SUPREME COURT OF FLORIDA

CASE NO. 70,533

IN RE

ADVISORY OPINION OF THE GOVERNOR
REQUEST OF MAY 12, 1987

BRIEF OF FLORIDA INFORMANAGEMENT SERVICES, INC.

JACK M. SKELDING, JR.
Parker, Skelding, McVoy & Labasky
Post Office Box 669
Tallahassee, Florida 32302
(904) 222-3730

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STATEMENT OF THE CASE AND FACTS

This Court has exercised its discretionary jurisdiction to respond to a request from the Governor of Florida, pursuant to Article IV, Section 1(c) of the Florida Constitution, which provides that the governor "may request in writing the opinion of the justices of the Supreme Court as to the interpretation of any portion of this Constitution upon any question affecting his executive powers and duties." In Re: Advisory Opinion of the Governor Request of May 12, 1987, _____ So.2d _____ (Fla. 1987).

In its Interlocutory Order dated May 13, 1987, this Court agreed to answer the following question:

> Did the Legislature by enacting Chapter 87-6, Laws of Florida, validly create revenue sources from the tax imposed on the sale or use of services consumed or enjoyed in this State as enumerated therein or did it fail in that effort which will require me to propose a supplemental budget which either reduces state expenditures or attempts to identify and propose alternative sources of revenue so that the budget of this State will be in balance as dictated by Article VII, Section 1(d), Florida Constitution?

In its Interlocutory Order, this Court also permitted interested parties to file briefs discussing the constitutionality or unconstitutionality of the tax created by the Legislature of the State of Florida in Chapter 87-6. This decision is in accordance with Fla. R. App. P. 9.500 which states "the Court may permit persons whose substantial interests may be affected to be heard on

the questions presented through briefs, oral arguments, or both." (emphasis added).

On May 29, 1987, attorneys for FIserv Tampa, Inc. (FIserv Tampa) and North American Financial Services, Inc. (NAFS) filed Briefs with this Court challenging the constitutionality of one exemption to the sales tax on services.

It is the contention of Florida Informanagement Services, Inc. (FIS) that neither of these Briefs is in compliance with the Interlocutory Order of this Court. The Briefs are outside the scope of this Advisory Opinion as they do not address the constitutionality or unconstitutionality of the sales tax on services or the constitutional power of the Legislature of the State of Florida to enact a tax on the sale or use of services consumed or enjoyed in this state. The Governor requested an advisory opinion from this Court because if the tax is declared unconstitutional he will need to find other sources of revenue to balance the budget. If any single exemption is found unconstitutional, the result will be to bring in more revenues. The legislature expressly provided that:

> if any exemption is declared facially unconstitutional by a court of competent jurisdiction, it is the intent of the Legislature that the exemption be deemed inoperative as to all persons and not expanded to encompass services or persons not expressly exempted from the tax. Committee Substitute for Senate Bill 143.

Therefore, the Briefs of FIserv Tampa and NAFS are irrelevant to the purpose for which the Governor seeks the advisory opinion.

FIS also contends that the issues raised in the Briefs of FIserv Tampa and NAFS are inappropriate in this forum and would be more properly raised in the Circuit Courts of Florida. However, since the Briefs have been filed, FIS is compelled to respond to the issues raised by FIserv Tampa and NAFS.

The legislative history of Chapter 87-6 reveals the thorough consideration given the law before it was enacted. After an extensive review by the Committee on Finance, Tax and Claims and the Committee on Appropriations, the sales tax on services bill (Senate Bill 777) was passed by the full Senate and sent to the House of Representatives. The House, which had already scrutinized a similar bill (House Bill 1250), passed the amended Senate version. On April 23, 1987, both houses passed the bill as amended by the Conference Committee Report, and it was signed into law by the Governor. On June 6, 1987, during the extended legislative session, the Legislature approved a "glitch bill" (Committee Substitute for House Bill 1506) which amended portions of Chapter 87-6, including Exemption 35, Section 3, the subject of this Brief. The new law becomes effective on July 1, 1987.

When it approved the passage of the sales tax on

services, the Florida Legislature was fully aware of the various tax exemptions it provided in the law including the 51 services listed in Section 3 of Chapter 87-6, and in particular, Exemption 35 which provides an exemption for data processing services performed for a financial institution by a service corporation of that financial institution under certain specified conditions. The exemption will be applied only to those services provided to parent financial institutions by their subsidiary. Any data processing services performed by the service corporation for a non-parent financial institution will be taxable.

In their Initial Briefs, FIserv Tampa and NAFS would have this Court believe they are identical to FIS and are providing the same service to the same market. This argument is absurd. Both the Florida Senate and the Florida House of Representatives were fully aware that private companies such as FIserv Tampa and NAFS would not qualify for this exemption because of major differences between these two companies and those companies similarly situated to FIS. While the former supply data processing services to <u>various</u> corporations on a for-profit basis and pay out dividends, the latter are owned <u>entirely</u> by savings and loans or savings banks which make investments of varying amounts to purchase stock in <u>their own service corporation</u>.

Contrary to the Briefs submitted to this Court by both NAFS and FIserv Tampa, not only does Exemption 35 limit to whom the service corporation may provide tax-free data processing services but it provides an open door for other savings and loans and savings banks to organize a service corporation which could provide tax-exempt services back to the owners.

Exemption 35, as amended by the "glitch bill", provides an exemption for:

> Data processing services performed for a financial institution by a service corporation of that financial institution, provided:
>
> (a) The service corporation is organized pursuant to s. 545.74, Rules of the Federal Home Loan Bank Board;
>
> (b) All capital stock of the service corporation may be purchased by only savings and loan associations and savings banks having operations in this state;
>
> (c) No savings and loan association or savings bank owns, or may own, more than 10 percent of such service corporation's outstanding capital stock;
>
> (d) Every eligible savings and loan association or savings bank shall own an equal amount of capital stock or shall, on such uniform basis as the service corporation shall determine, own an amount of such stock equal to a stated percentage of its assets or savings capital at the time the stock is purchased, or an amount of such stock equal to its pro-rata share of accounts serviced;
>
> (e) As used in this subsection, "financial institution" means any savings and loan association or savings bank organized under the laws of this state, or of another state, or of the United States.

In drafting the above provision, the Legislature intentionally restricted the exemption to specific service corporations, i.e. those owned solely by savings and loans or savings banks which make investments to purchase stock in their own service corporation. By only allowing an exemption for those service corporations meeting the requirements of (b), (c) and (d) above, the Legislature was following the language of the Rules and Regulations of the Federal Home Loan Bank Board, which were promulgated pursuant to 12 U.S.C. §1464. The restrictions expressed in Exemption 35 are similar to those restrictions imposed by federal statute on the formation of a service corporation. The federal law states in pertinent part:

> (4) **Other loans and investments.**--The following additional loans and other investments to the extent authorized below:
>
> . . .
>
> **(B) Service corporations.**--Investments in the capital stock, obligations, or other securities of any corporation organized under the laws of the State in which the home office of the association is located, if the entire capital stock of such corporation is available for purchase only by savings and loan associations of such state and by Federal associations having their home offices in such State. 12 U.S.C. §1464(c)(4)(B) (emphasis added).

The Congressional intent behind 12 U.S.C. §1464(c)(4)(B) was to provide a method whereby certain financial institutions could band together and form an organization to provide services to themselves. This would enable the smaller institutions to compete with the larger institutions who could provide in-house services.

By requiring that the capital stock of the corporation be purchased only by institutions having operations in the same state, Congress was assured that the organization would remain local rather than become a national "supercorporation."

The Legislature, in drafting Exemption 35, was acknowledging the Congressional intent behind 12 U.S.C. §1464(c)(4)(B) and the Rules and Regulations of the Federal Home Loan Bank Board. The Legislature recognized that in-house data processing services would not be taxable, either because no taxable transaction occurs, as in the case of services performed truly in-house, or because such services will be exempt if provided by a service corporation which meets the requirements of Exemption 5, Section 3 of Chapter 87-6, which exempts services performed by members of an affiliated group. Thus, in keeping with the Congressional directives that forced the passage of 12 U.S.C. §1464(c)(4)(B) and the Rules and Regulations of the Federal Home Loan Bank Board, the Florida Legislature enacted Exemption 35 to allow the smaller financial institutions to remain in competition with the larger institutions.

ARGUMENTS PRESENTED

I.

EXEMPTION 35 COMPLIES WITH THE REQUIREMENTS OF THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

II.

IN ENACTING EXEMPTION 35 THE FLORIDA LEGISLATURE EXERCISED ITS BROAD DISCRETIONARY TAXING POWERS AND ESTABLISHED A CLASSIFICATION THAT SATISFIES THE REQUIREMENTS OF THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION.

SUMMARY OF THE ARGUMENT

Some financial institutions in Florida use in-house data processing services. Such institutions will receive those services tax free. Either the sales tax will not apply because no taxable transaction occurs as in the case of services performed truly in-house or such services will be exempt if performed by a service corporation which meets the requirements of the exemption for services performed between members of an affiliated group. Exemption 5, Section 3, Chapter 87-6. The Legislature, to enable savings and loans and savings banks which do not have in-house data processing to compete with those that do, enacted Exemption 35.

Exemption 35 is constitutionally sound and withstands scrutiny under the commerce clause of the United States Constitution. The exemption does not create any undue burden on interstate commerce above the restraints placed on interstate commerce by federal laws governing the creation of service corporations. Exemption 35 promotes a legitimate local purpose by the least burdensome means.

Exemption 35 also satisfies the requirements of the equal protection and due process clauses of the United States Constitution and the Florida Constitution. The United States Supreme Court has continuously applied a very narrow scope of equal protection restrictions to state taxation laws and has acknowledged its respect for

the broad discretion of the states in exercising their taxing authority.

The Florida Supreme Court has also recognized the wide discretion of the Legislature to classify for tax purposes.

Both Courts have established tests to determine the constitutionality of legislative classifications and have deferred to the legislatures unless a classification is proven to be arbitrary, whimsical, grossly oppressive, or irrational. No such proof has been offered in this action.

The Florida Legislature acted within the bounds of both the United States Constitution and the Florida Constitution by enacting Exemption 35, and any argument to the contrary is totally without merit.

ARGUMENT

I. EXEMPTION 35 COMPLIES WITH THE REQUIREMENTS OF THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

A. EXEMPTION 35 DOES NOT CONSTITUTE ECONOMIC PROTECTIONISM AND IS THEREFORE NOT PER SE INVALID.

The purpose of the commerce clause of the United States Constitution is to promote the free flow of commerce among the states and to protect against economic protectionism. The commerce clause prohibits state legislation which protects local economic interests to the detriment of interstate commerce. Philadelphia v. New Jersey, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978); Hunt v. Washington Apple Advertising Commission, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977); Boston Stock Exchange v. State Tax Commission, 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977).

Exemption 35 has neither the purpose nor the effect of promoting any local Florida industry or product or preserving Florida resources at the expense of out-of-state competition. The economic protectionism cases cited by FIserv Tampa in its Brief share one feature that distinguishes them from the instant case. Each case involves some attempt by the state to protect a local economic interest. For example, in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200

(1984), the challenged law protected certain locally produced alcoholic beverages from the Hawaiian liquor tax. Thus out-of-state liquors being sold in-state were disadvantaged because they had to pay the tax. The Court found a commerce clause violation and labelled the law "economic protectionism" because its purpose and effect was to provide a direct commercial advantage to local business. Similarly, Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985), involved a state's attempt to promote domestic business by taxing domestic insurance companies at a rate lower than that imposed on out-of-state insurance companies. See also Hughes v. Oklahoma, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979) (law prohibiting shipment out of state of minnows harvested from Oklahoma waters); Philadelphia v. New Jersey, 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978) (New Jersey's attempt to preserve its natural resources by prohibiting waste from other states from being dumped in the state); Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977) (law which had effect of protecting North Carolina's apple industry); Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970) (law which burdened out-of-state cantaloupe growers); Dean Milk Co. v. Madison, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951) (law prohibiting sale of milk as pasteurized

unless processed and bottled within five miles of Madison, Wisconsin); Best & Co. v. Maxwell, 311 U.S. 454, 61 S.Ct. 334, 85 L.Ed. 275 (1940) (tax on out-of-state merchants who displayed samples in hotel rooms rented to secure retail orders).

This Court in Delta Air Lines, Inc. v. Department of Revenue, 455 So.2d 317 (Fla. 1984) addressed a commerce clause challenge to a corporate income tax credit for Florida-based airlines. According to this Court, the test under the commerce clause is "whether the statute discriminates against interstate commerce by providing a direct commercial advantage to local commerce." Id. at 321 (emphasis added). Exemption 35 does not provide any direct commercial advantage to local commerce. Therefore, applying the test enunciated by this Court, Exemption 35 does not discriminate against interstate commerce. Unlike the legislation involved in the above cited cases, Exemption 35 does not have the purpose or effect of closing off or limiting a potential market for foreign competition. Non-Florida savings and loans and savings banks can freely compete for Florida customers. The exemption does not competitively disadvantage out-of-state savings and loans and savings banks. Nothing in the law requires out-of-state competitors to use in-state services or penalizes them for using out-of-state data processing.

Exemption 35 does allow certain Florida savings and

loans and savings banks, and potentially all Florida savings and loans and savings banks, to receive tax-exempt data processing services through the vehicle of a service corporation. However, two alternatives are available to non-Florida savings and loans and savings banks that want to avoid paying the Florida tax. If they have operations in Florida, they can form a service corporation which qualifies for Exemption 35. The exemption requires that the savings and loans and savings banks that own the service corporation have operations in Florida, but it does not require that they have operations exclusively in Florida. Non-Florida savings and loans and savings banks can also avoid paying the tax simply by purchasing data processing services in their home states.

Chapter 87-6 does not require out-of-state savings and loans to use Florida data processing services. In fact, the effect of the law is to encourage non-Florida savings and loans and savings banks to use out-of-state data processing services to avoid paying the Florida tax. Thus the suggestion that the law gives Florida data processing services a competitive advantage over their non-Florida counterparts is absurd. Clearly, the law does not give Florida savings and loans and savings banks or data processing services any advantage over their out-of-state competition. Exemption 35 therefore does not constitute any form of economic protectionism.

B. EXEMPTION 35 DOES NOT IMPOSE AN UNCONSTITUTIONAL BURDEN ON INTERSTATE COMMERCE.

As outlined above, Exemption 35 does not constitute economic protectionism. Therefore it is not per se illegal. The Court must examine the exemption under the balancing test set forth in Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). In Pike the Supreme Court stated the rule as follows:

> where the statute regulates evenhandedly to effectuate a legitimate local public interest and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

To find that Exemption 35 violates the commerce clause, the Court must find that the three prong test enunciated in Hughes v. Oklahoma, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979), is satisfied. The Court must find that the statute creates burdens on interstate commerce which are not merely incidental or discriminates against interstate commerce, that the statute does not serve a legitimate local purpose, or that the local purpose could be promoted as well by alternative means which do not discriminate against interstate commerce. Exemption 35 satisfies all three of these requirements.

1. Exemption 35 does not create an undue burden on interstate commerce.

The commerce clause does not prohibit the states from enacting legislation which will affect interstate

commerce, if the effects are merely incidental. If Exemption 35 affects interstate commerce at all, the effects will be merely incidental. The requirement that the stock of the service corporation be available only to savings and loans and savings banks having operations in the state is not a requirement uniquely imposed by the Florida Legislature. The Federal government specifically restricts investments by savings and loans and savings banks to investments in service corporations whose stock is available for sale only to savings and loans and savings banks having a home office in the state. The federal statute provides in pertinent part:

> **(4) Other loans and investments.**--The following additional loans and other investment to the extent authorized below:
>
> . . .
>
> **(B) Service corporations.**--Investments in the capital stock, obligations, or other securities of any corporation organized under the laws of the State in which the home office of the association is located, if the entire capital stock of such corporation is available for purchase only by savings and loan associations of such state and by Federal associations having their home offices in such State. 12 U.S.C. §1464(c)(4)(B).

Any burden on interstate commerce is therefore created by federal law. Chapter 87-6 does not impose any additional burden on interstate commerce.

Because the first requirement of the test for finding a violation of the commerce clause is not met, the Court need not reach the second and third prongs. However, Exemption 35 satisfies both these prongs as well.

2. Exemption 35 promotes a legitimate local purpose.

Data processing services provided in-house are not subject to the sales tax either because no taxable transaction occurs, or because they are exempt under Exemption 5, Section 3, Chapter 87-6, which applies to services performed by members of an affiliated group. Federal law enables financial institutions which do not have in-house data processing to band together to form a service corporation to provide their data processing services. Exemption 5 will not apply to any service corporation in which no parent owns greater than 10 percent of the corporation's outstanding stock. Exemption 35 allows those financial institutions which use service corporations which do not qualify for Exemption 5 to compete on a more even basis with financial institutions which use exempt in-house services. Thus, Exemption 35 merely gives to institutions belonging to service corporations the same tax exemption given to financial institutions with in-house data processing.

3. Exemption 35 is the least burdensome means of promoting the local purpose.

As noted above, Exemption 35 burdens interstate commerce only to the extent that federal law already burdens it. Therefore, by tracking the federal requirements the Florida Legislature promoted the local purpose without creating any additional burden on interstate commerce. The only alternative means of

promoting the local purpose would be to deny the exemption to financial institutions using in-house data processing services. This alternative would not be any less burdensome to interstate commerce than the alternative chosen.

II. IN ENACTING EXEMPTION 35 THE FLORIDA LEGISLATURE EXERCISED ITS BROAD DISCRETIONARY TAXING POWERS AND ESTABLISHED A CLASSIFICATION THAT SATISFIES THE REQUIREMENTS OF THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION.

As FIserv Tampa noted in its Brief (pg. 6), the United States Supreme Court held in Kahn v. Shevin, 416 U.S. 351, 94 S.Ct. 1734, 4 L.Ed.2d 189 (1974), that the states, in exercising their taxing powers, are subject to the due process and equal protection clauses of the Fourteenth Amendment. However, the Court continued that the Fourteenth Amendment contained no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation.

The high court was affirming its previous holding in Allied Stores of Ohio v. Bowers, 358 U.S. 526, 79 S.Ct. 3 L.Ed.2d 484 (1959), that:

> "states have a very wide discretion in the laying of their taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the National Government or violating the guaranties of the Federal Constitution, the States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Of course, the States, in the exercise of their taxing power, are subject to the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation."

The United States Supreme Court has long upheld the

broad discretion given to state legislatures in classifying for tax purposes. In 1937 the Court held:

> Taxes, which are but the means of distributing the burden of the cost of government are commonly levied on property or its use, but they may likewise be laid on the exercise of personal rights and privileges. As has been pointed out by the opinion in the Chas. C. Steward Mack. Co. Case, such levies...were known in England and the Colonies before the adoption of the Constitution, and must be taken to be embraced within the wide range of choice of subjects of taxation, which was an attribute of the sovereign power of the states at the time of the adoption of the Constitution, and which was reserved to them by that instrument. Carmichael v. Southern Coal and Coke Co., 301 U.S. 495, 575 S.Ct. 868, 81 L.Ed. 1245 (1937).

Three years later, the Court was again faced with the issue of broad state taxing powers and again yielded to the legislature's authority:

> The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. This Court fifty years ago concluded that "the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation," and the passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Madden v. Kentucky, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940) (quoting Bill's Gap R. Co. v. Pennsylvania, 134 U.S. 232, 237, 10 S.Ct. 533, 33 L.Ed. 892, 895 (1890)). (emphasis added).

The Madden decision was later cited by Justice Thurgood Marshall in his majority opinion in Austin v. New

Hampshire, 420 U.S. 656, 95 S.Ct. 1191, 43 L.Ed. 2d 530 (1975):

> In resolving constitutional challenges to state tax measures this Court has made it clear that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." Madden v. Kentucky, 309 U.S. 83, 88, 84 L.Ed. 590, 60, S.Ct. 406, 125 ALR 1383 (1940). See Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 35 L.Ed. 2d 351, 93 S.Ct. 1001 (1973). Our review of tax classifications has generally been concomitantly narrow, therefore, to fit the broad discretion vested in the state legislatures. (420 U.S. at 662).

It is indeed obvious that the United States Supreme Court has continuously applied a very narrow scope of equal protection restrictions to state taxation laws and has acknowledged its respect for the broad discretion of the states in exercising their taxing authority. New York Rapid Transit Corp. v. New York, 303 U.S. 573, 58 S.Ct. 721, 82 L.Ed. 1024 (1938); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed. 1245 (1937); State Board of Tax Commissioners v. Jackson, 283 U.S. 527, 51 S.Ct. 540, 75 L.Ed. 1248 (1931); Stebbens v. Riley, 268 U.S. 137, 45 S.Ct. 424, 69 L.Ed. 884 (1925); Brown-Forman Co. v. Kentucky, 217 U.S. 563, 30 S.Ct. 578, 54 L.Ed. 883 (1910).

The Florida Supreme Court has also addressed the issue of equal protection as it pertains to the taxing power of the Florida Legislature. In affirming a decision of the First District Court of Appeal, the Supreme Court ruled

that "the Florida sales tax being an excise tax is not subject to the constitutional requirements of equality and uniformity. Rather, the constitutional test to be applied to such a tax is whether the classifications created by such tax are reasonable and not arbitrary." W. T. Grant Co.'s Estate v. Lewis, 358 So.2d 76 (1st DCA 1978), aff'd, 380 So.2d 764 (Fla. 1979), appeal dismissed, 444 U.S. 976 (1979).

The high Court established an even stronger test in Gray v. Central Florida Lumber Co., 140 So. 320 (Fla. 1932), wherein it held:

> In the imposition of an excise tax, the rule of equality and uniformity as guaranteed by article 9 of the Constitution is not involved. Excise taxes have been imposed in many ways, but so long as they are reasonable, not unjustly discriminatory, nor arbitrary, whimsical, irrational, grossly oppressive, plainly unequal, or contrary to common right, they will be upheld. (140 So. 2d 325) (emphasis added).

Although NAFS and FIserv Tampa allege that Exemption 35 is arbitrary, neither has shown any justification for its position. The fact that they do not qualify for this particular exemption does not mean the exemption is "unjustly discriminatory, arbitrary, whimsical, irrational, grossly oppressive, plainly unequal, or contrary to common right." It is doubtful that these two companies qualify for any of the other 51 exemptions in Section 3 of Chapter 87-6, but that is not sufficient justification for the Court to override the broad taxing

authority of the Florida Legislature and strike down the law.

As the United States Supreme Court held in Madden v. Kentucky, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940):

> Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it. (emphasis added).

The members of the Florida Legislature fully recognized their broad range of discretionary powers in determining classifications for the sales tax on services. They used this discretion in creating revenue sources for the tax imposed on the sale or use of certain services and in exempting other services from the sales tax.

In exempting data processing services performed for a financial institution by a service corporation of that financial institution created according to certain specified conditions, the Legislature recognized that there were other companies performing this same business. It also recognized that the other companies were not owned by savings and loans or savings banks and therefore would not qualify for the benefit of this particular exemption.

Both the Florida Senate and the Florida House of Representatives were fully aware that private companies

such as FIserv Tampa and NAFS would not qualify for this exemption because of major differences between these two companies and those companies similarly situated to FIS. While the former supply data processing services to various corporations on a for-profit basis and pay out dividends, the latter are owned entirely by savings and loans or savings banks which make investments of varying amounts to purchase stock in their own service corporation. In addition, the latter, the companies exempted from the sales tax on services, do not pay dividends but instead use their profits to lower prices to their owners. The data processing services they provide for their owners will be exempted from the sales tax.

In numerous instances, the United States Supreme Court has permitted occupations to be subdivided by the States for tax classification purposes when, as in this action, differences exist. See, Independent Warehouses, Inc. v. Scheele, 331 U.S. 70, 676 S.Ct. 1062, 91 L.Ed. 1346 (1947) (classification between commercial and private warehouses); Brown-Forman Co. v. Kentucky, 217 U.S. 563, 30 S.Ct. 578, 54 L.Ed. 883 (1910) (classification between blenders and distillers of alcoholic beverages); Southwestern Oil Co. v. Texas, 217 U.S. 114, 30 S.Ct. 496, 54 L.Ed. 688 (1910), (classification between wholesalers and retailers of the same product); Union Bank & Trust Co. v. Phelps, 288 U.S. 181, 53 S.Ct. 321, 77 L.Ed. 687 (1933)

(classification between commercial banks and other financial institutions).

Contrary to the statements of both NAFS and FIserv Tampa, there is no restriction in the law as to how many service corporations can receive the benefit of this exemption. According to Chapter 87-6, as few as ten (10) savings and loans or savings banks having operations in Florida can band together and purchase equal amounts of the service corporation's outstanding stock and organize a service corporation pursuant to §545.74, Rules of the Federal Home Loan Bank Board. The service corporation would meet the requirements expressed in Exemption 35.

In constructing the provisions of Exemption 35, the Legislature merely followed the language of the Rules and Regulations of the Federal Home Loan Bank Board which were promulgated pursuant to 12 U.S.C. §1464.

The State was acknowledging the Congressional intent to provide smaller financial institutions with an opportunity to band together and form an organization which would provide services to themselves. This would enable the smaller institutions to compete with the larger institutions that could provide in-house services.

It is totally absurd to argue that the services performed by FIserv Tampa and NAFS are identical to those performed by FIS or service corporations similarly situated. It is even more erroneous to suggest to this

Court that the classification imposed by the Florida Legislature under Exemption 35 is outside the broad discretionary taxing powers of the State. The classification satisfies the requirements of the equal protection and due process clauses of the United States Constitution and the Florida Constitution.

CONCLUSION

During the 1987 legislative session, the Florida House of Representatives and Florida Senate exercised their broad discretionary taxing powers and approved a sales and use tax on services.

In enacting Exemption 35, the Florida Legislature established a classification that complies with the requirements of the commerce clause of the United States Constitution and satisfies the requirements of the equal protection and due process clauses of the United States Constitution and the Florida Constitution.

Exemption 35 is fully within the discretionary powers of the Florida Legislature, is based on a legitimate state interest and complies with the requirements of the United States Constitution and the Florida Constitution.

Therefore, the Court should uphold the constitutionality of Exemption 35.

Respectfully submitted,

JACK M. SKELDING, JR.
Parker, Skelding, McVoy & Labasky
Post Office Box 669
Tallahassee, Florida 32302
(904) 222-3730

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy has been furnished by U. S. Mail to The Honorable BOB MARTINEZ, Governor, The Capitol, Tallahassee, FL 32301; The Honorable BOB BUTTERWORTH, Attorney General, The Capitol, Tallahassee, FL 32301; EDITH BROIDA, Esq., P.O. Box 390751, Miami Beach, FL 33119; STEPHEN J. WEIN, Esq., KELLI HANLEY CRABB, Esq., Ballaglia Ross, Hastings, etc., P.O. Box 41100, St. Petersburg, FL 33743; JULIAN CLARKSON, Esq., Holland & Knight, P.O. Box 1288, Tampa, FL 33601; ROBERT E. MEALE, Esq., Baker & Hostetler, P.O. Box 112, Orlando, FL 32802; RAY FERRERO, JR, Esq., Ferrero, Middlebrooks, Strickland & Fischer, P.A., P.O. Box 14604, Ft. Lauderdale, FL 33302; WILLIAM G. MATEER, Esq., Mateer, Harbert & Bates, P.A., P.O. Box 2854, Orlando, FL 32802; DAN PAUL, Esq., 777 Brickell Ave., Suite 1000, Sun Bank Center, Miami, FL 33131; GEORGE H. FREEMAN, Esq., The New York Times Co., 229 W. 43rd St., New York, NY 10036; HOWELL L. FERGUSON, Esq., 118 N. Gadsden St., Tallahassee, FL 32302; DANIEL F. O'KEEFE, JR., The Proprietary Assn., Inc., 1150 Connecticut Ave., N.W., Suite 1200, Washington, D.C. 20036; ROBERT A. ALTMAN, Esq., Clifford and Warnke, 815 Connecticut Ave., N.W., Washington, D.C. 20006; BRUCE ROGOW, Esq., 3100 S.W. 9th Ave., Ft. Lauderdale, FL 33315; MILTON HIRSCH, Esq., White Building, Suite 204, One Northeast Second Ave., Miami, FL 33132; RICHARD J.

OVELMAN, Esq., 6841 S.W. 66th Ave., South Miami, FL; GERALD B. COPE, JR., Greer, Homer, Cope & Bonner, P.A., Southeast Financial Center, Suite 4360, Miami, FL 33131; JOHN W. CAVEN, JR., Esq., 3306 Independent Square, Jacksonville, FL 32202; BARRY RICHARD, JR., Esq., Roberts, Baggett, LaFace & Richard, P.O. Drawer 1838, Tallahassee, FL 32301; DONALD M. MIDDLEBROOKS, Esq., Steel, Hector & Davis; 4000 S.E. Financial Center, Miami, FL 33131; DAVID W. JOHNSON, Esq., Johnson & Crane, 1200 Brickell Ave., 16th Floor, Miami, FL 33131; DONALD L. DISKANT, Esq., Patterson, Belknap, Webb & Tyler, 30 Rockefeller Plaza, New York, NY 10112; CHARLES RIGBY RANSON, Esq., Ranson & Wiggins, P.O. Drawer 1657, Tallahassee, FL 32302; RICHARD G. GARRETT, Esq., Greenberg, Traurig, Askew, Hoffman, Lipoff, Rosen & Quental, P.A., 1401 Brickell Ave., PH-1, Miami, FL 33131; CHRIS W. ALTENBERND, Esq., CHARLES A. WACHTER, Esq., Fowler, White, Gillien, Boggs, Vallareal & Banker, P.A., P.O. Box 1438, Tampa, FL 33601; SAMUEL A. TERILLI, Esq., Office of the General Counsel, The Miami Herald, One Herald Plaza, Miami, FL 33101; PARKER D. THOMSON, Esq., Thomson, Zeder, Bohrer, Werth & Razook, 4900 Southeast Financial Center, 200 South Biscayne Blvd., Miami, FL 33131-2363; ROBERT P. SMITH, JR., Esq.; Hopping Boyd Green & Sams, P.O. Box 6526, Tallahassee, FL 32314, on this 8th day of June, 1987.

JACK M. SKELDING, JR.