

IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,533

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

Brief of Capital Cities/ABC, Inc., CBS Inc.
and National Broadcasting Company, Inc.

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BRIEF OF CAPITAL CITIES/ABC, INC., CBS INC.
AND NATIONAL BROADCASTING COMPANY, INC.

This brief is submitted by Capital Cities/ABC, Inc. ("CapCities"), CBS Inc. ("CBS") and National Broadcasting Company, Inc. ("NBC") in response to this Court's Orders of May 13, 1987, and May 21, 1987, in which interested parties were invited to submit briefs concerning the issues raised by Governor Martinez's May 12, 1987, Request for Advisory Opinion (the "Request"). For the reasons set forth below, CapCities, CBS and NBC submit that the Court need not and should not in this proceeding prejudge, or prejudice the proper adjudication of, the difficult and substantial legal questions that have arisen concerning the meaning of Chapter 87-6, Laws of Florida, or the validity of that statute under the United States and Florida Constitutions. This Court should answer the Request, if at all, only by advising the Governor whether he is required by Article VII, § 1(d) of the Florida Constitution to disregard Chapter 87-6 prior to any adjudication in a proper case or controversy as to its meaning and validity.

Preliminary Statement

Chapter 87-6 is, as the Court knows, an extremely broad and complicated statute. Its printed version runs 175 pages in length, and it contains literally dozens of novel provisions that touch upon a wide range of business transactions. It has been the subject of substantial political and public controversy both within the State and among potentially affected parties throughout the country.

Serious concerns have been suggested as to whether particular provisions of Chapter 87-6 may violate, on various different grounds, inter alia, Articles I and VI of the United States Constitution; the First, Fourth, Sixth and Fourteenth Amendments to the United States Constitution; and/or Articles I, II and III of the Florida Constitution. These concerns apply to the validity of the statute on its face, as it may be applied to particular transactions by particular parties, or both. Governor Martinez's Request itself makes clear the breadth and gravity of some of these questions and enumerates several of the broad categories into which they fall. Briefs of other interested parties that are today being filed in this proceeding supply further evidence of the scope and difficulty of these constitutional questions.

Some of the constitutional concerns of particular significance to CapCities, CBS and NBC have never been decided by

any court. Many of the questions raised by others are simply unanswerable without reference to the identity of the putative taxpayer and the particular circumstances surrounding the application of the tax to particular transactions by that taxpayer. Still other questions that may arise as to the possible constitutional infirmities of the statute cannot be anticipated at this time.

It is plain that the validity vel non of Chapter 87-6 cannot be resolved in this proceeding in any fashion remotely consistent with any notion of proper constitutional adjudication. It is equally clear that, if this Court now attempts to opine on some or all of the legal issues affecting that very broad question, their proper adjudication in the courts of this State is likely to be seriously prejudiced. CapCities, CBS and NBC submit that there is no justification, either under the Florida Constitution or in the light of the most basic prudential considerations, for this Court to pursue such a course of action at this time.

Substantial questions have also been raised as to whether this Court's jurisdiction under Article IV, § 1(c) of the Florida Constitution has been properly invoked by the Governor. Whatever the precise reach of that provision may be, it is at the very least evident that it cannot sensibly be construed as a warrant to enmesh this Court in a thicket of questions concerning

the meaning or possible unconstitutionality of all or part of a complex new revenue measure as it applies or may apply to a host of differently situated private parties.

The narrow question presented by the Request is whether Governor Martinez is currently required under Article VII § 1(d) of the Florida Constitution to submit an amended budget to the legislature and to disregard Chapter 87-6, which has not been adjudicated in a real case or controversy to be partly or wholly invalid. CapCities, CBS and NBC submit that, if the court finds it proper to answer that question, its answer should address only the purely public matters embodied by Article IV § 1(c) -- i.e. advising the governor as to his constitutional responsibilities. The court need not and should not address or prejudge the dozens of difficult issues that are subsumed in the question whether the statute is valid.

The Interest of CapCities, CBS and NBC

CapCities and CBS are corporations organized under the laws of the State of New York; NBC is a corporation organized under the laws of Delaware. All three have their principal places of business in New York City. Among the activities of CapCities, CBS and NBC that are most pertinent to this proceeding are their operation of national radio and television broadcast networks, in connection with which each produces and makes available for transmission throughout the nation advertiser-sponsored entertainment and sports programming and news and public affairs broadcasts.

CapCities, CBS and NBC may be affected in a variety of ways by Chapter 87-6. Of particular concern to CapCities, CBS and NBC in this proceeding is the apparent intent of Chapter 87-6 to impose a tax on out-of-state corporations and individuals that purchase advertisements for distribution by national media, solely on the ground that the advertisements are to be broadcast or otherwise disseminated in Florida, as well as elsewhere throughout the nation. The effect of imposing a tax on such purchases of advertising would be to increase the cost of advertising in media disseminated in Florida and thereby to make such advertising less attractive to advertisers. Indeed, some advertisers have already requested that CapCities, CBS and NBC not broadcast their national advertisements in Florida. Thus,

even though the statute does not require CapCities, CBS and NBC themselves to collect the tax imposed on out-of-state national advertisers, CapCities, CBS and NBC have a substantial interest in the interpretation and validity of Chapter 87-6. See generally Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 267 (1984).

So far as we are aware, Chapter 87-6 is the first instance in which a state has sought to impose a compensating use tax on a person not physically present in the state at the time of that person's alleged "use." In that respect, it raises constitutional issues beyond those presented by statutes which place a duty on an out-of-state seller merely to collect and remit a use tax imposed on a user who is physically present in the state at the time of use. Compare National Bellas Hess v. Department of Revenue, 386 U.S. 753 (1967), with National Geographic v. California Equalization Bd., 430 U.S. 551 (1977). It also appears to be the first statute that defines as a presumed "in state use" an act (e.g., the purchase of network advertising) that does not involve the user's physical presence within the state.

In addition, Chapter 87-6 levies a use tax directly on advertising as such. Advertising is of course a form of speech protected by both the United States and Florida Constitutions. While advertising is subject to tax under the new statute, other forms of speech, such as education, religious activities,

professional sports exhibitions, motion picture films and some private interstate communications, along with other "service" activities such as transportation, health services, brokerage and insurance, are exempted from the tax. Moreover, the tax is levied directly on some advertisers, including those who use advertising to deliver political speech or other messages, while other advertisers, such as the State of Florida, its subdivisions and veterans' organizations, are exempt from the tax, even when they engage in similar types of advertising. See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983); Harper v. Virginia Board of Elections, 383 U.S. 663, 665, n.5 (1966); Murdock v. Pennsylvania, 319 U.S. 105 (1943).

Public Law 87-6 thus presents weighty constitutional issues of first impression that are of particular interest to CapCities, CBS and NBC. These issues are unusually complex and patently unsuitable for resolution by an advisory opinion.

Argument

CapCities, CBS and NBC believe that this Court need not and should not decide in this proceeding the constitutionality vel non of Public Law 87-6 in all its many currently unknowable potential applications. It also need not and should not opine herein in a fashion which prejudices, or will prejudice the fair and effective resolution of, the disputes that appear certain to arise between the network advertisers and the State of Florida

concerning their respective rights and duties under Chapter 87-6. Any advisory opinion by this Court should therefore be limited to advising the Governor as to his duties under Article VII, § 1(d) of the Florida Constitution. The reasons that the Court should so limit its decision are found both in the grant of authority to the Court to render advisory opinions in the first instance and in more general principles of due process and judicial decision-making.

I. Under the Florida Constitution, This Court is Authorized To Render Advisory Opinions Only As To the "Powers and Duties of the Governor," and Not To Render Such Opinions Regarding the Legal Rights or Obligations of Private Parties

This proceeding arises under Article IV, § 1(c) of the Florida Constitution. That section provides in pertinent part that the Governor may request the opinion of the Justices of this Court "as to the interpretation of any portion of this constitution upon any question affecting his [the Governor's] executive powers and duties." (Emphasis added.)

Mindful of the dangers inherent in the issuance of advisory opinions, this Court has in the past narrowly construed its authority under section 1(c). The Court's prior decisions make clear that that section is intended to provide a mechanism for the Governor to receive advice as to how he should carry out his duties, and not a means to circumvent ordinary procedures for judicial resolution of disputes involving private parties. See,

e.g., In re Advisory Opinion to the Governor, 151 Fla. 44, 9 So. 2d 172, 174 (1942) (advisory opinion appropriate only as to matters that "directly affect the executive powers and duties of the Governor"). Typically, this Court has dealt with such questions as whether the governor has authority to call a special primary election, Advisory Opinion to the Governor, 388 So. 2d 554 (Fla. 1980), whether the governor may by appointment fill a vacancy created by the death of a state senator between the primary and general elections, Advisory Opinion to the Governor, 157 Fla. 885, 27 So. 2d 409 (1946), and whether the governor is empowered to extend a special session of the Florida legislature. Advisory Opinion to the Governor, 206 So. 2d 641 (Fla. 1968). In none of these instances was the Court called upon to resolve, or did it resolve, questions concerning the constitutionality of legislation as applied to private parties.

Indeed, to our knowledge, this Court has never exercised its powers under Article IV, § 1(c) of the Constitution either to declare a statute to be valid or invalid as applied to particular parties or otherwise to prejudge disputes involving such parties. To the contrary, the Court has previously recognized that its powers under Article IV, § 1(c) are limited to advising the governor as to his duties and responsibilities under the State Constitution, In re Advisory Opinion to the Governor, 96 So. 2d 900, 902 (Fla. 1957), and it has accordingly refused to decide questions concerning the meaning or validity of state

statutes, at least where interests of private parties may thereby be compromised. As this Court explained in In re Advisory Opinion to the Governor, 113 So.2d 703, 705 (Fla. 1959):

"This court has many times declined to pass upon the constitutionality of a statute in rendering advisory opinions, particularly where such a test can best be accomplished in adversary proceedings appropriately briefed and buttressed by argument of counsel. This policy is the product of the historical recognition of the presumed constitutionality of an act of the Legislature until such presumption is set at rest by a court of competent jurisdiction in a proper adversary proceeding."

Accord, In re Opinion of Justices, 54 Fla. 136, 44 So, 756 (1907).^{1/}

The Court should not and need not depart from those principles here. Governor Martinez's Request is based on his asserted need for advice as to his "executive duties and responsibilities as chief executive" under the Constitution. (Request at 1.) The Governor seeks guidance as to whether he is required

^{1/} In In re Advisory Opinion to the Governor, 243 So. 2d 573 (Fla. 1971), the Court advised the governor that the State Constitution prohibited imposing an income tax upon both natural and non-natural persons including corporations. That case is noteworthy in two respects: First, the Court addressed only the meaning of certain provisions of the State Constitution and did not either construe or assess the validity of any particular statute. Second, and more important, the Court's decision did not in any way cast doubt on any statutory or constitutional claims of private parties. The Court's decision in In re Advisory Opinion of Governor Civil Rights, 306 So.2d 520 (Fla. 1975), is to the same effect.

"to submit an amended budget to the legislature for consideration which eliminates as a revenue source taxes collected" pursuant to Chapter 87-6. (Id. at 5-6.) This question requires determining only whether the Governor is obliged to disregard comprehensive legislation duly enacted by the state legislature and not yet adjudicated in a real case or controversy to be partly or wholly invalid.

It is not necessary to decide, and indeed no one can know at this time, how Chapter 87-6 will be applied in the myriad complex factual circumstances about which disputes may arise, or whether individual taxpayers or groups of taxpayers to whom the statute might apply may have valid statutory or constitutional objections to the imposition of the tax upon them. The Court should not in these proceedings express views about those issues.

II. Other Important Constitutional Principles
Would Be Undermined Were The Court To
Address Issues Concerning the Meaning or
Validity of Chapter 87-6 In This
Proceeding

In more focused and less hurried proceedings involving a real case or controversy, the Court may rule that some provisions of Chapter 87-6 are unconstitutional on their face. But resolution of other issues concerning the validity of the statute will require careful attention to the particular factual circumstances. The statute contains hundreds of provisions that affect countless types of transactions in different and sometimes

obscure ways. Regulatory proceedings that will affect the scope and significance of the statute are underway at present. No one now knows precisely what the statute means or how it will be applied in various factual contexts, many of which are not yet even anticipated. Nor is anyone able fully to assess the constitutional validity of the statute as applied to all the myriad transactions potentially within its reach. These advisory opinion proceedings do not provide an adequate record or opportunity for the Court to decide those issues.

This Court has recognized the long-established principle of American law, to which the procedures under Article IV, § 1(c) of the Florida Constitution are a narrowly construed exception, that courts generally do not render advisory opinions. E.g., Askew v. City of Ocala, 348 So. 2d 308, 310, (Fla. 1977). This principle, which is embodied in the jurisprudence of both state and federal courts, counsels that courts should not decide "abstract, hypothetical or contingent questions." Federation of Labor v. McAdory, 325 U.S. 450, 461 (1945); accord, United States v. Evans, 213 U.S. 297 (1909); Snedeker v. Vernmar, Ltd., 151 So.2d 439, 441 (Fla. 3d DCA 1963). While Governor Martinez's concern about whether he must submit a new budget may not be "abstract, hypothetical or contingent," the question whether Chapter 87-6 validly applies to any particular transaction or out-of-state corporation or individual surely is at present.

Courts have recognized that advisory opinions are dangerous for several reasons, all of which apply directly here. First, such opinions often result in ill-focused or unconsidered judicial decisions because the issues are not presented in a concrete context or the parties do not present legal or factual arguments with appropriate, focused vigor. "The legal consequences," Chief Justice Hughes noted, "flow from the facts and it is the province of the courts to ascertain and find the facts in order to determine the legal consequences." Aetna Life Insurance v. Haworth, 300 U.S. 227, 242 (1937). There is therefore a grave risk that an advisory opinion rendered in a proceeding in which there is no meaningful record will result in a mistaken decision. As the United States Supreme Court put it in United States v. Freuhauf, 365 U.S. 146, 157 (1961):

"Such opinions, such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of multi-faceted situations embracing conflicting and demanding interests, we have consistently refused to give."

See also, Baker v. Carr, 369 U.S. 186, 204 (1962) ("concrete adverseness which sharpens the presentation of issues"); Glendale Fed. S. & L. v. State Dept. of Ins., 485 So.2d 1321 (Fla. 1st DCA 1986); Frankfurter, A Note on Advisory Opinions, 37 Harv. L. Rev. 1002, 1006 (1924).

Second, advisory opinions based on hypothetical facts or contrived assumptions about the application of a statute to particular individuals may prejudice future litigation involving more concrete and focused disputes. While the advisory function is generally characterized as extrajudicial on the theory that the justices are forming a legal opinion rather than dealing with a dispute, advisory opinions may as a practical matter have precedential effect in the courts similar to that of litigated decisions. See State ex rel. Williams v. Lee, 121 Fla. 815, 164 So. 536 (1935).

Indeed, it is beyond dispute that a statement by this Court of its views as to the constitutionality of all or any part of Chapter 87-6, no matter how tentative those views may be, will affect the perceptions of the lower Florida courts in future litigation involving similar issues, regardless whether this court intends such a result. See, In re Advisory Opinion to the Governor, 306 So.2d 520 (Fla. 1975). Such a result, in turn, may well prejudice the ability of litigants raising serious constitutional challenges to develop a record necessary to the fair adjudication of their claims. In short, whether binding or not, any decision of this Court on the constitutionality of a particular provision can have a significant impact on the rights of parties whose disputes have not yet taken shape.

Third, it is fundamental that courts should decide difficult constitutional questions only when it is necessary that they do so. As the Supreme Court explained in Federation of Labor v. McAdory, 325 U.S. 450, 471 (1945):

It would be an abuse of discretion for this Court to make a pronouncement on the constitutionality of a state statute before it plainly appeared that the necessity for it had arisen, or when the Court is left in uncertainty, which it cannot authoritatively resolve, as to the meaning of the statute when applied to any particular state of facts.

Accord Electric Bond & Share Co. v. SEC, 303 U.S. 419, 443 (1938); State v. Inter-American Center Authority, 84 So.2d 9, 17 (Fla. 1955). For the Court to address the sweeping constitutional issues outlined in Governor Martinez's Request would directly contravene this principle. Especially in a case such as this, where the statute is complex and ambiguous and ongoing regulatory and interpretative proceedings have not been completed, it is premature to reach general constitutional issues that may never need be decided.

Beyond these general principles, other factors call for special caution here. Some of the questions that have been raised about Chapter 87-6 touch upon the most sensitive and constitutionally protected interests in our society. To impose a selective tax on advertising and other kinds of speech, including political or religious speech, while exempting other activities,

raises serious issues under the First Amendment to the United States Constitution and its analogue, Article I, § 4 of the Florida Constitution. See, e.g., Arkansas Writers' Project v. Ragland, 55 U.S.L.W. 4522 (April 22, 1987); Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983); Murdock v. Pennsylvania, 319 U.S. 105 (1943). Similarly, any effort by Florida to tax out-of-state corporations and individuals on the presumed use in Florida of national advertising purchased and enjoyed by them without being present in Florida would raise serious issues under the Commerce and Due Process clauses of the United States Constitution and Article I, § 9 of the Florida Constitution. See, e.g., Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977); National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967); Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954).

Governments and the courts have a special duty to refrain from taking actions that might directly or indirectly inhibit a robust exercise of constitutionally protected freedoms. If this Court is to determine whether or not Florida may constitutionally impose a tax on those who speak by means of advertising, it should do so only after it has developed a full and well-considered record in a concrete adjudicatory context. Were this Court to suggest in these abbreviated proceedings that the State has broad powers to impose taxes on such advertising, it could well inhibit those activities and impose irreparable

constitutional harm on private parties who cannot develop the necessary factual and legal record in these advisory proceedings.

In addition, as Governor Martinez's Request recognizes, the questions that have been raised concerning Chapter 87-6 arise under both the Florida Constitution and the United States Constitution. Article IV, § 1(c) of the Florida Constitution expressly limits the authority of this Court to questions arising under the Florida Constitution. See, e.g., In re Advisory Opinion to Governor Request, 388 So.2d 554, 555 (Fla. 1980). Nevertheless, even if the Court were to limit its discussion to matters arising under the Florida Constitution, its decision would likely prejudice the ability of parties in subsequent state court proceedings to an adequate adjudication of their federal constitutional claims. This result would be especially inappropriate in light of the fact that the Court's opinion in these proceedings may not, because of its advisory character, be capable of prompt review by the United States Supreme Court.

Conclusion

For the foregoing reasons, CapCities, CBS and NBC respectfully urge this Court not to express an opinion about, or otherwise to prejudge or prejudice the proper adjudication of disputes concerning, the meaning of Chapter 87-6 or the validity of that statute as applied to particular private parties. The Court should instead either decide that it cannot answer the

questions posed in Governor Martinez's Request or, at most, advise Governor Martinez as to his duties under Article IV, § 1(d) of the Florida Constitution.

Respectfully submitted,

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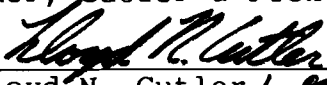
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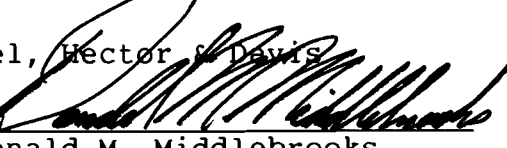
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