilege. To the extent that Chapter 87-6 may be construed to tax the act of newspaper distribution, it is unconstitutional. Sentinel and Sun-Sentinel respectfully urge the Justices of this Court to so advise Governor Martinez.

CONCLUSION

Sentinel and Sun-Sentinel respectfully request that the Justices of the Florida Supreme Court issue their opinion that, to the extent Chapter 87-6, Laws of Florida, is construed or interpreted to impose a tax on fees paid by publishers for the service of delivering newspapers and collecting subscription payments, Chapter 87-6 is unconstitutional.

Respectfully submitted,

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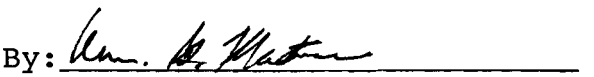
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 28th day of May, 1987 to The Honorable Bob Martinez, The Governor of Florida, Office of the Governor, The Capitol, Tallahassee, Florida 32399-0001, and to The Honorable Robert Butterworth, Attorney General of Florida, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399.

By: _____
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