IN THE SUPREME COURT
OF FLORIDA

CASE NO. 70,533

In Re:)
)
Advisory Opinion of the)
Governor Request of)
May 12, 1987)
)

REPLY BRIEF OF THE NEW YORK TIMES COMPANY FLORIDA NEWSPAPERS

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I. INTRODUCTION

As more completely explained in our Initial Brief, the United States Supreme Court has conclusively established that a tax many not be imposed which discriminates against the media, or among the media, or on the basis of the content of protected expression. Arkansas Writers' Project, Inc. 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). Nothing articulated in the briefs of the Governor or the Legislature avoids the fact that the Florida Advertising Tax suffers from all three of these constitutional infirmities.

It is undisputed that the Advertising Tax imposes a "special" tax on the media. The Governor and the Legislature also concede that Chapter 87-6, Laws of Florida discriminates

among the media based upon the format of expression and the identity of the speaker, (Governor's Brief p. 16; Legislature's Brief p. 31, hereinafter collectively referred to as the "State"). Finally, the Advertising Tax clearly regulates and taxes protected expression based upon the content of that expression.

Rather than contest the obvious discriminatory "effects" of the Advertising Tax, the State suggests three reasons why the constitutional prohibitions recited by the United States Supreme Court in Arkansas Writers' do not apply to the Tax. First, the State contends that Section 212.0595, which is expressly entitled "Advertising Special Provisions", does not target advertising and the media. Second, the State asserts that the First Amendment permits the State to "enhance" the expression of certain speakers over others, solely because such discrimination is implemented through exemptions to the tax. Finally, the State argues that the history of the Bill of Rights does not support the rule established by the United States Supreme Court in Grosjean v. American Press Co., 297 U.S. 233 (1936).[1/] However, these questionable arguments

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1/ The State's historical discussion conflicts directly with the United States Supreme Court's historical analysis of advertising taxes as set forth in Grosjean v. American Press Corp. 297 U.S. 233 (1956), and reaffirmed in Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983). The State's view of the history of "taxes on knowledge" must therefore be seriously discounted.

offered by the State, neither remove the Advertising Tax from the purview of the constitutional analysis reiterated in Arkansas Writers', nor present any "compelling state interests" which would justify the three discriminatory impacts of the tax.

II. THE TAX IS NOT A TAX OF GENERAL APPLICABILITY AS THE STATE CONTENDS

A. Section 212.0595 Imposes a Selective Tax Upon the Media.

The State acknowledges the substantial impact which the Advertising Tax will have upon "the goods and services identified with the print and electronic media."[2/] (Governor's Brief p. 18). The State suggests, however, that the statute is nevertheless constitutional, because the tax is alleged to be merely an incidental effect of a generally applicable scheme of taxation.

The State's suggestion is based on a line of cases stemming from Giragi v. Moore, 64 P.2d 819 (Ariz. 1937), cert. denied, 301 U.S. 670 (1937). Unlike the Florida Advertising Tax, however, the taxes addressed in Giragi and its progeny were truly taxes of general applicability. These taxes were imposed upon "the sales or gross income of practically every person or concern engaged in selling merchandise or services in the

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2/ The freedom of the press amounts to freedom of expression for all media. Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973).

state" and required "every person engaging or continuing in a business" to pay the tax.[3/] Such taxes did not single out "advertisers" or the "media" for the special burden of the tax.

Rather than being a tax of general applicability, the Florida Advertising Tax specifically focuses on a single service, advertising, within a single industry, the media. The Advertising Tax is a new and unprecedented tax, and is expressly segregated from other generally applicable provisions of the Florida Sales Tax on goods and services. The Legislature's intent to impose a special tax on advertising and the media is clearly manifested by the title of Section 212.0595 -- "Advertising Special Provisions".[4/]

3/ The State fails to discuss meaningfully the terms "tax of general applicability", or to address in detail Giragi and its progeny. This failure stems from the facial differences between the taxes addressed in these cases and the Florida Advertising Tax. See, Corona Daily Independent v. City of Corona, 115 Cal. App. 2d 382, cert. denied, 546 U.S. 833 (1953) (an "ordinance [that] imposed a license tax for the privilege of engaging in any business in the city"); Arizona Publishing Co. v. O'Neil, 22 F. Supp. 117 (Ariz. 1938), aff'd, 304 U.S. 543 (1938) (a privilege tax of one percent of "the gross proceeds of sales or gross income from the business of every person engaging or continuing ... in ... business.")

4/ The State asserts that those challenging the tax mischaracterize the tax as "an advertising ... tax." (Governors Brief p. 24). Apparently, the State overlooks the label the Legislature itself attached to the Tax.

The Florida Advertising Tax is virtually identical to the advertising tax struck down in City of Baltimore v. A.S. Abell Co., 145 A.2d 111 (Md. Ct. App. 1958). In City of Baltimore, the Court rejected a similar contention that the tax there was a tax of general applicability.

> But, can the proposition that these [advertising] taxes are ordinary or general taxes be sustained? We think not. They are imposed upon a segment of the advertising industry, and, in practical effect, have approximately 90% to 95% of their impact upon newspapers and radio and television stations, businesses entitled to immunities of the First Amendment.

Id. at 118. The United States Supreme Court has also explicitly rejected this same argument in a case involving nearly identical circumstances. In Minneapolis Star, the Tax Commissioner also argued that Minnesota amended a general sales and use tax to "impose a 'use tax' on the cost of paper and ink products consumed in the production of a publication." Id. at 580. The Commissioner asserted that the State merely brought a previously non-taxed item within a comprehensive tax scheme. The Court found this argument to be unpersuasive and found the tax to be unconstitutional.

> Although the State argues now that the tax on paper and ink is part of the general scheme of taxation, the "use tax" provision ... is facially discriminatory, singling out publications for treatment that is, to our knowledge, unique in Minnesota tax law.

Minneapolis Star at 581.

Florida's position suffers from the same flaws as did Minnesota's. Rather than a general tax on all services, the Florida Advertising Tax creates a "special" tax on advertising. The tax is "facially discriminatory" since it "singles out" advertising and the media for special taxation, and is virtually identical to the taxes condemned by the United States Supreme Court in Grosjean v. American Press Co., 297 U.S. 233 (1936), Minneapolis Star, and Arkansas Writer's.

The Florida Advertising Tax without question suffers from the first of the constitutional infirmities set forth by the Court in Arkansas Writers'.

B. Section 212.0595 Imposes An Unconstitutional Tax On Speech.

The constitutional guarantees embodied in the First Amendment apply to all advertisements.[5/] Advertisements communicate information, express opinions and recite grievances, thereby providing an "important outlet for the promulgation of an idea by persons...who wish to exercise their freedom of speech." New York Times Co. v. Sullivan, 376 U.S. 254, 266 (1964). Expression, therefore, does not forfeit its

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5/ Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976) ("speech does not lose its First Amendment protection because money is spent to protect it, as in a paid advertisement of one form or another.")

constitutional protection merely because it is published in the form of a paid advertisement. Id.

A state is prohibited from imposing a revenue tax on the enjoyment of a right guaranteed by the First Amendment. Murdock v. Pennsylvania, 319 U.S. 105 (1943).[6/] A tax on advertising is a tax on one of the main avenues of communicating information and ideas. The Florida Advertising Tax, therefore, is a tax on speech itself: the more one advertises -- the more tax is paid to the State. The Advertising Tax imposes a direct, immediate and selective burden upon speech and the media. Thus, the Advertising Tax cannot withstand strict constitutional analysis.

III. THE STATE FAILS TO REBUT THE ASSERTION THAT THE FLORIDA ADVERTISEMENT TAX UNCONSTITUTIONALLY DISCRIMINATES BASED UPON IDENTITY OF THE SPEAKER AND FORMAT OF COMMUNICATION

The State concedes that the Advertising Tax "enhances the relative voice" of religious organizations, certain

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6/ That Breard v. City of Alexandria, 341 U.S. 622 (1951) did not disturb Murdock regarding the rule of law prohibiting direct taxation of constitutional 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 4. 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.").

not-for-profit organizations and governmental entities.[7/] This enhancement takes two forms. The statute exempts certain publications, i.e., religious publications, not-for-profit publications, and governmental publications. The voice of these formats for expression is "enhanced", because the State imposes no tax on advertising sold by such publications. In addition, the statute also exempts advertisements purchased by such groups in other publications, thereby enhancing expression by such groups.

While conceding that the Advertising Tax enhances the speech of certain "corporation(s), association(s), union(s) or individual(s)", the State nevertheless argues that the format-based and speaker-based discrimination contained in the statute is constitutional. The State relies on an inapposite Establishment Clause case, Walz v. Tax Committee of City of New York, 397 U.S. 664 (1970), to support this contention. In Walz the Supreme Court did not even address the issue of enhancement of speech of religious organizations. Instead, the Court ruled that "[t]he grant of a [property] tax exemption is not sponsorship" of religion. Id. at 1915. The Court in no way

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7/ (Governor's Brief p. 31-35) (Legislature's Brief p. 46).

hinted that the government could "enhance" the speech of religious groups at the "expense" of others.[8/] And, in a later case, the Supreme Court explicitly rejected the State's position.[9/] Only last month the Court in Arkansas Writer's explicitly held that a tax, which was "not evenly applied to all" formats of protected expression, is unconstitutional. Id. at 4524.

All speakers and mediums of communication are equal under the First Amendment. The government may neither "enhance" nor "inhibit" the voice of certain "elements of society" over others based upon the identity of the speaker.

> The inherent worth of speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual.

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

8/ The State also cites Bob Jones University v. United States, 461 U.S. 574 (1983), and United States v. New Mexico, 455 U.S. 720 (1982). These cases do not involve exemptions from taxation which enhance the speech of "certain elements of society" over others.

9 > Nor for present purposes do religious organizations enjoy rights to communicate, distribute, and solicit ... superior to those of other organizations having social, political, or other ideological messages to proselytize.

Heffron v. International Society for Krishna Consciousness, Inc., 425 U.S. 640 (1981).

In addition, the First Amendment does not permit discrimination based upon medium of communication. No one particular form of publication is entitled to a greater degree of First Amendment protection than another. The Florida Advertising Tax is unconstitutional because it discriminates among the media based upon the identity of the speaker and the format of communication.

The Legislature also apparently argues that the State's imposition of discriminatory taxes upon certain forms of speech prior to imposition of the new Advertising Tax, somehow insulates the Advertising Tax from constitutional scrutiny. (Legislative's Brief p. 45). Historical unconstitutional actions by the State, do not offer support for current constitutional infirmities. As the Court explained in Walz:

> It is obviously correct that no one acquires a vested or protected right in violation of the constitution by long use, even when that span of time covers our national existence and indeed predates it.

Walz v. Tax Commission of City of New York, 397 U.S. 664 (1970).

A state's advancement of public policy does not permit it to "dictate the subjects about which persons may speak and the speakers who may address a public issue." First National Bank of Boston v. Bellotti, 439 U.S. at 784-85. The State's enhancement of speech by certain groups over others through the Advertising Tax is undisputed. Thus, the Florida Advertising

Tax also suffers from the second constitutional infirmity identified by the Court in Arkansas Writers'.

IV. THE STATE FAILS TO REBUT THE ASSERTION THAT THE FLORIDA ADVERTISING TAX UNCONSTITUTIONALLY DISCRIMINATES BASED UPON CONTENT

The Florida Advertising Tax finally suffers from the third form of unconstitutional discrimination identified in Arkansas Writers': it discriminates based upon the content of speech. Arkansas Writers at 492. The State accomplishes this regulation of subject matter by carving out preferential treatment for expression on certain subject matters.

The State acknowledges that "the tax struck down in Arkansas Writers' expressly and specifically exempted particular publications, as such, on the basis of their content: religious, professional, trade and sports journals and/or publications.'" (Governor's Brief p. 31). The Florida Advertising Tax likewise regulates on the basis of content, because it also exempts religious, not-for-profit and governmental advertisements while taxing other protected expression.

Arkansas Writers' supplies the test to determine whether a tax is content based.

> In order to determine whether a magazine is subject to sales tax, Arkansas' enforcement authorities must necessarily examine the content of the message that is conveyed....

Id. at 4924. Here, in order to determine whether a particular advertisement is subject to the Advertising Tax, Florida enforcement authorities must necessarily examine the content of the advertisement to determine if it is a religious, not-for-profit, or governmental advertisement.

> Such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press.

Arkansas Writers' at 4524.

A statute which regulates or taxes speech based upon the government's judgment of its worth, is dangerous and unconstitutional. The "public policy" argument offered by the State (Governors Brief p. 31) would relegate the media to the status of a public utility. As explained by former Supreme Court Justice Potter Stewart, in such circumstances, "newspapers and television networks could then be required to promote contemporary government policy or current notions of social justice" 26 Hast. L.J. 631, 633-634 (1975). This idea was unanimously rejected by the Court in Miami Herald Publishing Company Tornillo, 418 U.S. 241 (1974).

Since the Florida Advertising Tax discriminates against protected expression on the basis of content, the Court should declare the Tax unconstitutional.

V. CONCLUSION

The Advertising Tax is a prior restraint on expression and comes to this Court with a heavy presumption against its constitutionality. Organization for a Better Austin v. Keefe, 402 U.S. 425 (1971). The State does not even attempt to articulate a "compelling state interest" which would justify such a discriminatory tax. This Court must not permit the State to exercise discriminatory taxing power against the media. The Florida Advertising Tax should be declared unconstitutional in violation of the First Amendment and Article I Section of the Florida Constitution.

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