IN THE SUPREME COURT OF FLORIDA

No. 70,533

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

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

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SUMMARY OF ARGUMENT

This Court should advise the Governor that the newspaper and advertising provisions of the tax are facially unconstitutional. First, the tax violates the First Amendment. As it now stands it singles out the press for discriminatory treatment and discriminates against certain publications and speakers on the basis of the content of their message. Second, the Legislature's argument that the Framers did not intend the First Amendment to bar taxation of the press is contrary to controlling United States Supreme Court precedent and riddled with inaccuracies and misrepresentations of the historical materials.

ARGUMENT

I. The Tax Is Unconstitutional Because It Is Not Generally Applicable.

The FPA[1/] has argued that the sales tax is not in conformity with the principles recently set forth by the United States Supreme Court in Arkansas Writers' Project v. Ragland, 107 S.Ct. 1722 (1987). Both the Governor and the Legislature deny this. Although they admit that content-based discrimination is unconstitutional, they maintain that the tax law does not so discriminate.

1/ The term "FPA" is used herein to refer collectively to The Florida Press Association and The Boca Raton News, Inc.

The Governor and the Legislature are wrong for three reasons. First, the tax does discriminate on the basis of content. Second, the content-based discrimination is only one form of impermissible discrimination. They neglect to address the problem of differential taxation, from which the tax also suffers. Finally, the Governor and the Legislature fail to address the effect of the most recent amendment to the tax. New Chapter 87-72 defines "advertising" in such a way that it singles out the press for discriminatory treatment. We address the last of these propositions first.

A. The Tax on Advertising, as Defined By Chapter 87-72, Singles Out The Press for Discriminatory Treatment

Subsequent to the submission of the initial briefs in this matter, the Legislature adopted Chapter 87-72, Laws of Florida, which was submitted to this Court on June 8, 1987 with the Governor's "Notice of Amendment to Law."

Section 3 of Chapter 87-72 has been amended to read:

> 212.0595 Advertising; special provisions. -- The following special provisions shall be applicable to the sales and use tax on advertising:
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> * * *
>
> (10) For purposes of this part, 2/ the term "advertising" means the service of conveying the advertiser's message, and shall include any mark-up charged by an

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2/ The term "this part" refers to Part I of Chapter 212, Florida Statutes, which is entitled "tax on sales or use of tangible personal property, admissions, and rentals."

> 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.

(emphasis added).

The Legislature has thus modified the statute to exclude sales or use taxation of all advertising agency services, except "mark-ups" and resold publication charges. As a result, the only "advertising" which is now subject to taxation is published advertising and advertising in the electronic media. The tax in its present form uniquely targets advertising media providers, namely the press, for discriminatory treatment. It is no less than a special media tax.

As amended, the tax is directly comparable to the "print and ink" tax invalidated by the United States Supreme Court in Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983). Like Minnesota, Florida "has singled out the press for special treatment." Id. at 582. As a result, the tax "cannot stand unless the burden [it places on the press' First Amendment rights] is necessary to achieve an overriding governmental interest." Id.

Because the tax cannot survive such exacting scrutiny, the Court should advise the Governor that the advertising provisions of the tax are facially unconstitutional.

B. The Tax Discriminates On the Basis of Content.

The tax clearly discriminates on the basis of content in two ways. First, the tax contains a specific exemption for "religious publications":

> The taxes imposed by this chapter do not apply to the use, sale, or distribution of religious publications ....

§212.06(9), Fla. Stat.

As the FPA Initial Brief explained, and as the Governor concedes, the sales tax struck down by the Court in Arkansas Writers contained an exemption for, among other things, "religious ... publications". 107 S.Ct. at 1724; Gov. Br. 31.

Despite, or perhaps because of, the obvious similarity between the Arkansas statute and the Florida tax, neither the Governor nor the Legislature confront the applicability of Arkansas Writers to Section 212.06(9), Florida Statutes. This Court cannot similarly avoid the issue; it must advise the Governor of this clear constitutional infirmity in the tax.[3/]

3/ The Legislature argues that this Court must invalidate all exemptions for "churches and charities" if it agrees that this argument is correct. This is simply false. In fact, the identical argument was rejected in the Arkansas Writers decision. 107 S.Ct. at 1725-26.

Second, the tax discriminates among speakers based on their organizational identity. Both the Governor and the Legislature argue that this discrimination is not on the basis of content, but on the basis of organization. Gov. Br. 30-33, Leg. Br. 45-50. They assert that since the tax exempts purchases (including purchases of advertising services) by religious, charitable, educational, and scientific institutions "wholly apart from content," Gov. Br. 30, the tax does not violate the principle of non-discrimination described in Arkansas Writers and Minneapolis Star.

Yet a discrimination among organizations is a discrimination based on content. The organizations in issue are defined by their purposes; the unique character of such associations necessarily involves the promulgation of particular messages. Thus, the organization exemption directly favors selected speakers and messages, namely those with religious, charitable, educational, and scientific purposes, over others. See, e.g., Buckley v. Valeo, 424 U.S. 1, 49 (1976) (government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others").

The Governor and the Legislature also argue that any discrimination which occurs is only "incidental" because the exemption is not "intended" to discriminate on the basis of

context. This is irrelevant. The simple fact that the effect of the exemption is to discriminate among speakers renders the classification scheme unconstitutional. As the Supreme Court stated in Minneapolis Star:

> We need not and do not impugn the motives of the Minneapolis Legislature in passing the ink and paper tax. Illicit legislative intent is not the sine qua non of a violation of the First Amendment.

Minneapolis Star, 460 U.S. at 592 (citations omitted). Thus, in Arkansas Writers, the Court never inquired into the motives of the Arkansas Legislature; it simply invalidated the tax because of its content-based effect. 107 S.Ct. at 1727-28. This Court should do the same.

C. The Tax Applies Differentially.

Content-based discrimination is only one form of impermissible discrimination. As both Minneapolis Star and Arkansas Writers make clear, differential taxation unrelated to content also offends the First Amendment:

> We would be hesitant to fashion a rule that automatically allowed the State to single out the press for a different method of taxation as long as the effective burden was no different from that on other taxpayers . . . . [T]he very selection of the press for special treatment threatens the press not only with the current differential treatment, but with the possibility of subsequent differentially non burdensome treatment.

460 U.S. at 588. Thus, even if the Governor and Legislature were correct, and the organization exemption did not constitute a content-based discrimination, the scheme would be invalid because it taxes speakers differentially.[4/]

II. The Framers Intended The First Amendment to Bar Sales Taxation of the Press.

The Legislature argues at pages 35-43 of its brief that the "historical evidence overwhelmingly supports the view that the First Amendment was neither originally intended nor initially interpreted to curtail Legislative power to tax the press." Leg.Br. 43. This claim is flatly wrong. The United States Supreme Court itself has examined the history of the First Amendment and explicitly held that the Framers intended the First Amendment to restrict taxation of newspapers and advertising. The Court has repeatedly invalidated taxes on the press for just this reason. Arkansas Writers, supra; Minneapolis Star, supra; Grosjean v. American Press Co., 297 U.S. 733 (1936). Second, a review of the historical evidence reveals that opposition to the stamp

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4/ The fact that religious institutions have traditionally been exempt from taxation does not alter the analysis. Religion and speech are both constitutionally protected activities by virtue of the First Amendment. Religion does not enjoy a preferred status vis-a-vis speech; the free exercise clause and the free speech clause of the First Amendment are coextensive. Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 652 (1981). Thus, the proponents of the tax cannot argue that the tax's differential treatment of religious institutions does not violate the non-discrimination mandate of Minneapolis Star and Arkansas Writers.

taxes imposed by the British in 1765, and by Massachusetts in 1755 and again in 1785, was so strenuous and widespread they were quickly repealed. Contrary to the Legislature's assertions, "the overwhelming weight of historical scholarship" is that the stamp taxes were opposed and repealed because of the burden they placed on the press, and that in drafting the First Amendment, the Framers intended to bar future legislatures from levying such taxes.

A. Controlling United States Supreme Court Precedent Holds That The Framers Of The First Amendment Intended To Limit Taxation Of The Press.

The United States Supreme Court first addressed the constitutionality of a state advertising tax over fifty years ago in Grosjean v. American Press Co., supra. The Court engaged in a careful historical analysis and specifically rejected the interpretation of the First Amendment now espoused by the Legislature.

In Grosjean, the Court's historical analysis began with a detailed consideration of the long "English struggle" against the "taxes on knowledge." This struggle, which the Supreme Court deemed essential to the Framers understanding of the First Amendment is explained in detail in the FPA Brief at 11-14. The Legislature attempts no reply to these historical facts.

Next, the Grosjean Court addressed the "then recent Massachusetts episode" in which the legislature of that state

imposed a stamp tax first on newspapers and later on advertisements. 297 U.S. at 248. The Legislature makes much of the Massachusetts stamp tax, claiming that it demonstrates the Framers' acceptance of the propriety of such a tax. Leg. Br. 37-38, 40. The Grosjean Court, however, drew precisely the opposite conclusion, noting that the Massachusetts taxes were violently opposed until they were repealed, and specifically stating the Massachusetts "occurrence did much to bring about the adoption of the amendment." 297 U.S. at 248.

On the basis of the English and Massachusetts experiences, and the Framers' familiarity with them, the Grosjean Court concluded that it is "impossible to believe" that the Framers did not intend the First Amendment to bar the "two forms of taxation" they had known and opposed so strenuously. 297 U.S. at 248 (emphasis added). The FPA brief notes that by 1791 no state taxed the press. The Legislature offers no reply.

Less than five years ago, the United States Supreme Court revisited the historical question in Minneapolis Star, supra. The Court reiterated the historical analysis conducted in Grosjean and reached the same conclusion: taxes which burden the press "would have troubled the Framers of the First Amendment." 460 U.S. at 583. The Legislature ignores this authority also.

Although the Legislature makes no mention of the United States Supreme Court's interpretation of the history

and purposes of the First Amendment, this Court must follow it and recognize that the Framers of the First Amendment intended that constitutional guarantee to extend to questions of taxation of the press.

B. The Historical Evidence Contradicts The Legislature's Assertion That The Framers' Opposition To The Stamp Taxes Was Not Based On a Concern To Protect The Freedom of The Press.

The Legislature's lead argument in support of the facial validity of the tax as it applies to newspapers and advertising is that the historical record does not show the First Amendment was intended to limit taxation of the press. The Legislature's argument is essentially two-fold. First, the Legislature contends that the colonists were not popularly opposed to stamp taxes levied on the press by their own representatives and that they opposed the British stamp tax imposed in 1765 solely because Britain had levied the tax. Leg.Br. 35-38. Second, the Legislature argues that the Antifederalist opposition to permitting Congress to tax the press was of "small constitutional significance" -- both because the Antifederalists were "really" opposed to congressional taxing power in general and because the Federalist position triumphed. Leg.Br. 39-43.

The Legislature's analysis is not correct; indeed, it is not even supported by the very materials cited. The

following serial review of the Legislature's argument refutes every one of its contentions and reveals that, as initially argued by the FPA and as recognized by the United States Supreme Court, the Framers clearly intended the protections of the First Amendment to bar future legislatures from imposing any "taxes on knowledge."

1. The Historical Evidence Reveals That The Framers Were Opposed To Stamp Taxes On The Press Regardless Of Who Levied Them.

The Legislature cites three examples to prove that the colonists were not generally opposed to stamp taxes on the press. None of the Legislature's examples stands for this startling proposition.

a. The Massachusetts and New York Stamp Taxes of 1755 and 1756. The Legislature notes that both Massachusetts and New York enacted stamp duties in the 1750's. According to the Legislature, "only" the press opposed the taxes and they were repealed several years later "simply because they failed to produce the desired revenue." Leg.Br. 35-36.

The Legislature's only authority for this argument is a five-and-a-half page article from the William and Mary Quarterly (the "Thompson article") which the Legislature calls a "detailed examination" of the stamp acts. Leg.Br. 36 n.61. The thesis of the Thompson article, however, does not

support the Legislature's conclusion. The argument made in the article is simply that opposition to the stamp taxes levied in Massachusets and New York was not so strong that it should have served as a clear warning to the English not to extend the Stamp Act to the colonies in 1765. The Thompson article recognizes that there was significant opposition to the taxes and does not seriously address the factors determinative in their repeal.

In fact, the Legislature has seriously misrepresented the content of the Thompson article. Thus, the Legislature states:

> The only opposition to these revenue measures came from "the people most immediately affected" -- namely the printers in the colonies.

Leg.Br. at 35-36. What the Thompson article actually says is:

> [In New York, o]pposition came from one of the people most immediately affected -- James Parker, printer of the New York Gazette.

Thompson, Massachusetts and New York Stamp Acts, 26 Wm. & Mary Q. 253, 257 (1969)(emphasis added). Nowhere does Thompson state that only the printers opposed the tax.

Moreover, the Thompson article, unlike the Legislature's distortion of it, does not claim that the acts were repealed "simply because they failed to produce the

desired revenue." Leg.Br. at 36. The article's claim is infinitely more modest; in fact it makes no attempt to explain why the New York Act was repealed. Concerning the Massachusetts tax, Thompson indicates only that "[d]iscontinuance may also have been partly the result" of the act's failure to produce much revenue. Thompson at 256-57 (emphasis added).

Errors of material omission likewise abound. The Legislature simply ignores any facts which fail to comport with its revisionist history. Thus, regarding the Massachusetts act, the Legislature ignores the comment of a Massachusetts lawyer that "the Stamp Act of 1755 was 'so bothersome' to the people of the colony, 'and it was so generally complained of, that it was laid aside and hath never since been revived.'" Thompson at 256 (citation omitted). Regarding the New York act, the Legislature claims "the printers were unable to build a solid phalanx of opposition." Leg.Br. 36 n.62. As authority for this proposition, the Legislature relies on the single example of Hugh Gaine. The Legislature neglects to note, however, that Hugh Gaine was a Tory printer. His New-York Gazette and Weekly Mercury, along with James Rivington's Massachusetts Gazettes, "turned out some of the most belligerent loyalist pamphlets in America" and were dubbed by Patriots "Lord

North's Press." Id. A. Schlesinger, Prelude to Independence: The Newspaper War on Britain, 1764-1776, 222 (1958).

Finally, the Legislature dismisses as mere self interest the printers' opposition to the stamp taxes and thus regards all published opposition to the taxes as irrelevant to the question whether the public, as distinct from printers, was generally opposed to the taxes. The difficulty with this approach is that the primary historical source materials to have survived to the present day are the newspapers. Further, as the examination of the popular opposition to the Stamp Act of 1765 which follows makes clear, the opposition of the newspapers to the taxes played a fundamental role in shaping public opinion and fomenting the Revolution.5/

b. The English Stamp Tax of 1765. The Legislature contrasts the supposed "public indifference" to the Massachusetts and New York taxes to the "immediate and

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5/ The Legislature asserts that the general population did not oppose the stamp taxes levied by its own representatives without considering the system of representation in place in 1755. In fact, taxes were levied at the English governor's behest; if the colonists' representatives failed to produce the revenue to accomodate the governor's wishes, the Crown would simply levy the tax on the colonists. The Legislature's contention that the colonists voluntarily imposed stamp taxes on themselves is thus meaningless.

violent" reaction to the English tax. Leg.Br. 36-37. The Legislature attributes this vast difference to the fact that colonial opposition to the Stamp Act of 1765 was premised solely on "the English constitutional principle that no man should be taxed without his consent." Id. No authority supports this proposition, and none is cited. If "taxation without representation" were all the American Revolution had been about, there would have been no need for the Bill of Rights, since the federal and state constitutions already afforded representative government.

The Legislature's argument is contrary to the vast array of historical authority cited in the FPA brief and by the United States Supreme Court. The fact that the stamp tax fell on the newspapers proved as important to the revolutionary cause as the fact that Britain had imposed the tax. Numerous historians have recognized and commented on the role of the stamp tax in influencing the newspapers to become politically active, and the substantial role of the newspapers, in turn, in catalyzing the Revolution. As one historian of the period stated:

> It was fortunate for the liberties of America, that News-papers were the subject of a heavy stamp duty. Printers, when uninfluenced by government, have generally arranged themselves on the side of liberty, nor are they less remarkable for attention to the profits of their profession. A stamp duty, which openly

> invaded the first, and threatened a great diminution of the last, provoked their united zealous opposition.[6/]

As the newspapers increasingly took a leading role in the crisis, the citizenry became increasingly supportive and protective of the press. Thus, in June 1765, the town of Worcester, Massachusetts, which had no newspaper, instructed its representatives in the Legislature to "take special care of the LIBERTY OF THE PRESS." Schlesinger, The Colonial Newspapers and the Stamp Act, 8 N.E.Q. 63, 68 n.7 (1935) (citation omitted).

Contrary to the sarcastic and belittling comment of the Legislature that "'No Taxation Without Representation' (not 'Stop the Ad Tax') was the rallying cry of the Sons of Liberty" (Leg.Br. 37), the evidence shows that the Sons of Liberty were opposed to the tax in great part because it fell on the press.[7/]

6/ D. Ramsay, History of the American Revolution, 61-62 (1789). See generally M. Jensen, The Founding of a Nation, 126-28 (1968); E.& H. Morgan, The Stamp Act Crisis: Prologue to Revolution 187-88 (1953); A. Schlesinger, Prelude to Independence: The Newspaper War on Britain, 1764-1776 (1958).

7/ Indeed, both Benjamin Edes and William Bradford, both active Sons of Liberty (Edes was one of the "Loyall Nine"), were prominent printers whose opposition to the tax because of its effect on the press was well known. Schlesinger at 73. Indeed, Bradford's paper, the Pennsylvania Journal, on the last day before the tax went into effect, was decorated

[Footnote continued on following page.]

The place of the press in the American Revolution is clear; the basis of colonial opposition to the Stamp Act of 1765 is equally so. The tax was opposed both because it was levied by Britain and because it was levied on the newspapers. Massachusetts' later experience with its stamp tax in the 1780's only confirms this conclusion.

c. The Massachusetts Stamp Taxes of 1785 and 1786. The Legislature further argues that the fact that Massachusetts levied stamp taxes on newspapers and advertising in the 1780's demonstrates that the colonists were not averse to taxes on the press so long as they were levied by their own representatives. In fact, the contemporary history of the Massachusetts taxes proves just the reverse. The taxes were repealed soon after they were enacted and long before the ratification of the Bill of Rights -- facts the Legislature simply ignores.

Reports of the proceedings in the General Court, the Massachusetts Legislature, were carried in the Boston Magazine, a monthly journal which regularly reported the

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[Footnote continued from previous page.]

> with urns and death's-heads and with the inscription: "EXPIRING: In Hopes of a Resurrection to LIFE again." Along the margin appeared the words: "Adieu, Adieu to the LIBERTY of the PRESS," while the last page displayed a coffin symbolizing the paper's death "Of a STAMP in her Vitals."

Schlesinger at 75-76.

"Proceedings of the General Court."[8/] Of the enactment of the tax, the Boston Magazine reported:

> The passing of the Stamp Act was found to be one of the most difficult measures that could have occurred.

Boston Magazine, March 1785, at 115. Many members of the court feared the tax would face popular opposition and "were for referring it to the opinion of their constituents, previous to its completion." Id. This measure was only opposed out of fear that it would make the legislators appear too timid. Id. Eventually, "having been contested in every stage, [the tax] was suffered to rest on the table." Id. at 116. Only because the need for revenue was so great and other sources "so trifling" did the stamp tax finally garner the additional supporters it needed to pass. Id. at 116.

Repeal came quickly. Only four months later, the July 1785 edition of the Boston Magazine reported the event:

> In addition to the various causes of speculation, not to say of discontent, which existed in several parts of the commonwealth, we may mention the Stamp Act. . . . No one is ignorant of the

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8/ The Boston Magazine provided the only coverage of the debates in the General Court. "Thus, the typical voter could obtain only the printed session laws . . . which gave him no information about roll calls, debates, or where defeated bills had been bottled up in committees or quietly ignored." V. Hall, Politics Without Parties: Massachusetts, 1780-1791, at 81 & n.28 (1972).

> melancholy predictions, which all of those publications teemed with, from the arbitrary restraint which the Act laid upon the press. And what may appear extraordinary, scarce a single piece can be produced, in vindication of [the] duty. . . .

(emphasis added). The uniform public opposition described above forced the General Court to reconsider the tax it had only hesitantly taken up months earlier. The Boston Magazine account continued:

> All the arguments which had been drawn from the prejudices of the people, against it, at its origination, were now repeated, and, though the exigencies of Government were undoubtedly pressing, some gentlemen could not be brought to supply them through so odious a channel.

Id.

The report of the proceeding in the legislature also explains why the advertising tax was enacted in the place of the newspaper tax. The legislature was afraid that it would appear weak and easily manipulated if, in response to public pressure, it repealed a law it had just enacted:

> [S]omething more than the revenue was now concerned in the question. The dignity of government called for their attention. If the Legislature were deliberately to frame measures in one session, and they were to be frightened out of them in the next, the protection and the safety of the people was a float. . . . Some things which it would then have been well to have omitted, ought not, perhaps, under the present circumstances, to be rejected.

Id. (emphasis added). In order, then, to maintain the status of the legislature, its members determined not to repeal the tax absolutely but to exchange the duty on newspapers for one on advertising. Id. This advertising tax was also quickly repealed.

The Legislature discusses none of the aforementioned circumstances and contemporaneous accounts of enactment and repeal in its Brief. Instead, the Legislature relies exclusively on a fifteen-year-old study which the Legislature incorrectly states is the "most recent historical investigation" of the Massachusetts taxes.[9/] V. Hall, Politics Without Parties: Massachusetts, 1780-1791 (1972) (the "Hall study"); Leg.Br. 37. But the Legislature completely misstates both the Hall study and its findings.

First, the Legislature fails to explain the nature of the study. The study does not purport to be an "investigation" of the taxes. Rather, as its title indicates, it is an analysis of the politics of Massachusetts towns in the 1780's prior to the organization of formal political parties, as measured by the voting records of the towns' representatives to the General Court. Contrary to

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9/ The 1972 study is not the most recent study of the Massachusetts experience. See, e.g., Baldasty, Toward an Understanding of the First Amendment, 3 Journalism History 25, 26 (1976) (reviewing the tax and public response to it and concluding "[u]nder such pressure from the public and printers, the General Court repealed the tax in mid-1785").

what the Legislature clearly seeks to imply, when the Hall study states that "Despite [the newspapers'] effort all three groups of towns favored the act," Hall is referring to the representatives of those towns, not their general population. V. Hall at 117; Leg.Br. 38. In fact, the study itself draws the distinction:

> The debate over this question created a furor throughout the state but caused less of a division within the General Court than had the proposed cider levy.

V. Hall at 117 (emphasis added). Second, the Legislature quotes from the Hall study in a manner designed to mislead. Compare the underlined portions in the Legislature's redaction to those in the foregoing quotation from the original:

> The debate over the act 'caused less of a division within the [assembly] than had the proposed cider levy.'

Leg. Br. 38 (emphasis added).

The Legislature would have this Court believe that the colonists were more concerned with their supply of cider than of newspapers. But the Legislature fails to explain why the cider levy caused such divisiveness. There were two reasons. First, the incidence of the cider tax was concentrated on the trading towns. Second, and more

important, the method of collection of the cider tax was offensive:

> [T]he excise tax was a 'grievance without parralel [sic] in any of his Majesty's governments' because it permitted the collectors to invade the citizens' homes in search of contraband wine or liquor.

Thompson at 256 (citation omitted).[10/]

2. The Historical Evidence Reveals That The Framers Intended The First Amendment To Limit Taxation Of The Press.

The Legislature concedes that "a number of Antifederalists . . . explicitly argued against permitting Congress power to tax the press" but argues that this evidence is not relevant to interpreting the First Amendment because "the ideas of the Antifederalists were of small constitutional significance." Leg.Br. 39. This is an extraordinary proposition for which the Legislature cites no

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10/ The Legislature also quotes from an advocate of the advertising tax to show that "individual citizens denounced the newspapers." Leg.Br. 38. This quotation, taken from a letter to the editor printed in the Massachusetts Gazette is signed only "A Loyal Republican." There is no indication that the sentiment it reflected was widespread. In fact, given the character of the proceedings in the General Court when the newspaper tax was repealed, there is every reason to believe that the letter represented a small dissident faction. A single anonymous letter to the editor is no proof that the Framers favored the imposition of stamp taxes on the press, particularly given the mass of historical evidence to the contrary.

authority and for which none exists. It is also exactly contrary to the opinion of the United States Supreme Court. See Minneapolis Star, 460 U.S. at 584 ("The concerns voiced by the Antifederalists let to the adoption of the Bill of Rights.").

The Legislature contends that (i) the Anti-federalists argued for a bill of rights only in an effort to defeat the Constitution, and (ii) the Antifederalists argued for a press clause in order to prevent Congress from taxing the press only in an effort to prevent Congress from exercising any taxing power. Leg.Br. 39-40. Neither contention is true.

In fact, "[t]he motives of those clamoring for a bill of rights were complex." Anderson, The Origins of the Press Clause, 30 UCLA L. Rev. 455, 469 (1983). While it is true that protection of civil liberties may not have been the Antifederalists' exclusive aim, "[i]t does not follow that the demand for a bill of rights was contrived." Id. at 470. Moreover, whatever political use the Antifederalists may have made of the bill of rights issue, "the genuineness of the public's concern about the lack of protection for individual liberties" is beyond dispute. Id. at 470. (emphasis added). "The Antifederalists did not fabricate the demand for a bill of rights; they merely attempted to capitalize on it." Id. at 471. See also Minneapolis Star, 460 U.S. at 584 ("When the Constitution was proposed without an explicit

guarantee of freedom of the press, the Antifederalists objected."). "But the very fact that both Federalists and Antifederalists, whatever their ulterior motives, found it so politically effective to advocate constitutional protection for speech and the press indicates that freedom of expression was an important concern for many Americans." Rabban, The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History, 37 Stan.L.Rev. 795, 813-14 (1985).

The next argument made by the Legislature is that the First Amendment was premised on the Massachusetts press clause and that since Massachusetts considered it constitutional to tax the press, it is proper to infer that the Framers of the First Amendment did, too. 11/ This argument fails on numerous grounds. First, the wording of the First Amendment came from many sources, including state constitutions and state ratifying conventions. See generally Anderson at 462-85. It is thus impossible to equate the First Amendment simply with the Massachusetts press clause. Second, the Legislature attributes the First Amendment to James Madison, a prominent Federalist. However, while Madison introduced the bill of rights in the Congress, it was far from "his bill of rights." Leg.Br. 40. (emphasis added).

11/ This argument is wrong not only because it ignores the fact that Massachusetts repealed the tax, but also because it equates the legislative enactment of a tax with the conclusion that the tax is constitutional. If such were the case, courts would never have to invalidate tax laws on constitutional grounds.

> The Bill of Rights was the literary product of three committees and several floor amendments in both houses. The language of the first amendment went through five versions and the final language was a compromise.

Anderson at 476. Third, the First Amendment and the Massachusetts press clause did not contain "equivalent language." Leg.Br. 40. If any state's constitutional protection for freedom of speech and press paralleled the ultimate language of the First Amendment, it was Pennsylvania, which never taxed the press. Anderson at 465. Fourth, the Legislature's argument ignores the many states with pre-existing constitutional protections for the press, as well as the many states which suggested such provisions in their ratifying conventions, which never believed it proper to tax the press. Fifth, the Legislature's argument ignores the fact that at the time of the adoption of the First Amendment, no state levied a tax on the press. Finally, the argument ignores the actual historical evidence. Thus, a prominent Antifederalist from Pennsylvania, the state whose press clause most closely parallelled the First Amendment, specifically warned against ratification of the Constitution in the absence of an explicit protection for the press precisely because of the Massachusetts taxation experience:

> The Liberty of the press is not secured, and the powers of Congress are fully adequate to its destruction, as they are to have the trial of libels, or pretended libels against the United States,

> and may by a cursed abominable Stamp Act (as the Bowdoin administration has done in Massachusetts) preclude you effectually from all means of information.

"An Officer of the Late Continental Army," in Pennsylvania and the Federal Constitution 1787-1788, 181 (J. McMaster & F. Stone, eds. 1888). (emphasis added).

The Legislature attempts to buttress this argument with a long quotation from Alexander Hamilton, a prominent Federalist, arguing that the Constitution should not specifically protect the press. In the passage, Hamilton reasons that a press clause, even if adopted, would be ineffective to bar the taxation of the press. Leg.Br. 41-42. But the Legislature ignores the fact that this is an argument which Hamilton lost. See Minneapolis Star, 460 U.S. at 584. A bill of rights which included the First Amendment was proposed and adopted because of popular demand for the guarantee it provided. The Framers ultimately rejected Hamilton's view that a press clause was neither necessary nor effective.[12/]

12/ The Legislature also notes that Richard Henry Lee greeted the passage of the First Amendment "with dismay." Leg.Br. 41 n.75. Aside from the fact that it is unclear what difference this makes, it proves nothing. Lee's concern was that the amendments would not be sufficient to "secure against the annihilation of the state governments," not that the press would not be protected. L. Levy, Emergence of a Free Press, 264 (1985)(citation omitted).

Finally, the Legislature contends that the "special postal charge" on newspaper delivery which was enacted shortly after the Bill of Rights was ratified demonstrates that such taxes on the press are constitutional. Leg. Br. 42-43. The Legislature relies particularly on Madison's reaction to the "tax" and the fact that although he was staunchly opposed to it, he did not choose to describe it as "unconstitutional." The argument has one fatal flaw: the postal charge was not a "tax."

> In reality "tax" was an emotional term applied by the press to an increase in postal rates.

D. Stewart, The Opposition Press of the Federalist Period 462 (1969). Although the Legislature cites this source, they unaccountably fail to note this crucial distinction.

As the foregoing review makes clear, the Legislature has distorted the history on which it relies almost beyond recognition. Far from displaying "indifference" to taxation of the press, the Framers specifically considered and opposed such taxation and adopted the First Amendment in order to bar future legislatures from taxing the press. This Court should heed and respect the clear mandate of history and the United States Supreme Court and advise the Governor that the tax on newspapers and advertising is unconstitutional.

CONCLUSION

The Court should advise the Governor that those provisions of Chapter 212, Florida Statutes, as amended by Chapters 86-166, 87-6, and 87-72, Laws of Florida, that tax the sale of newspapers and advertising are facially unconstitutional.

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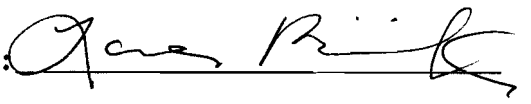
By: 

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