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IN THE SUPREME COURT OF FLORIDA

No. 70,533

IN RE: ADVISORY OPINION )  
TO THE GOVERNOR, REQUEST )  
OF MAY 12, 1987 )

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INITIAL BRIEF  
OF THE FLORIDA PRESS ASSOCIATION  
AND THE BOCA RATON NEWS, INC.

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## STATEMENT OF INTEREST

The Florida Press Association and The Boca Raton News, Inc., file this Initial Brief in opposition to the constitutionality of the provisions of Chapters 86-166 and 87-6, Laws of Florida, which tax the sale of newspapers and advertising.

The Florida Press Association is an association of 55 daily and 160 weekly newspapers published in Florida. The Boca Raton News, Inc., is a Florida corporation which publishes The Boca Raton News, a daily newspaper of general circulation in Boca Raton.

The members of the Florida Press Association and The Boca Raton News would be adversely affected if the Court held the sales tax on newspapers and advertising to be constitutional.

## SUMMARY OF THE ARGUMENT

On April 22, 1987, the United States Supreme Court decided Arkansas Writers' Project, Inc. v. Ragland, 107 S.Ct. 1722 (1987). The Court struck down, on First Amendment grounds, a state sales tax exempting certain publications from taxation on the basis of content. The Arkansas tax law exempted religious, professional, trade and sports journals, as well as newspapers, but taxed all other publications. The Court stated that "'Regulations which permit the Government



to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.'" 107 S.Ct. at 1727 (citation omitted).

On April 23, 1987, Chapter 87-6, Laws of Florida, was signed by the Governor. As a result of Chapter 87-6, and related legislation, Chapter 86-166, Laws of Florida, the Florida sales tax is now applicable to the sale of most newspapers and magazines, as well as to most advertising. However, the new law exempts both religious publications and the sale of advertising to religious, educational and other nonprofit institutions. Such a sales tax scheme, which taxes both publications and advertising differentially on the basis of content, violates the First Amendment. The sales tax law must therefore be invalidated on that ground.

However, even if the sales tax were not imposed differentially, it would violate the First Amendment. An analysis of the historical evidence reveals the Framers intended the First Amendment to bar more than mere discrimination in taxation. It shows the Framers would have found at least equally troubling any application of a general sales tax to newspapers.

The state sales tax, as applied to newspapers, is the contemporary analogue of the odious eighteenth-century stamp taxes, or "knowledge taxes." These taxes imposed a duty on newspapers and other goods at the point of retail sale, as well as on advertising. They were opposed not only

because they were intended to suppress expression or because they singled out the press for discrimination. Indeed, the Stamp Act of 1765 did neither; it was a revenue raising tax of broad applicability. Even the first Stamp Act applied to goods other than newspapers and served revenue-raising, as well as other, purposes. In part, these Acts were opposed simply because they taxed the sale of newspapers to the public. A general sales tax on newspapers and advertising is unconstitutional because it, like the Stamp Act taxes, is precisely the type of "knowledge tax" the Framers intended the First Amendment to preclude.

The Framers' opposition to direct taxes on newspaper sales and advertising is complex and historically rooted in their deep antipathy toward the English knowledge taxes. Their posture is not reducible to simple abstract principles, but it may in part be attributable to certain unique characteristics of such taxes which they believed rendered them too dangerous to trust government to fairly administer.

The Framers feared the Stamp Acts because they directly taxed the exercise of a fundamental right, the dissemination and acquisition of knowledge. The Framers believed that as government may not tax prayers or speeches, it may not tax the dissemination or acquisition of news. This is, in fact, the central meaning of several of the Court's more venerable First Amendment decisions. See, e.g., Follett v. McCormick, 321 U.S. 573 (1944).

The Framers recognized the Stamp Acts were unrelated to the profitability of the newspapers to which they applied. Since the tax had to be paid even when a publisher made no money, the effect on a marginally profitable publication was to put it out of business. This was indeed the effect of the infamous Stamp Acts, and the Framers well knew it. They believed government should not be granted the power to levy such taxes because their consequence was an evil irrespective of their intent.

The Framers also feared stamp taxes on the press because, in the English experience, they often served to place newspapers beyond the means of the poor. Whether they discriminated or not, flat taxes on the acquisition of news kept newspapers out of the hands of the English lower classes. The Framers intended to give this government no such power.

By the time the First Amendment was adopted, no state imposed a tax on the sale of newspapers. Both Massachusetts and New York, the only states to place taxes on newspapers, had repealed them. This Court should adhere to the intent of the Framers of the First Amendment by declaring that the exemption of the press from sales taxation is constitutionally required.

## ARGUMENT

### I. The Law Is Unconstitutional Because It Taxes Publications And Advertising Differentially On The Basis of Content<sup>1/</sup>

Florida's sales tax, as amended by Chapters 86-166 and 87-6, Laws of Florida, contravenes the principles set forth last month in Arkansas Writers' Project v. Ragland, 107 S.Ct. 1722 (1987). The Court struck down Arkansas' sales tax on First Amendment grounds because it differentiated among publications on the basis of content. As a consequence of Chapters 86-166 and 87-6, Florida's sales tax suffers from the same constitutional infirmity. The provisions of the law which tax the sale of newspapers and advertising must therefore be invalidated.

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<sup>1/</sup> This argument addresses both the sales tax on newspapers and the sales tax on advertising. This Court declined to announce whether it would address the constitutionality of the sales tax as applied to newspapers, or whether it would limit its advisory opinion to the new sales tax on services. Because of this ambiguity, and because this argument applies equally to newspapers and advertising, both are addressed herein.

The Florida Press Association and the Boca Raton News, Inc., endorse the views of those parties who contend that the Justices' advisory opinion powers do not extend to answering the question asked by the Governor here, that the Justices do not have advisory opinion power regarding federal constitutional questions, and that the specific question asked by the Governor does not address any issue relating to the taxation of goods, as opposed to services. The Florida Press Association and the Boca Raton News, Inc. reserve their rights to challenge Chapters 86-166 and 87-6 under both state and federal law.

A. Background Of The Florida Sales Tax

From its adoption in 1949, Florida's sales tax law contained a large number of exemptions, Ch. 26319, §§6, 8, Laws of Florida (1949), including exemptions for newspapers, §212.08(6), Fla.Stat. (Supp. 1986), and religious publications, §212.06(9), Fla.Stat. (Supp. 1986).

The 1986 Legislature enacted Chapter 86-166, Laws of Florida, which (among other things) repeals the newspaper exemption effective July 1, 1987. Ch. 86-166, §5, Laws of Florida. The exemption for religious publications was not repealed.

Chapter 87-6 imposes a sales tax on services but exempts from the sales tax

Sales or leases to nonprofit religious, nonprofit charitable, nonprofit scientific, or nonprofit educational institutions when used in carrying on their customary nonprofit religious, nonprofit charitable, nonprofit scientific, or nonprofit educational activities, including church cemeteries.

Ch. 87-6, §14, creating §212.08(7)(o)(1)(b), Fla.Stat. Likewise, Chapter 87-6 leaves intact the longstanding comprehensive tax exemption for

the use, sale or distribution of religious publications, bibles, hymn books, prayer books, vestments, altar paraphernalia, sacramental chalices, and like church service and ceremonial raiments and equipment.

§212.06(9), Fla.Stat. (Supp. 1986).

Thus, the new sales tax on its face discriminates between newspapers and advertising in general, which are taxed, and religious publications and advertising sold to religious, charitable, scientific, educational and other nonprofit institutions, which are not taxed. Such differential taxation of the press clearly violates the First Amendment. That the differential is based on the content of the publication or advertising only makes the discrimination more offensive.

B. The Sales Tax Law Violates The First Amendment

Last month the United States Supreme Court held unconstitutional a state sales tax scheme which, like Florida's, discriminated among publications on the basis of content. The Arkansas law struck down by the Court "taxe[d] general interest magazines, but exempt[ed] newspapers and religious, professional, trade and sports journals." 107 S.Ct. at 1724. The Court held the tax improperly discriminated among members of the press because it was "not evenly applied to all magazines." Id. at 1727.

The Court found the tax even "more disturbing" because it differentiated between magazines on a basis "particularly repugnant to First Amendment principles," namely "content." Id. (emphasis in original). Thus, the Court stated:

"[A]bove 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 content." Police Dept. of Chicago v. Mosley, supra, 408 U.S. at 95, 92 S.Ct., at 2289. See also Carey v. Brown, supra, at 462-463, 100 S.Ct., at 2291. "Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." Regan v. Time, Inc., 468 U.S. 641, 648-649, 104 S.Ct. 3262, 3266-3267, 82 L.Ed.2d 487 (1984).

Id. at 1727-28.

The Florida tax, like the Arkansas tax, is imposed differentially. Chapter 87-6 exempts certain publications and advertising, namely religious publications and advertising sold to a wide variety of nonprofit institutions, solely on the basis of content. The tax thus clearly violates the First Amendment's guarantee of freedom of the press.<sup>2/</sup>

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<sup>2/</sup> The new sales tax is imposed differentially in a second significant way. Chapter 87-6 exempts from the sales tax on services "services provided by an employee to an employer." Ch. 87-6, §3, creating §212.0592(2), Fla.Stat. Thus, advertising services performed by an independent contractor are taxed, but identical services performed by an employee are not. Consequently, the tax is imposed differently on different speakers. Such discrimination likewise violates the First Amendment. See Arkansas Writers', supra; Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983).

II. The Law Is Unconstitutional Because  
It Imposes A "Knowledge Tax" Contrary  
To The Intent Of The Framers Of  
The First Amendment

The new sales tax imposes a tax on newspapers and advertising differentially according to their content. For this reason alone, the Court should invalidate the Law. However, even if the tax applied to all newspapers and advertising it would violate the First Amendment. As a careful historical analysis reveals, the Framers of the First Amendment were vehemently opposed to any form of taxation which acted as a "knowledge tax." Since the sales tax as applied to newspapers and advertising is just such a tax, it must be invalidated. See Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575, 584 n.6 (1983) (where there is "evidence that a particular law would have offended the Framers, [the Court has] not hesitated to invalidate it on that ground alone.").<sup>3/</sup>

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<sup>3/</sup> Although the Supreme Court noted in Arkansas Writers' that it had "indicated in Minneapolis Star that a genuinely nondiscriminatory tax on the receipts of newspapers would be constitutionally permissible," the statement was dictum. 107 S.Ct. at 1727. Both Arkansas Writers' and Minneapolis Star, like this case, addressed the constitutionality of discriminatory taxation. In any event, the historical evidence reveals that the Framers intended to bar direct taxation of newspaper sales and advertising. As the cited passage from Minneapolis Star indicates, the existence of such evidence is sufficient reason to invalidate the tax.



A. The Framers Intended to Preclude Taxation Of The Press Imposed At The Point Of Sale

The United States Supreme Court has observed that "[w]hen the Constitution was proposed without an explicit guarantee of freedom of the press, the Antifederalists objected." 460 U.S. at 584. The Federalists argued "that such a guarantee was unnecessary because the Constitution granted Congress no power to control the press." *Id.* The Antifederalists responded that without express protection for the press, the "necessary and proper" clause in combination with the taxing power could be used to abridge its freedom in much the way that power had been used in England. 3 J. Elliot (ed.), The Debates in the Several State Conventions on the adoption of the Federal Constitution 441-42 (George Mason); J. Main, The Antifederalists 154-55 (1961) (quoting "Timoleon" in N.Y. Journal, Nov. 1, 1787); Lee, "Letters from the Federal Farmer" IV, in H. Storing (ed.), The Antifederalist 59 (1985). As the Court noted in Minneapolis Star, "[t]he concern voiced by the Antifederalists led to the adoption of the Bill of Rights." 460 U.S. at 584. Because the "framers of the First Amendment were familiar with the English struggle," Grosjean v. American Press Co., 297 U.S. 233, 248 (1936), it is necessary to view the Antifederalists' position against the backdrop of the English experience with the infamous Stamp Acts or "knowledge taxes" to understand precisely their "concern."

1. The Infamous English Stamp Acts  
Were General Revenue Raising  
Measures Which Taxed Newspapers  
And Other Goods At The Point of  
Sale

By the end of the seventeenth century, as the popular demand for easily accessible information grew, the English Crown found it propitious to develop more subtle means to retain some control of the press. Public sentiment began to play a greater role in the conduct of governmental affairs, especially as competing factions of power sought public support for their respective positions. Laws which created and supported the licensing system were regarded as ineffective and unworkable and by 1694 were allowed to lapse. F. Siebert, Freedom of the Press in England, 1476-1776, 244, 305-06 (1952).

Despite the fact that the value of a free press was acknowledged by prominent government officials at the turn of the century, publications which commented on political affairs were still viewed with suspicion by government regulators. F. Siebert, supra, at 305-06. It was in this light that Parliament first considered taxing the press in order to regulate printed matter indirectly. F. Siebert, supra, at 306-10; 1 C.D. Collett, History of the Taxes on Knowledge 7 (1899). Parliament had just passed its first tax on printed matter (calendars and almanacs) in 1710, and in 1711 a report had circulated suggesting that taxation of

"weekly newspapers and pamphlets . . . would probably reduce the circulation of newspapers from 45,000 to not above 30,000." F. Siebert, supra, at 309 (footnote omitted). On January 17, 1712, at the request of the Ecclesiastical Convocation, Queen Anne addressed Parliament and deplored the

"great license . . . taken in publishing false and scandalous Libels such as are a reproach to any government. This Evil seems too strong for the Laws now in force; it is therefore recommended to you to find a Remedy equal to the Mischief."

F. Siebert, supra, at 309; C.D. Collett, supra, at 8.

But suppression was not the only purpose of the tax. Of at least equal concern to the Crown was the need to raise money to fight the War of the Spanish Succession. Stewart, John Lennox and The Greenock Newsclout: A Fight Against the Taxes on Knowledge, 15 Scot. Hist. Rev. 322, 326-27 (1918); J.B. Williams, History of English Journalism (1908); F. Siebert, supra, at 309. The newspaper stamp duty and the special tax on advertising in England "were a part of ordinary revenue measures; the position of the government was that the press, as a business, should pay its fair share of taxes." J. Gerald, The British Press Under Government Economic Controls 6 (1956).

Parliament responded on May 16, 1712 by passing the first general revenue tax which included a tax on newspapers. This enactment (10 Anne, c. 19), known as the

Stamp Act of 1712, placed a tax on imported linen; soaps; several kinds of agreements written on vellum, parchment, or paper; and printed papers, pamphlets, and advertisements. The Act earned its name because it required a stamp to be affixed on all documents, including newspapers at the point of sale. Collett, supra, at 8. The law also provided certain "exemptions" or "discounts". For example, there was a one-third "drawback" on soap used in making clothes or serges, since the wool industry had had a long history of favorable treatment by the government. There was also a "drawback" for paper used by the universities at Oxford and Cambridge and in Scotland, as well as for any books printed in Latin, Greek, Oriental, or Northern languages for the "encouragement of learning." C.D. Collett, supra, at 8-9. Thus, the early Stamp Act was directly analogous to the broad contemporary sales tax, even including a disparate array of exemptions.<sup>4/</sup>

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<sup>4/</sup> The contemporary form of the state sales tax is of relatively recent vintage; the first modern sales tax law was enacted by West Virginia in 1921, followed by Georgia in 1929. Morgan, Retail Sales Tax 3 (1964). Today some 45 states have a sales tax; only Alaska, Delaware, Montana, New Hampshire, and Oregon do not. St. Tax Guide (CCH) ¶60-000 at p. 6021 fn. In general, these sales taxes are peppered with exemptions which serve a variety of purposes -- from ameliorating the regressive character of the tax to placating special interest groups. Oster, State Retail Sales Taxation 114 (1957).

Whatever the intent of the English stamp tax, its effects were clear. The immediate consequence of the Stamp Act was the demise of several newspapers. F. Siebert, supra, at 312. As Sir Richard Steele, editor of the Spectator explained the day before the Stamp Tax went into effect: "This is the day on which many eminent authors will publish their last words." C.D. Collett, supra, at 12. The tax likewise retarded the establishment of mass-circulation newspapers. Id. at 5-6; Stewart, supra, at 326.

Parliament passed a second Stamp Tax Act in March 1765. This Act taxed legal documents (including contracts, court pleas, land grants, college diplomas, and liquor licenses), publications and advertisements, and gambling items (dice and playing cards). The stated purpose of the law was to defray "the expense of defending, protecting, and securing" the colonies. This purpose was real. A large public debt had been incurred during the Seven Years War, and the Stamp Act was only one of several measures designed to increase British revenues. C. Miller, The Supreme Court and the Uses of History 76 (1969).

2. The American Colonies Vehemently  
Opposed The Newspaper Tax  
Included in The Stamp Act of  
1765

The Stamp Act of 1765 so outraged the colonists that Parliament repealed it within a year. In passing this Stamp Act, Prime Minister George Grenville had touched "each nerve

center in American life at which either economic or intellectual activity was registered." J. Pole, Foundations of American Independence, 1763-1815 42 (1973). "No group in America was more directly affected than the publishers of the twenty-four newspapers in the mainland colonies." M. Jensen, The Founding of a Nation 126 (1968). Benjamin Franklin, who was serving as a colonial agent in London when the Stamp Act was adopted, wrote to America, "I think it will affect the Printers more than anybody . . . as a Sterling Halfpenny Stamp on every Half Sheet of a Newspaper, and Two shillings Sterling on every Advertisement, will go near to knock up one Half of both." Botein, "Printers and the American Revolution," in The Press & the American Revolution 11, 23 (B. Bailyn & J. Hench, eds., 1980). Foreign-language publications had to pay twice the normal rates, a severe blow to the German-language Press around Philadelphia, leading Henrich Miller, a German-language publisher, to call the Stamp Act "the most unconstitutional law imaginable." Schlesinger, The Colonial Newspapers and the Stamp Act, 8 N.E.Q. 66, 70 (1935).

Some newspapers set off their columns with heavy black mourning margins the day before the tax went into effect, while others printed silhouetted skulls and crossed bones to symbolize a dead free press. J. Lofton, The Press as Guardian of the First Amendment 2 (1980); M. Jensen, supra, at 127. The New Hampshire Gazette represented itself as

gasping, "I must Die, or submit to that which is worse than Death, be Stamped, and lose my Freedom." Schlesinger, supra, at 74 (emphasis in original). Many publishers defied the law, printing their newspapers on unstamped paper. In New York, Holt's Gazette added to its title the motto, "The United Voice of all His Majesty's free and loyal Subjects in America -- LIBERTY, PROPERTY and no STAMPS." Id. at 75 (emphasis in original).

"The newspapers played a tremendous role in political life from the Stamp Act onward." M. Jensen, supra, at 127. Newspapers reprinted liberally from each other, thus helping to unite the colonies. They appealed to the masses, stirred their emotions and urged them to action. Id. at 128. When stamped copies of newspapers from Barbados and Nova Scotia were found in Philadelphia, they were publicly burned. Schlesinger, supra, at 79 n.33. Thus the British themselves helped to make the American press an instrument of revolution. J. Lofton, supra, at 2; J. Pole, supra, at 423.

In 1765, an assembly of delegates from nine of the colonies met as the "Stamp Act Congress" to protest the tax. A formal complaint was issued, entitled "A Declaration of Rights and Grievances," the basic principles of which were later incorporated into the Declaration of Independence. Because of this opposition, the American stamp tax was repealed less than a year after its enactment. Z. Chafee, Free Speech in the United States 321 (1967). In 1787, a

leading Antifederalist, Samuel Bryan, wrote in the Philadelphia Independent Gazette and Freeman's Journal that "[i]t was not the mere amount of the duty on stamps, or tea that America opposed, they were considered as signals of approaching despotism, as precedents whereon the superstructure of arbitrary sway was to be reared." 2 H. Storing (ed.), The Complete Antifederalist 176-77 (1981) (emphasis in original).

3. The American Colonies So Opposed Taxes on Newspaper Sales That They Repealed All Such Duties By The Time The Bill of Rights Was Enacted

The English were surprised by the colonists' reaction to the Stamp Act of 1765, but the history of precursor taxes in both New York and Massachusetts foreshadowed the reception awaiting the tax. In New York, a tax was imposed on paper in 1756. It met with strong opposition which lead to its demise in 1760. L. Levy, Judgments: Essays on American Constitutional History 128 (1972). James Parker, printer of the New York Gazette, called the tax "like to a killing Frost," and complained in particular that New York's stamp tax disadvantaged him in competition with printers in nearby colonies. Thompson, Massachusetts and New York Stamp Acts, 26 Wm. & Mary Q. 257 (1969); Botein, supra, at 24.



In Massachusetts, a halfpenny newspaper tax was passed in 1755. As a result of this tax, one newspaper discontinued publication, while another voiced its opposition to the tax by printing articles on the freedom of the press extracted from contemporary London newspapers. C. Duniway, The Development of Freedom of the Press in Massachusetts 120 (1906).

By 1780, after the Declaration of Independence, nine of the newly-formed state governments included specific press clauses in setting up their state constitutions. By the time the Constitution was ratified, every state guaranteed the freedom of the press. These clauses were couched in terms similar to the eventual wording of the First Amendment to the Constitution. C. Duniway, supra, at 132-36. Nevertheless, in 1785 and 1786, Massachusetts enacted taxes on both newspaper sales and advertisements. Opposition to these measures was explicitly based on the view that the taxes violated the guarantee of the liberty of the press in the Massachusetts constitution:

A series of articles in the Massachusetts Centinel for April and May, 1785, are typical of the feeling against the tax. It was denounced as "the first Stone in the fabrick of Tyranny"; if the principle of such a tax were once admitted, it might be made prohibitory by a venal House of Representatives and thus "end the liberty of the press." It was contrary to the constitution, because it was a stab at the freedom of the press, and "whatever tends in the smallest

degree to deprive the people of political information, is inimical to the principles of Republicanism."

C. Duniway, supra, at 136 n.2. This is further evidenced by contemporary articles in the Boston Gazette:

"The sixteenth article on our Bill of Rights says: 'The Liberty of the Press is essential to the security of Freedom in a State: It ought not therefore to be restrained in this commonwealth.'"

\* \* \*

"The duty on advertisements also prevents our publishing that we have lately reprinted an excellent moral Discourse, entitled 'the Shortness and Affliction of Human Life illustrated'..."

F. Hudson, Journalism in the United States 164 (1873).

As a result of this opposition, the taxes on newspapers and advertisements were repealed by 1788. At the time the Bill of Rights was adopted, no state thought it proper to impose a sales tax on newspapers, and none did.

4. The Debates Over The Ratification  
Of The Constitution Demonstrate  
The Framers Did Not Intend  
Government To Levy Sales Taxes On  
Newspapers

The Constitution originally contained no Bill of Rights and no guarantee of the liberty of the press. At the Constitution Convention, the Federalists had successfully

argued that none was necessary.<sup>5/</sup> The immediate public reaction to the proposed Constitution, however, proved them wrong. The greatest single objection to the new Constitution was the lack of any explicit protection for individual rights, and specifically the liberty of the press. J. Main, supra, at 255; R. Rutland, The Birth of the Bill of Rights 218 (1955); H. Storing, What the Antifederalists Were For 64 (1981). The debate between the Antifederalists and the Federalists over the ratification of the Constitution centered on this objection. Antifederalists argued that without an explicit guarantee, the power to tax for the "general welfare" could be perverted and used to restrict the press. E.g., 3 J. Elliot, supra, at 441-42 (George Mason); J. Main, supra, at 154-55 (quoting "Timoleon" in N.Y. Journal, Nov. 1, 1787). They further argued that because the power to tax was not limited, it would extend to everything, including the press, unless a guarantee of press freedom was added. E.g., Lee, "Letters from the Federal Farmer" IV, XVI, in H. Storing (ed.), The Antifederalists, 49, 85-86; 4 H. Storing (ed.), The Complete Antifederalist 206-07 (Thomas

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<sup>5/</sup> Late in the Convention, Elbridge Gerry and Charles Pinckney moved that a clause be added to the proposed constitution guaranteeing "that the liberty of the Press should be inviolably observed --." M. Farrand, ed., The Records of the Federal Convention, II, at 617 (Madison). Roger Sherman responded, "It is unnecessary -- The Power of Congress does not extend to the Press," and the motion was voted down 6-5. Id. at 618. See M. Farrand, The Framing of the Constitution of the United States 124 (1913).

Cogswell). The Antifederalists explicitly stated that a Bill of Rights was needed to prevent the government from imposing stamp taxes on newspapers. As one pamphleteer wrote:

Congress have power to lay all duties of whatever kind, and although they could not perhaps directly bar the freedom of the Press, yet they can do it in the exercise of the powers that are expressly decreed to them. Remember there are such things as stamp duties and that these will as effectually abolish the freedom of the press as any express declaration.

3 H. Storing (ed.), The Complete Antifederalist 81-82 (emphasis in original). The Federalists argued primarily that no guarantee of the liberty of the press was necessary because nothing in the Constitution gave Congress the power to tax the press. E.g., 2 J. Elliot, supra, at 435-36, 453-54 (James Wilson); 3 J. Elliot, supra, at 469 (Edmund Randolph); 4 J. Elliot, supra, at 208-09 (Richard Spaight).

In the end, the Antifederalists prevailed. The Constitution was ratified, but only on the understanding that a Bill of Rights, including a guarantee of the liberty of the press, would follow immediately. An analysis of the arguments of the prevailing parties -- The Antifederalists -- is therefore essential to an understanding of the intent of the Framers of the First Amendment. 460 U.S. at 584-85.

The Antifederalists were concerned that the proposed Constitution could be abused by the new federal government and employed against the press. Richard Henry Lee, one of

the most widely read and respected of the Antifederalists, wrote in his "Letters From the Federal Farmer," of the danger to the press posed by the taxing power. Lee feared that, in the absence of an explicit constitutional guarantee, Congress could properly consider itself free to employ the taxing power against the press, just as it would against any other industry. And, because of the supremacy clause, state constitutional guarantees would be powerless to bar federal taxation of the press:

Should the printer say, the freedom of the press was secured by the constitution of the State in which he lived, congress might, and perhaps, with great propriety, answer, that . . . in exercising the powers assigned them, and in making laws to carry them into execution Congress are restrained by nothing beside the federal constitution.

Lee, "Letters From the Federal Farmer" IV, in H. Storing (ed.), The Antifederalist, at 59.

Lee expanded on this argument in Federal Farmer XVI. He initially noted the widespread belief that the freedom of the press "ought not to be restrained by any taxes." Then he warned the press is provided no protection by the fact that the Constitution does not expressly give the Congress the power to tax it. The danger, Lee notes, is that the power to tax is unlimited:

But, say the advocates, all powers not given are reserved: -- true; but the great question is, are not powers given, in the

exercise of which this right may be destroyed? . . . The question is, what laws will congress have a right to make by the constitution of the union, and particularly touching the press? By art. I, sect. 8, congress will have the power to lay and collect taxes, duties, imposts and excise. By this congress will clearly have power to lay and collect all kind of taxes whatever-taxes on houses, lands, polls, industry, merchandise, &c.-taxes on deeds, bonds, and all written instruments-on writs, pleas, and all judicial proceedings, on licenses, naval officers papers. &c. on newspapers, advertisements, must cease when taxed beyond its profits; and it appears to me, that a power to tax the press at discretion, is a power to destroy or restrain the freedom of it.

Lee, "Letters From the Federal Farmer" XVI, in H. Storing (ed.), The Antifederalist, at 85-86 (emphasis added).

Lee's fear regarding the taxing power and the press was voiced by many Antifederalists. In New York, Melancton Smith explained why the Constitution needed a press clause: "We contend, that by the indefinite powers granted to the general government, the liberty of the press may be restricted by duties, &c. and therefore the constitution ought to have stipulated for its freedom." 1 B. Schwartz (ed.), The Bill of Rights: A Documentary History 576 (1971).

The Antifederalists did not distinguish between taxes levied specifically on the press for purposes of suppression and general taxation of the press. A constitutional guarantee of the freedom of the press was understood to bar both equally. Thus, in Federal Farmer IV,

Lee notes that, without an explicit guarantee, Congress would be free both to lay "any duties whatever on printing" and to lay "duties particularly heavy on certain pieces printed." Likewise in Federal Farmer XVI, Lee explains that left unrestricted the taxing power will reach "newspapers [and] advertisements," just as it does "industry [and] merchandise." In the minds of the Antifederalists, a guarantee of the liberty of the press was essential to stop Congress from laying any duties at the point of sale on the press.

The important lesson taught by the history of the Framers' opposition to the stamp taxes is they were deeply offended by any tax on the sale of newspapers to the general public. Even where stamp taxes were enacted for revenue raising purposes and had a broad applicability, they were anathema to the Framers. An important purpose of the First Amendment was to ban taxation of the press at the point of sale, which necessarily precludes imposition of a general sales tax.

B. The Framers Intended the First Amendment to Bar Any Tax Which Acted as a "Knowledge Tax" Because They Considered The Potential for Abusive Consequences Too Great

The unrelenting antipathy of the Framers toward any tax on knowledge, whether in the form of the Stamp Act of the colonial era or the contemporary sales tax on newspapers, reflects most profoundly the Framers' reading of English and

colonial history and the socio-political world of eighteenth century America. The complexity of the Framers' rationale does not lend itself to any reductionist explanation, but several powerful themes run through the Framers' writings on those matters which help in part to explain their view.

First, the Stamp Act, like the sales tax, directly burdened the exercise of a right: the acquisition of news and information. As New Hampshire Chief Justice Thomas Cogswell, wrote:

"[t]he liberty of the Press is essential to a free people, it ought therefore to be inviolably preserved and secured in the Bill of Rights, and no duty or tax to be imposed thereon, of what name or nature soever."

4 H. Storing (ed.), The Complete Antifederalist 206-207. Similarly Lee, in his "Letters from the Federal Farmer" noted:

"All parties apparently agree, that the freedom of the press is a fundamental right, and ought not to be restrained by any taxes, duties, or in any manner whatever."

Lee, "Letters From the Federal Farmer" XVI, in H. Storing (ed.), The Antifederalist 85.

This Court has long recognized the danger of allowing states to tax the exercise of constitutional rights. Follett v. McCormick, 321 U.S. at 578 (no requirement "to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege"); Murdock v.



Pennsylvania, 315 U.S. 105, 113 (1943) ("A state may not impose a charge for the enjoyment of a right granted by the federal constitution."); See Jones v. Opelika, 319 U.S. 103 (1943).<sup>6/</sup>

Second, the Framers were deeply concerned by the fact that the stamp tax (like the sales taxes) imposed a burden on newspapers unrelated to their profitability. Richard Henry Lee expressed this fear most clearly: "Printing, like all other businesses, must cease when taxed beyond its profits." Lee, "Letters From the Federal Farmer", XVI, in H. Storing (ed.), The Antifederalist 85-86 (emphasis added).

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<sup>6/</sup> In Minneapolis Star, the Court suggested in dicta that Breard v. Alexandria 341 U.S. 622 (1951) "substantially undercut" the line of cases which began with Martin v. Struthers, 319 U.S. 141 (1943). But neither Martin, nor Breard addressed the question of whether a direct tax may be placed on the exercise of a right since neither involved taxation. The Breard decision held only that any First Amendment interest in soliciting periodical subscriptions door-to-door at private homes, in the absence of an invitation from the homeowner, must give way to the privacy rights of the homeowner. That Breard did not disturb Murdock and Follett regarding the rule of law prohibiting direct taxation of rights is evident from the restatement of that position by the Court in the term immediately following the Breard decision. Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1952).

Whether Breard itself remains good law in any respect is open to serious doubt. Compare Breard with Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 n.7 (1980) ("To the extent that any of the Court's past decisions discussed in Part II [which include Breard] hold or indicate that commercial speech is excluded from First Amendment protection, those decisions are no longer good law.").

The Framers knew that marginally profitable newspapers, whether large or small, often did not survive a tax imposed at the point of sale. They knew this because the English and Massachusetts experience demonstrated it. As Professor Siebert starkly observed: "A sizable number of newspapers were immediately killed by the Act." F. Siebert, supra, at 312. Jonathan Swift noted the draconian effect of the Stamp Act on the English "penny press" with typical, yet telling, hyperbole:

Do you know that all Grub-street  
is dead and gone last week? . . .  
[N]ow every single half-sheet pays a  
halfpenny to the queen. The  
Observator is fallen; the Medleys are  
jumbled together with the Flying Post;  
the Examiner is deadly sick; the  
Spectator keeps up and doubles its  
price.

Id. at 313. Because they knew the potential danger of direct sales taxes to economically weak publications, the Framers greatly feared them. It was no solace to them that a sales tax which applied to a variety of goods would drive marginally profitable non-press companies out of business as effectively as it killed the profitless members of the press.

Third, perhaps the Framers' greatest concern was the effect of a stamp tax on newspaper sales, particularly the less affluent populace. They understood that the English Crown had used such taxes to place acquisition of the news beyond the reach of many members of the public. As noted above, the intent of the first stamp tax was in part to

reduce newspaper circulation by one-third. F. Siebert, supra, at 308-09. The primary victims of the tax were the inexpensive publications which had formerly circulated widely among the general public:

Was there no way by which, without the necessity of constant contention, private men might be prevented from using the Press to make their opinions public? The pamphleteers were not rich, but they were often persons of education, and not penniless. When only a few copies of their writings were wanted they could pay for them, but now that reading was become more common, and that great numbers of copies were printed, the cost had, to a great extent, to be paid by the readers. If these sheets could be taxed their distribution might become difficult, and when any one attempted to evade the tax he could be punished, not as a libeller, but as a smuggler, and the character of what was printed would not come under discussion, as it generally would in a trial for libel.

Collett, supra, at 7.<sup>7/</sup>

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<sup>7/</sup> "Cheapness and expansion were evidently becoming the characteristics of the periodical press; to which every tax, however light, was an impediment. Hence a new movement for the repeal of all 'Taxes on knowledge' led by Mr. Milner Gibson, with admirable ability, address, and persistence. In 1859, the advertisement duty was swept away; and in 1855, the last penny of newspaper stamp was relinquished. Nothing was now left but the duty on paper; and this was assailed with no less vigor. Denounced by penny newspapers, which the repeal of the stamp duty had called into existence; complained of by publishers of cheap books; and deplored by the friends of popular education, it fell, six years later, after a parliamentary contest memorable in history. And now the press was free alike from legal oppression and fiscal impediments." T. May, Constitutional History of England 215 (1891).

Whether these concerns of the Framers retain all of their vitality today is beyond the issue and the record of this case. It is enough that a law imposing a tax on the sale of newspapers and advertising "would have offended the Framers"; the Court should not "[hesitate] to invalidate it on that ground alone." 460 U.S. at 584 n. 6.

CONCLUSION


The Court should advise the Governor that those provisions of Chapters 86-166 and 87-6, Laws of Florida, that tax the sale of newspapers and advertising are facially unconstitutional.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true copies of the foregoing Initial Brief of The Florida Press Association and the Boca Raton News, Inc. was served by mail this 29th day of May, 1987 upon the following:

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