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 TRIBUNE COMPANY; THE FLORIDA PRESS ASSOCIATION; GANNETT CO., INC.; THE MEDIA GENERAL BROADCAST GROUP; and THE FLORIDA RETAIL FEDERATION

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INTRODUCTION

The Governor's brief finesses many of the arguments advanced by these and other parties, urging they are prematurely raised. For example:

> "Challenges addressed to a particular application of the Act must be raised in proper, adversary proceedings." (P. 5).
>
> "[T]he Justices do not consider particular factual applications." (P. 7).
>
> "All parties are free to initiate lawsuits to challenge the tax and, in so doing, to argue that the advisory opinion . . . should not be applied to the particular facts relating to the party." (P. 8 n. 2).
>
> "The Governor was aware that certain issues would have to be left for future determination in separate cases involving specific facts and a fully developed record." (P. 16).
>
> "If problems do arise in the application of the Tax, they may be raised in appropriate evidentiary proceedings." (P. 39).

These acknowledged deferrals of uncounted disputes--for a future day--limit the usefulness of the advice sought in this proceeding.[1] The point made here is that this Court's response to the Governor's request should memorialize the limited scope of the advice rendered in consonance with the disclaimers quoted above.

These parties now reply to the answer briefs.

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[1] The number and variety of briefs opposing the tax cast doubt upon the Governor's postulation that "failure of the tax in application to isolated taxpayers or transactions would not significantly impact upon anticipated revenues." (P. 16).

ARGUMENT IN REPLY

I. THE ACT UNCONSTITUTIONALLY DELEGATES FUNDAMENTAL DECISION-MAKING POWER TO THE DEPARTMENT OF REVENUE.

Under Florida law, a statute is constitutionally deficient if it invites or allows the opportunity for the exercise of arbitrary discrimination. Drexel v. City of Miami Beach, 64 So.2d 317 (Fla. 1953). Thus, Florida courts have consistently invoked the nondelegation doctrine to strike down enactments which effectively confer upon an agency "the authority to grant approval to one yet withhold it from another, at whim, and without guides of accountability." Dickinson v. State ex rel. Bryant, 227 So.2d 36, 38 (Fla. 1969); see also Florida Home Builders v. Division of Labor, 367 So.2d 219, 220 (Fla. 1979); Lewis v. Bank of Pasco County, 346 So.2d 53, 55-56 (Fla. 1977). Application of these principles requires that Chapter 87-6, Laws of Florida, as amended by Chapter 87-72 (collectively referred to as the "Act"), be declared invalid.

The taxation of advertising services is far more than a logical "next step" in the development of Florida's system of taxation. The Legislature, by means of a special apportionment formula, has placed a greater tax burden upon advertising services than upon any other property or services save interstate transportation.[2] In this context, the critical, unanswered

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[2] This "special" apportionment formula, whose effect is to tax speech to a greater extent than the other "services" taxed under the Act, prevents the Act from being a tax of "general applicability." As discussed in the briefs filed by other media interests, such discriminatory taxation, which burdens speech more than any other item taxed, cannot stand.

questions which are left to the Department of Revenue ("DOR") to resolve take on added significance.[3]

Specifically, the question of whether a service is designated as advertising or is simply deemed taxable under provisions of the Act pertaining to general services, or under the pre-existing provisions taxing tangible property and services related thereto, will in many cases determine whether any tax is due at all. As with all services, if 51% or more of advertising is considered to have been consumed in Florida, a tax is imposed on its full price. Unlike any other service, however, if 50% or less of advertising is considered consumed in Florida, an apportioned tax is imposed. Thus, the DOR is given the impermissible power to exempt some services by characterizing them as non-advertising. It is essential that an adequate legislative definition of the service to be taxed, as well as a comprehensible standard for apportionment decisions, be provided by the Florida Legislature.

A. The Amendments To The Act Do Not Cure The Act's Violations Of The Nondelegation Doctrine

The amendments to the Act since the filing of Petitioners' Initial Brief do nothing to remedy the Act's unlawful delegation

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[3] Who is an "advertiser"? When is advertising consumed in Florida? How is non-print or broadcast advertising to be apportioned? What factors is the DOR to consider in making these decisions? What principles will govern determinations of "market coverage" for apportionment purposes? The amendments to the Act answer none of these questions. If respondents are allowed to prevail, the DOR will be left with unfettered and effectively unreviewable discretion to resolve each of these issues.

of legislative power to the DOR to determine how "market coverage" will be defined (1) for purposes of deciding when advertising is "consumed" in Florida, and (2) for purposes of apportioning all non-print or broadcast media advertising and all advertising by "new or restructured service providers." The amendments likewise impose no limitations upon the agency's authority to determine in which state the "benefit" of taxable non-advertising services is "enjoyed."

The only change which even arguably affects the Act's unconstitutional delegations of legislative authority is the addition of subsection (10) of § 212.0595. That subsection provides:

> For purposes of this part, the term 'advertising' means the service of conveying the advertiser's message, and shall include any mark-up charged by an advertising agency or any other person for the service of brokering the medium. However, the term 'advertising' shall not include creative services of a type customarily performed by an advertising agency.

This definition makes it clear that certain creative services are not subject to the special rules which apply to advertising services. It does not, however, eliminate the delegation problems with the tax on advertising. The obviously unsatisfactory result of defining "advertising" by reference to "the advertiser" simply shifts the focus from "what is advertising?" to "who is an advertiser?" Respondents' novel contention that no further definition is needed because advertisers generally know who they are disregards the fact that it is the DOR, and the courts reviewing DOR actions, who need to ascertain whether the Legisla-

ture intended that a particular individual or entity be so classified.[4]

The SIC Manual categories incorporated in Section 212.02(22) of the Act as a means of defining the "services" taxed cannot be invoked to supplement or clarify the definition of "advertising." The SIC Manual's description of "advertising" encompasses creative services performed by advertising agencies, and does not include print or broadcast media advertising services. See Major Group 73 ("Business Services"), Group No. 731 ("Advertising"). Reliance on this classification to determine what services are taxable as advertising under the Act would yield an absurd result in view of the language of § 212.0595, which expressly provides that creative services are not to be apportioned and taxed as advertising, while print and broadcast media services are to be so apportioned and taxed.

B. Adoption Of The "Sliding Scale" Standard Of Review Urged By Respondents Would Be An Unwarranted And Unprecedented Expansion Of Florida Law.

As discussed in the Initial Brief, the sovereign power of taxation is vested exclusively in the legislative branch, and must be exercised responsibly. It is essential that statutes imposing taxes be clear regarding who and what are to be taxed. There is absolutely no support for the Governor's contention that a taxation statute merits special status under the nondelegation

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[4] This is particularly significant where, as here, criminal penalties will be imposed for noncompliance with the Act's requirements.

doctrine because taxation is a complicated subject. Principles governing taxation indicate precisely the opposite. Moreover, this argument greatly underestimates the abilities of the Legislature. The Legislature can correct the Act's unconstitutional delegation of authority to the DOR by enacting guidelines for determinations made under the advertising provisions, and by deleting or elaborating upon the provision allowing the DOR to grant exemptions from the general services tax whenever it is demonstrated "to the satisfaction of the department" that the benefit of a non-advertising service is enjoyed outside of Florida.

Unlike the cases cited by the Governor, the issue here is not the specificity of guidelines, but rather, their complete absence. Respondents rely on State Dept. of Citrus v. Griffin, 239 So.2d 577, 581 (Fla. 1970), in urging the adoption of a standard whereby more complicated statutes would be subject to less searching application of the nondelegation doctrine. In Griffin, however, this Court took care to emphasize that there is no "double standard" in the application of the nondelegation doctrine, and thus, "[e]ven where a general approach would be more practical than a detailed scheme of legislation, enactments may not be drafted in terms so general and unrestrictive that administrators are left without standards for the guidance of their official acts." Id.

C. The Act Unconstitutionally Delegates The Power To Make Apportionment Determinations.

As discussed in the Initial Brief, the Legislature has defined "market coverage" differently for the print media than for the broadcast media, and has offered no definition or guidance as to how it should be measured for any other forms of advertising. Contrary to the Governor's contention, Petitioners do not challenge the Legislature's policy choice on measurement of market coverage for these two forms of advertising services; Petitioners merely point out that the DOR is left without guidance in view of these inconsistent standards. This is a critical problem because, under the Act, "market coverage" is the variable whose measurement will determine (1) whether advertising services are deemed used or consumed in Florida; (2) how advertising services will be apportioned for all non-print or broadcast media advertising; and (3) how advertising services will be apportioned for new or restructured service providers.

This Court has consistently stressed the distinction between permissible "flexibility in administration of a legislative program" and prohibited "power to establish fundamental policy," emphasizing that in any area, however complicated, "some minimal standards ascertainable by reference to the enactment establishing the programs" must exist. Askew v. Cross Key Waterways, 372 So.2d 913, 924-925 (Fla. 1978). The provisions imposing a tax upon advertising allow the DOR both to determine whether an individual or entity which pays to convey a message is an advertiser and to determine the method of defining market coverage and apportioning the advertising. This improperly permits the DOR to

"flesh out" what it has in the first instance conceived. The Act as it pertains to advertising impermissibly leaves the critical legislative determinations of who and what are to be taxed to the DOR.

Finally, leaving every determination of where the benefit of a non-advertising service is enjoyed entirely to the DOR, with no limiting criteria or standards, effectively gives the agency the unreviewable power to arbitrarily grant exemptions from the tax. The only statutory requirement is that it be demonstrated "to the satisfaction of the department" - whatever that means - that the benefit of a service is enjoyed outside of Florida. §§ 212.0591(9)(a)(3) and (9)(b)(6). As the Legislature so aptly observes, the place where services are sold or used is not intuitively obvious. (Leg. Br. at 23). The Legislature has abrogated its responsibility by leaving these decisions to the DOR.

As it stands, there are no standards to which a reviewing court may refer to determine whether the actions taken by the DOR in these areas comport with the intent of the Legislature. Thus, the DOR improperly becomes the lawgiver rather than the administrator. This is precisely the result prohibited by Florida's nondelegation doctrine.

II. THE ACT UNCONSTITUTIONALLY REQUIRES ALL PERSONS OUTSIDE OF THE STATE OF FLORIDA TO REGISTER WITH THE DOR WHEN THEY PLACE AN ADVERTISEMENT WHICH WILL BE CONSUMED IN FLORIDA.

The Governor asserts that Talley v. California, 362 U.S. 60 (1960) stands for the limited proposition that overbroad statutes

are void. (Gov. Br. at 37). That interpretation misconstrues Talley.

The Los Angeles ordinance at issue in Talley was too broad because it banned all anonymous handbills. Talley, 362 U.S. at 562-3. The Court, however, questioned whether an ordinance which banned only anonymous handbills which were libelous or fraudulent could stand. Id. at 63. The Court focused on the critical role which anonymity has played in facilitating free speech:

> There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression.

Id. at 65. Because the ordinance at issue "might deter perfectly peaceful discussions of public matters of importance," it was declared void on its face. Id. (emphasis added). Since Talley, courts have repeatedly presumed that compelled disclosure of speakers' identities would have a chilling effect on the exercise of First Amendment rights and have not required proof of actual harassment before preserving the right to anonymity. Eg., Local 1814 International Longshoreman's Asso. v. Waterfront Commission of New York Harbor, 667 F.2d 267 (2d Cir. 1981); Printing Industries of Gulfcoast v. Hill, 382 F.Supp. 89 (S.D. Tex. 1974), vacated to permit consideration of statutory amendment, 422 U.S. 937 (1975).

The Governor, however, cites Buckley v. Valeo, 424 U.S. 1 (1976) as support for the argument that the Act can be declared void only as applied. His reliance is misplaced. No facial challenge was even made in Buckley. Id. at 711. Citing a long line of decisions, the Court recognized that "compelled disclo-

sure, in itself, can seriously infringe" upon First Amendment rights. Id. at 713. Buckley is repeatedly cited for this proposition. See e.g., Wilson v. Stocker, Nos. 85-2323, 85-2641, 85-2736, Slip op. at 7 (10th Cir. May 14, 1987); Block v. Meese, 793 F.2d 1303 (D.C. Cir. 1986).

Finally, citing no authority, the Governor broadly asserts Petitioners must prove that the tax could not be constitutionally applied under any circumstances. (Gov. Br. at 39). Petitioners' research discloses no authority for that bold proposition. Talley expressly recognizes the mere possibility that identification requirements might discourage public discussion is enough. Talley, 362 U.S. at 563. In any case, it is clear that the novel standard which the Governor urges this Court to adopt is not the proper standard for determining whether a law is facially unconstitutional.

The Governor correctly observes that the State can overcome the challenge only if a sufficiently compelling interest is at stake and the law is narrowly tailored to effect that interest. (Gov. Br. at 38). The State, however, cannot justify the burden placed on First Amendment activities by the Act's requirement that those whose speech is taxed by the Act identify themselves to the State. The Legislature itself recognized that First Amendment interests outweigh its recordkeeping concerns by affirmatively protecting the identity of advertisers who utilize in-state advertising media to communicate their messages. See § 212.0595(8). Moreover, less intrusive means are clearly available. The State could, for example, require the advertising media to collect the tax, thereby insulating the speaker and

protecting the advertiser's right to anonymity. Because the Act is neither justified by a compelling state interest nor narrowly tailored to effect that end, it must fall.

CONCLUSION

For all of the reasons set forth herein and in the Initial Brief of these parties, this Court should declare Chapter 87-6, as amended by Chapter 87-72, unconstitutional.

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