

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 Capital Cities/ABC, Inc., CBS Inc.
and National Broadcasting Company, Inc.

Of Counsel:

Stephen A. Weiswasser
Senior Vice President
and General Counsel
Sam Antar
Capital Cities/ABC, Inc.
1330 Avenue of the Americas
New York, New York 10019

George Vradenburg III
Vice President and
General Counsel
Ellen Oran Kaden
Associate General Counsel
CBS Inc.
51 W. 52nd Street
New York, New York 10019

Corydon B. Dunham
Executive Vice President
and General Counsel
National Broadcasting
Company, Inc.
30 Rockefeller Plaza
New York, New York 10020

Howard Monderer
Vice President, Law,
Washington
National Broadcasting
Company, Inc.
1825 K Street, N.W.
Washington, DC 20006

Lloyd N. Cutler
Timothy B. Dyk
A. Douglas Melamed
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, DC 20037-1420
(202) 663-6000

Donald M. Middlebrooks
Steel Hector & Davis
4000 Southeast Financial Center
Miami, FL 33131-2398
(305) 577-2904

Attorneys for Capital Cities/
ABC, Inc., and CBS Inc.

Dean I. Ringel
Cahill Gordon & Reindel
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for National
Broadcasting Company, Inc.

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REPLY BRIEF OF CAPITAL CITIES/ABC, INC.,
CBS INC. AND NATIONAL BROADCASTING COMPANY, INC.

This reply brief is addressed solely to the threshold question that we believe this Court should address: that is, the scope of the advisory opinion this Court should render pursuant to the request of the Governor dated May 12, 1987.

Most of the parties who filed briefs on May 29, 1987 appear to agree with our position that this Court should not render an advisory opinion on the sweeping questions included in the Governor's request.^{1/} However, the briefs filed by the government parties (the Governor, the House and Senate, and the Attorney General) take the position that such an advisory opinion is both required and appropriate. We submit that they are mistaken.

^{1/} See the briefs of The Proprietary Association, at 5; The Magazine Publishers Association and The Association of Business Publishers, at 6; The Association of National Advertisers, The American Association of Advertising Agencies, The American Advertising Association, at 10.

It is not necessary for the Court to opine about the constitutionality of the tax act because, as the government parties acknowledge,^{2/} the Governor is not required to disregard the new law prior to the determination by a court in a proper case and controversy that the law is invalid. A decision by this Court would not be useful because, as even the Governor concedes,^{3/} there will inevitably remain myriad issues about the application of the law that cannot be addressed now; these issues could have a far greater impact on the state budget than the issues which the Governor argues this court can address. And a decision by this Court now could be harmful because it could prejudice the rights of private parties to have their claims decided in a proper case.

I. BY ACCEPTING JURISDICTION, THIS COURT HAS NOT RESOLVED QUESTIONS AS TO THE APPROPRIATE SCOPE OF ITS ADVISORY OPINION.

The Governor urges in his brief that "[t]he Justices have agreed to render the Governor an advisory opinion and they are obliged to provide full advice in that opinion."^{4/} The Governor further argues that interested parties "may not be heard on the threshold issue -- which has already been resolved -- of

^{2/} Brief of the Attorney General of the State of Florida, at 7.

^{3/} Brief of the Governor of the State of Florida and the Florida Department of Revenue ("Governor's Brief"), at 16.

^{4/} Id. at 6.

whether an opinion should be released."^{5/} Both assertions are incorrect.

Courts always have authority to decide the scope of their jurisdiction, especially where as here that jurisdiction is discretionary. Moreover, this Court has explicitly stated that the scope of its decision is open to discussion. In its original order of May 13, 1987, the Court stated that the "request is answerable . . . and we exercise our discretion to do so." But in its Order of Clarification dated May 21, 1987, the Court stated that

"[t]he 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. . . . If [a party] contends that we are inhibited from answering the Governor's questions on a certain ground, he should so urge us. Our opinion to the Governor would delineate the extent of our response and the reasons therefor." (Emphasis added.)

It is well established under Florida law that the assumption of jurisdiction does not obligate this Court to answer all of the questions set forth in the request for an advisory opinion. This Court has repeatedly declined in the past to answer questions that it believes to be inappropriate. In re Advisory Opinion to the Governor, 96 So.2d 900 (Fla. 1957); In re

^{5/} Id. at 10 (emphasis in original).

Advisory Opinion to the Governor, 113 So.2d 703 (Fla. 1959); In re Advisory Opinion to the Governor's Request, 388 So.2d 554 (Fla. 1980).

II. THIS COURT SHOULD DECLINE TO ADDRESS ANY OF THE QUESTIONS ABOUT THE CONSTITUTIONALITY OF THE NEW TAX ACT.

The government parties, as well as many of the private parties, address the merits of the constitutional questions that have been raised about the new tax law. We believe that those questions are beyond this Court's purview in an advisory opinion and that it is, in any event, inappropriate for this Court to address them in this proceeding.

A. The Court Does Not Need to Address the Constitutionality of the New Act Because No Executive Power or Duty is Affected by the Constitutional Challenges to the New Tax Law.

In order to perform its function under Article IV, Section 1(c) of the Florida Constitution, this Court need at most resolve only two questions -- the Governor's duty under the Florida Constitution to submit a supplemental budget and his responsibilities with respect to the enforcement of the laws of the State of Florida. The Court should not go beyond these questions. To the contrary, "[a]dvisory 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 duties of the Governor."

In re Advisory Opinion to the Governor, 151 Fla. 44, 9 So.2d 172, 174 (1942). Accordingly, "(t)his Court has many times declined to pass upon the constitutionality of a statute in rendering advisory opinions, particularly where such a test can best be accomplished in adversary proceedings appropriately briefed and buttressed by argument of counsel," In re Advisory Opinion to the Governor, 113 So.2d 703,705 (Fla. 1959). It should follow that course here.^{6/}

This Court need not resolve any of the underlying constitutional challenges to the new tax act in order to resolve either the Governor's obligation to submit a budget or his obligation to enforce the laws. For this purpose, it is enough to note that the Attorney General of the State of Florida repeatedly asserts in his brief that the Governor may regard statutes as being valid until they are held to be unconstitutional in a real case or controversy. Brief of the Attorney General at 6, 7. Indeed, it is well established that state officials do not

^{6/} The Governor relies on this Court's decisions in In re Opinion to the Governor, 239 So.2d 1 (Fla. 1970) and In re Advisory Opinion to the Governor, 243 So.2d 573 (Fla. 1971) but those proceedings raised very different issues. In each of those cases, unlike the present request, the Governor was concerned with the interpretation of narrow constitutional issues. The 1970 opinion dealt with the Governor's line item veto authority; the 1971 opinion was limited to the definition of a single word in the state constitution. In both of these opinions, the Court recognized that it was unusual to render advisory opinions in such circumstances (239 So.2d at 8; 243 So.2d at 576) and did so in the absence of any certainty that the matter would soon be resolved by further litigation.

violate their constitutional duties when they seek in good faith to enforce legislation as to which there exists constitutional doubt prior to the time that the courts have resolved the constitutional issue. See Cooper v. Aaron, 350 U.S. 1 (1958). If the rule were otherwise, this Court would be inundated with requests for advisory opinions with respect to the constitutionality of each piece of legislation which the Governor is obligated to enforce. Clearly, Article IV, Section 1(c) of the Florida Constitution contemplates no such procedure.

The Governor's claim that the preparation and submission of a budget to the legislature requires him to seek an opinion as to the constitutionality of budgetary legislation already enacted provides no greater justification for an advisory opinion on the validity of Chapter 87-6^{7/}. Indeed, the Governor cites no authority suggesting that the Governor is remiss in his duties if, in preparing budgets, he assumes the constitutionality of previously enacted tax legislation where no decision has been rendered declaring that or similar legislation to be unconstitutional.

In short, the Governor has no constitutional duty to disregard Chapter 87-6, even though substantial questions have been raised as to its validity. And "[s]ince it does not appear

^{7/}

See Governor's Brief at 4.

that the exercise of an executive power or duty is or will be affected by the requested interpretation of the legislative action proposed, [this Court is] compelled, under numerous precedents of this court to decline to answer [the Governor's] request." In re Advisory Opinion to the Governor, 96 So.2d 900, 902 (Fla. 1957). Accord, In re Advisory Opinion to the Governor Request of August 28, 1980, 388 So.2d 554, 555 (Fla. 1980).

B. An Advisory Opinion About The
Constitutionality of the New
Tax Law Would Not Be Appropriate

The Governor suggests that the dangers of rendering advisory opinions with respect to the underlying constitutional challenges cannot be considered by this Court because those concerns were rejected when a provision for advisory opinions was included in the Florida Constitution. Governor's Brief at 6-7. That is not correct. This Court has repeatedly recognized that prudential considerations can appropriately lead it to decline a request for an advisory opinion, even if the Court has the authority to issue the opinion under the Florida Constitution, and it has accordingly invited parties to address these considerations in this proceeding. The prudential considerations are especially significant where, as here, the rights of private parties are at issue. As the Court explained in one proceeding: "The question does not merely invite a definition of the limits of purely executive power. An answer [to the question would]

affect directly the rights of individuals against whom it is contemplated the power will be exercised." Advisory Opinion to the Governor, 196 So.2d 737, 739 (Fla. 1967).

As we urged in our opening brief (Brief of Capital Cities/ABC, CBS, and NBC at 14), these prudential considerations counsel the Court not to decide the constitutional issues in this proceeding. This Court confronts an enormously complex piece of tax legislation that raises many issues of constitutionality and construction under the federal as well as the state constitution. The time allowed for presentation on these issues has been limited, and the presentation itself has been made more difficult by the adoption of numerous amendments to the statute during the pendency of this proceeding. While the constitutionality of the statute cannot be finally resolved in this proceeding as to any potential taxpayer, even the Governor admits (Brief of the Governor at 8) that an opinion by this Court can prejudice the outcome of the adversarial litigation that will necessarily follow.

The Governor himself recognizes that constitutional questions which require factual determinations are not appropriate for this Court to consider pursuant to a request for an advisory opinion.^{8/} He urges, however, that this Court may resolve

^{8/} "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." Governor's Brief at 16.

the constitutionality of the new tax law on its face. See Governor's at 5. Yet even resolution of constitutional questions on the "face" of a statute is likely to require a firmer understanding of the context of the law -- an understanding that can be gained only when the issues arise in real cases, with real parties, to give concreteness and specificity to the issues.

Even if this Court were to answer the questions framed by the Governor, it could not finally resolve the constitutionality of the new tax legislation. The Governor concedes that the statute is subject to a host of constitutional challenges beyond those raised in the so-called "facial" questions that the Governor now argues the Court can decide.^{9/} Accordingly, an advisory opinion could not fully advise the Governor as to the viability of the revenue sources contemplated by the new statute; indeed, the concedely unanswerable questions concerning the application of the statute to various groups of taxpayers may have a far greater impact on the State's budget than the abstract issues that the Court is being urged to decide.

^{9/} The Governor concedes that "[c]hallenges addressed to a particular application of the Act must be raised in proper adversary proceedings." (emphasis in original) Governor's Brief at 5. And, while the Governor himself recognizes that advisory opinions have no binding precedential effect (see id at 7), he acknowledges that an advisory opinion issued by this Court will be found highly persuasive in the courts below. See id at 4. This advisory opinion would thus unnecessarily prejudice future controversies without providing the assurance as to the validity of the statute that the Governor seeks.

Moreover, several of the constitutional questions may well turn on regulatory and judicial interpretations ultimately given to the new tax act. This Court plainly cannot address the numerous statutory questions in the context of this advisory proceeding, and this Court should not seek to address important constitutional questions until it is determined in an appropriate case whether those questions can be avoided by construction of the statute.

Conclusion

Under these circumstances, the Court should decline to render an advisory opinion as to the constitutionality of the new statute. The Governor does not need such an opinion to carry out

his duties, and the rendering of such an opinion in these abbreviated proceedings would be of little value and would have a substantial prejudicial effect on the later adversarial litigation that must in any event result.

Of Counsel:

Stephen A. Weiswasser
Senior Vice President
and General Counsel
Sam Antar
Capital Cities/ABC, Inc.
1330 Avenue of the Americas
New York, New York 10019

George Vradenburg III
Vice President and
General Counsel

Ellen Oran Kaden
Associate General Counsel
CBS Inc.
51 W. 52d Street
New York, New York 10019

Corydon B. Dunham
Executive Vice President
and General Counsel
National Broadcasting
Company, Inc.
1825 K Street, N.W.
Washington, D.C. 20006

Howard Monderer
Vice President, Law,
Washington
National Broadcasting, Inc.
1825 K Street, N.W.
Washington, D.C. 20006

Respectfully submitted,

Wilmer, Cutler & Pickering

By *Lloyd N. Cutler*
Lloyd N. Cutler
Timothy B. Dyk
A. Douglas Melamed
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Steel, Hector, & Davis

By *Donald M. Middlebrooks*
Donald M. Middlebrooks
4000 Southeast Financial Center
Miami, Florida 33131-2398
(305) 577-2800

Attorneys for Capital Cities/
ABC, Inc., and CBS Inc.

Cahill Gordon & Reindel

By *Dean I. Ringel*
Dean I. Ringel
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for National
Broadcasting Company, Inc.

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Reply Brief of Capital Cities/ABC, Inc., CBS Inc. and National Broadcasting Company, Inc. was served by mail this 18th day of June, 1987, upon the counsel and persons listed on the attached Service List.

By



Donald M. Middlebrooks

Service List

The Hon Bob Martinez
Governor of the State of Florida
The Capitol
Tallahassee, FL 32301

Alan C. Sundberg
Sylvia H. Walbolt
Cynthia S. Tunnicliff
Carlton Fields Ward Emmanuel, et al.
P. O. Drawer 190
Tallahassee, FL 32302

William Townsend
General Counsel
Jeffrey Kielbasa
Deputy General Counsel
Florida Department of Revenue
The Carlton Building
Tallahassee, FL 32301

Joseph C. Spicola, Jr.
Office of the Governor
Suite 209, The Capitol
Tallahassee, FL 32302

The Hon. Robert A. Butterworth, Jr.
Attorney General
The Capitol
Tallahassee, FL 32301

Steven S. Rosenthal
Morrison & Foerster
Walter Hellerstein
2000 Pennsylvania Avenue, N.W.
Washington, DC 20006

Parker Thomson
Thomson Zeder Bohrer Werth & Razook
4900 Southeast Financial Center
Miami, FL 33131-2363

Julian Clarkson
Gregg D. Thomas
Steven L. Brannock
Richard M. Blau
Holland & Knight
1200 Brickell Avenue
Miami, FL 33101

Talbot D'Alemberte
Dean and Professor
Florida State University
Box 10294
Tallahassee, FL 32302

Joseph W. Jacobs
Florida State University
College of Law
Box 10294
Tallahassee, FL 32302

Adam J. Hirsch
College of Law
Florida State University
Tallahassee, FL 32306-1034

Gerald B. Cope, Jr.
Laura Besvinick
Greer, Homer, Cope & Bonner, P.A.
Southeast Financial Center
Suite 4360
200 South Biscayne Boulevard
Miami, FL 33131

Dan Paul
Franklin G. Burt
Finley Kumble Wagner Heine, et al.
777 Brickell Avenue, Suite 1000
Miami, FL 33131

Edith Broida
P. O. Box 390751
Miami Beach, FL 33119

George H. Freeman
The New York Times Company
229 W. 43rd Street
New York, NY 10036

Stephen J. Wein
Kelli Hanley Crabb
P. O. Box 41100
St. Petersburg, FL 33743

Robert E. Meale
John S. Schoene
Linda G. Levy
Baker & Hostetler
P. O. Box 112
Orlando, FL 32802

Ray Ferrero, Jr.
Wilton L. Strickland
P. O. Box 14604
Fort Lauderdale, FL 33302

William G. Mateer
P. O. Box 2854
Orlando, FL 32802

Charles Rigby Ranson
Post Office Drawer 1657
Orlando, FL 32302

Gregory L. Diskant
30 Rockefeller Plaza
New York, NY 10112

Richard G. Garrett
Stuart H. Singer
Greenberg, Traurig, et al
1401 Brickell Avenue, PH-1
Miami, FL 33131

Cravath Swaine & Moore
One Chase Manhattan Plaza
New York, NY 10015

Howell L. Ferguson
118 N. Gadsden Street
Tallahassee, FL 32302

Wyatt and Salzstein
1724 Desales Street, N.W.
Washington, DC 20036

Daniel F. O'Keefe, Jr.
Eve E. Bachrach
The Proprietary Association, Inc.
1150 Connecticut Avenue, N.W.
Suite 1200
Washington, DC 20036

Robert A. Altman
J. Griffin Leshner
James C. Duff
Clifford & Warnke
815 Connecticut Avenue, N.W.
Washington, DC 20006

Bruce Rogow
Steven Friedland
Nova University Law Center
3100 S. W. 9 Avenue
Fort Lauderdale, FL 33315

Milton Hirsch
Suite 204, White Building
One Northeast Second Avenue
Miami, FL 33132

Barry Richard
Lorence Jon Bielby
Roberts Baggett LaFace & Richard
Post Office Drawer 1838
Tallahassee, FL 32301

Douglas W. Abruzzo
Post Office Box 778
Tallahassee, FL 32302

Robert M. Ervin
Richard W. Ervin
Ervin, Varn, Jacobs, Odon and Kitchen
Post Office Drawer 1170
Tallahassee, FL 32302-1170

Chris W. Altenbernd
Charles A. Wachter
Fowler White Gillen Boggs, et al.
Post Office Box 1438
Tampa, FL 33601

Robert P. Smith, Jr.
Elizabeth C. Bowman
Hopping Boyd Green & Sames
Post Office Box 6526
Tallahassee, FL 32314

John W. Caven, Jr.
Allan P. Clark
Steven R. Browining
Caven Clark & Ray, P.A.
3306 Independent Square
Jacksonville, FL 32202

David W. Johnson
Johnson and Crane
1200 Brickell Avenue
16th Floor
Miami, FL 33131

12