IN THE SUPREME COURT OF FLORIDA

CASE NO. 70-533

IN RE:

ADVISORY OPINION
TO THE GOVERNOR
REQUEST OF MAY 12, 1987

REPLY BRIEF OF THE MAGAZINE PUBLISHERS ASSOCIATION AND THE ASSOCIATION OF BUSINESS PUBLISHERS

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This Reply Brief is submitted on behalf of the Magazine Publishers Association ("MPA") and the Association of Business Publishers ("ABP"). The interest of MPA and ABP in this matter is set forth in their initial brief at 1-3, and is incorporated herein.

ARGUMENT

I. **THE JUSTICES OF THIS COURT HAVE NO AUTHORITY TO RENDER AN ADVISORY OPINION ON FEDERAL CONSTITUTIONAL ISSUES**

In their Initial Brief, the MPA and the ABP argued that an advisory opinion by the Justices of this Court interpreting the United States Constitution would be unauthorized and unprecedented. Such an opinion would boldly ignore the plain language of the Florida Constitution. In language which could not be plainer, the advisory opinion power is restricted to interpretation of the Florida Constitution. Fla. Const. Art. IV, §1(c). The Justices of this Court have followed this constitutionally mandated restriction on the scope of their advisory opinion power and have never opined on federal constitutional questions.

In their Responsive Briefs, the Florida House of Representatives, the Florida Senate and the Governor urge the Justices to ignore constitutional limitations upon their advisory power. This invitation to ignore the fundamental charter from which this Court's authority derives must be rejected. This Court has repeatedly recognized that "advisory opinions to the governor are authorized by the Constitution and are therein limited to the

interpretation of any portion of the Constitution upon any question affecting the executive powers and duty of the Governor." In re Advisory Opinion to the Governor, 15 Fla. 44, 46, 9 So.2d 172, 174 (1942) (emphasis added). Accord In re Advisory Opinion to the Governor Request of August 28, 1980, 388 So.2d 554, 555 (Fla. 1980); In re Advisory Opinion to the Governor Request of June 29, 1979, 374 So.2d 959, 962 (Fla. 1979); In re Advisory Opinion to the Governor, 154 Fla. 866, 867, 19 So.2d 370, 371 (1944).

The plain language of the Florida Constitution, the amendment of that constitution in 1875 to eliminate the authority of the Justices to issue advisory opinions on "any question of law", the consistent practice of this Court for 100 years in refraining from advisory opinions on federal constitutional questions, and the repeated decisions of the Court acknowledging that the power to issue advisory opinions is limited to interpretations of the State Constitution, are all ignored by those advocating that the Justices of this Court appropriate the power to issue an advisory opinion on federal constitutional questions, a power plainly not granted by the Florida Constitution.

It is suggested that the Justices have agreed to express an opinion on such questions and are now obligated to do so. Brief of the Governor at 6-11. This Court did not agree to render an opinion on federal constitutional issues in its Interlocutory Order of May 13 in which the Justices announced their intention to respond to the Governor's Request for an advisory

opinion. To the contrary, in its Order of Clarification on May 21, 1987, the Court specifically stated that:

> The extent of the issues we can and should consider in responding to the Governor's question is subject to debate and should not be answered in an interlocutory order. All interested parties should call to this Court's attention any legal issue that affects the validity of the aforesaid statute. At the same time, if that person contends we are inhibited from answering the Governor's questions on a certain ground he should so urge us.

In light of the direct invitation for interested parties to brief those jurisdictional and jurisprudential concerns, we are frankly dismayed at the suggestion that interested parties may not be heard on such issues (Brief of the Governor at 10).

Equally erroneous is the contention that the Florida Constitution "merely limits advisory opinions to questions regarding the Governor's executive powers and duties under the Florida Constitution." (Brief of the Governor at 12). Article IV §1(c) provides for advisory opinions only: "as to the interpretation of any portion <u>of this Constitution</u> upon any question affecting his executive powers and duties." That grant of authority is plainly and unmistakably limited on its face to interpretations of the Florida Constitution. Nonetheless, the Brief of the Governor simply ignores that indisputable fact and flatly asserts that the grant of authority is not limited to interpretations of the Florida Constitution. We respectfully submit that that statement is just wrong, flatly contradicted by the provisions of the Constitution relied upon by the Governor.

In re Advisory Opinion to the Governor, 225 So.2d 512, 514 (Fla. 1969) cited in the Brief of the Governor at 12, does not support the Governor's position. To the contrary, that case, holding that the Justices are without power to render advisory opinions regarding the Governor's statutory powers and duties, highlights the strict construction given the advisory opinion power.

The Governor's Brief also takes the flatly erroneous position that this Court has previously ruled upon federal constitutional questions in Advisory Opinion to the Governor, 27 So.2d 409 (Fla. 1946) and In re Advisory Opinion to the Governor, 150 So.2d 721 (Fla. 1963) (Brief of the Governor at 12). We explained in our Initial Brief, at 11-12, that neither of these opinions ventured any opinion upon the merits of a federal constitutional issue or expressed any view as to whether a Florida statute could sustain scrutiny under the federal constitution. As our earlier analysis has not been addressed and the Brief of the Governor does nothing to explain its extraordinary statement that these cases constitute federal constitutional rulings, we can add nothing to our earlier analysis.

Finally, an appeal is made to this Court to issue an advisory opinion on federal constitutional issues because of the great public interest in ascertaining the validity or invalidity of the newly-enacted sale and use tax on services. The State's proclamation of a "public interest" cannot endow this Court with powers which the constitution has not granted it. The State of

Florida, like the United States, is a government of law, not unbridled discretion, and of limited powers, i.e., those powers granted to the Government by the people through their adoption of the Constitution. This Court cannot create powers for itself where none are granted by the Constitution. It has not done so in the past. The Court has recognized the existence of a great public interest in questions posed by earlier Governors, but in doing so, they have only exercised the powers granted by Art. IV §1(c) and have not expressed opinions on federal constitutional issues. Moreover, the public interest would be disserved by the issuance of an opinion creating the illusion of certainty on federal constitutional issues when those questions cannot be ultimately resolved except in a case or controversy, litigated, adjudicated, and subject to review by the Supreme Court of the United States.

II. COMMERCE CLAUSE AND DUE PROCESS OBJECTIONS TO THE FLORIDA SALE AND USE TAX ARE INHERENTLY "AS APPLIED" CHALLENGES AND CANNOT BE RESOLVED THROUGH AN ADVISORY OPINION

Even if the Justices of this Court were empowered to issue advisory opinions on federal constitutional questions, the validity of the new Florida tax under the Commerce Clause and Due Process Clause of the United States Constitution cannot be resolved in an advisory proceeding.[1/]

1/ In addition to challenges under the Due Process and Commerce Clauses, the argument herein is equally applicable to chal-
(continued)

The Legislature and Governor have taken two actions which makes this point crystal clear. First, they have acknowledged that the original form of the tax suffered from serious constitutional deficiencies by incorporating into the tax a new "nexus" requirement. 1987 Fla. Laws ch. 87-6, §§ 212.059(3)(b), 212.0595(6), as amended by Act of June 5, 1987, ch. 87-72, §§ 1, 3. In doing so, they transformed one of the elements of the Federal Commerce Clause's constitutional limitation on Florida's taxing power into a statutory question. In doing so, they removed that question from the scope of this Court's advisory opinion power under Art. IV §1(c) by turning it into a question of statutory interpretation. In re Advisory Opinion to the Governor, 225 So.2d 512, 514 (Fla. 1969); In re Advisory Opinion to the Governor, 113 So.2d 703, 705 (Fla. 1959); In re Advisory Opinion to the Governor, 9 So.2d 172, 174 (Fla. 1942).

Second, they have conceded, as argued in our Initial Brief, that the challenges to the application of the tax act must be raised in adversary proceedings. Brief of the Governor at 5; Brief of the Florida Senate and Florida House of Representatives at 69. It is suggested, however, that facial attacks can be addressed in an advisory opinion.

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lenges asserting that the Florida sale and use tax on services discriminates against certain taxpayers in violation of the First Amendment. First Amendment discrimination cases are concerned with the differential impact of the tax, requiring factual development for adjudication of the issue. See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983).

Whether or not that is true as an abstract matter, it has no application to the Commerce Clause questions. By their nature, these issues arise in the context of a challenge to the application of the tax upon a given taxpayer. Whether a particular state tax violates the Commerce Clause then turns upon the location of the activities sought to be taxed, and examination of the contacts between the taxpayer and the taxing state, the relation of the tax to services provided by the state,[2/] the fairness of the method by which a state apportions its tax upon a particular interstate business transaction, and the burden of the tax on interstate commerce. See Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 260, 58 S.Ct. 546, 551, 82 L.Ed. 823, 830 (1938); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 278-82, 97 S.Ct. 1076, 1078-1080, 41 L.Ed.2d 326, 330-32 (1977).

As argued in our Initial Brief, a 20-22, and not refuted, an advisory opinion is incapable of resolving such taxpayer-specific issues. When the Governor and Legislature concede that "as applied" challenges must be reserved for the normal adversarial processes of the courts, they are conceding that Due Process and Commerce Clause issues raised by the tax cannot be resolved in an advisory opinion.

2/ It has been suggested that this element of Commerce Clause analysis has essentially been converted into a measuring of the contacts between the taxpayer and the taxing state. Brief of the Governor at 67. Whether one looks at the amount of services provided to the taxpayer by the state or the amount of contacts, the issue turns on facts concerning the specific taxpayer, a determination which cannot be made in an advisory proceeding.

It has been suggested that Commerce Clause infirmities of the statute are solved by the recent amendment providing that the tax shall be self-accrued by the advertiser only "if the advertiser has nexus for tax purposes with the state." 1987 Fla. Laws ch.87-6, § 212.0595(b). This amendment at most transforms one Commerce Clause question -- the question of nexus -- into a statutory issue and thereby places the question beyond the scope of the advisory opinion power. See, e.g., In re Advisory Opinion to the Governor, 225 So.2d 512, 514 (Fla. 1969). The amendment does not, in any event, eliminate the need for a case-by-case determination of whether a sufficient nexus is present for a given taxpayer.

Moreover, unless all elements of the tests established by Western Live Stock and Complete Auto Transit, as set forth above, are satisfied, the tax is not constitutional. Because the Legislature has removed the "nexus" issue from the Court's advisory opinion power, because the other questions involved in the Commerce Clause, such as fair allocation and burden on interstate commerce, are inherently fact-dependent, and because the state has conceded that this Court cannot or should not address such questions in an advisory opinion, this Court cannot address the constitutionality of the new tax under the Commerce Clause in any meaningful sense.

Finally, while the merits of the constitutional issues are beyond the scope of this submission, the erroneous analysis of Western Live Stock found within the Brief of the Governor, at

65-66, cannot pass without comment. In Western Live Stock, the court upheld a New Mexico tax on advertising because no other state could constitutionally impose a tax on the advertising, notwithstanding that magazines subject to the new tax were sold outside of New Mexico. The Governor suggests that the holding of Western Live Stock is limited to the possibility of other states imposing taxes upon the sale of advertising rather than the use of advertising. This contention is contrary to the very text of the opinion.

> So far as the value contributed to appellants' New Mexico business by circulation of the magazine interstate is taxed, it cannot again be taxed elsewhere any more than than the value of railroad property taxed locally. The tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine.

Western Live Stock v. Bureau of Revenue, 303 U.S. at 260, 58 S.Ct. at 550-551, 82 L.Ed. at 830 (emphasis added). The point of the Court's opinion was that there was no risk of multiple taxation by allowing New Mexico to impose a tax on advertising because no other state could impose a similar levy. If another state could have done so merely by structuring its tax as a use tax rather than as a sales tax, the Supreme Court's analysis would be senseless. Thus, Western Live Stock stands for the proposition that a tax such as that imposed by the state of Florida on advertising activities which occur outside the state violates the Commerce Clause of the United States Constitution.

CONCLUSION

For the aforesaid reasons and those set forth in the Initial Brief of the MPA and ABP, the Justices of this Court lack jurisdiction to render an advisory opinion which requires determination of whether Florida's sale and use tax on services is valid under the Federal Constitution and further, even if the justices were empowered to render such an opinion, it would be entirely inappropriate for the Commerce Clause and due process issues concerning the tax to be resolved in an advisory opinion. The MPA and APB therefore request that the Court expressly indicate it is not offering an opinion of federal constitutional questions which may arise concerning Florida's sale and use tax on services and that such questions must be determined by normal adversarial processes.

Respectfully submitted,

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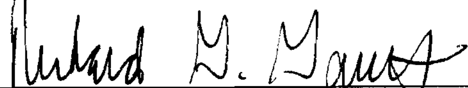
By: 
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