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 PROPRIETARY ASSOCIATION, INC. CONCERNING CHAPTER 87-6, LAWS OF FLORIDA

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Date: June 18, 1987

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

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CASE NO. 70,533

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

REPLY BRIEF OF
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INTRODUCTION

This Reply Brief is filed on behalf of the Proprietary Association, Inc. (the "PA") in response to the briefs filed by the Honorable Bob Martinez, Governor of the State of Florida and the Florida Department of Revenue (the "Governor's Brief"), the Florida Senate and House of Representatives (the "Legislature's Brief"), and the Honorable Robert A. Butterworth, Attorney General of the State of Florida (collectively referred to as the "proponents") in this matter on June 8, 1987. This Reply Brief will address the arguments raised by the proponents in response to the PA's particular concerns with Chapter 87-6 as set forth in PA's brief of May 29, 1987 ("Initial Brief of the PA").

Specifically, PA's concerns are that: (1) the Supreme Court of Florida should narrowly construe the scope of its review under the advisory opinion procedure provided in Article IV, section 1(c) of the Florida Constitution; (2) the advertising tax imposed by section 212.0595 under Chapter 87-6 violates the right of free speech and the due process and equal protection clauses under the Florida Constitution; and (3) assuming without conceding that federal constitutional issues can lawfully be addressed by this Court in an advisory opinion, the advertising tax in Chapter 87-6 violates the right of free speech, is unconstitutionally vague, and violates the Equal Protection and Commerce Clauses of the United States Constitution.

I.

THE ADVISORY OPINION PROCEDURE IS INAPPROPRIATE FOR CONSIDERATION OF THE COMPLEX CONSTITUTIONAL ISSUES RAISED

Before addressing the specific constitutional arguments raised by the proponents, the PA respectfully reiterates its general objection to the procedure utilized to address the complex issues in this matter. The submission of over 20 briefs to this honorable Court during the past two weeks has demonstrated the inappropriateness of addressing tax and constitutional questions of enormous complexity and magnitude

in such a short period of time without the benefit of a developed factual record.

Additionally, and from the time the Governor's Request to this Court for an advisory opinion was made on May 12, 1987, it has been unclear as to what issues are before the Court. For example, both the Governor's initial request of May 12, 1987 and the brief submitted on his behalf emphasized that the Governor is simply asking this Court to

> render him their advisory opinion as to whether the Legislature has validly created a revenue source from the tax imposed on the sale or use of services consumed or enjoyed in this State or whether it has failed to do so, thereby requiring the Governor to propose a new budget so that the budget will be in balance in accord with constitutional dictates.

Governor's Brief at 6 (June 8, 1987) (emphasis added). See also Request of Governor Bob Martinez at 7 (May 12, 1987). The Court agreed to respond to this specific and relatively narrow question, which appears to raise procedural concerns only. The Court could review the legislative record and render its opinion on the validity of the procedure by which the Legislature created the revenue source under Chapter 87-6.

The proponents, however, seek to expand the scope of the inquiry beyond the bounds of what may appropriately be reviewed in an advisory opinion. The proponents are asking this Court to address the entire range of constitutional problems

identified by those who are challenging or would challenge Chapter 87-6. By alluding to several of the constitutional issues that have been raised or threatened in lower courts concerning the tax, it is apparent that the proponents are not asking this Court whether the Legislature "validly created" a revenue source, but whether the Legislature created a constitutional statute. That is a qualitatively different question, one that requires a fully developed factual record not present herein before a meaningful opinion could be rendered.

The Governor's Brief states that

> [a]t the time the Governor recommended this tax, he believed that the tax was appropriate and valid. As stated in his letter, however, various constitutional objections have been raised regarding the new tax. The uncertainty created by the pending and threatened litigation assailing the constitutionality of this statute in turn created doubt as to <u>his</u> constitutional duties and responsibilities . . . .

Governor's Brief at 15-16 (emphasis in original). Thus, the proponents are, in effect, attempting to utilize the advisory opinion process to address fundamental constitutional issues concerning the tax statute <u>before</u> they can be fully litigated in the courts below. The PA respectfully suggests that this is an improper invocation of the advisory opinion process, one that may establish an unfortunate precedent in future disputes of this nature.

Although there have been periods when this Court has addressed the constitutionality of statutes in an advisory opinion, the Court has properly declined to do so on many occasions. The reasons for declining to render such an opinion have never been more compelling than they are in the present matter. The numerous constitutional and tax issues that may possibly arise under Chapter 87-6 are far too complicated and voluminous to be fully and fairly resolved in such an extra-ordinarily compressed time frame.

Furthermore, an advisory opinion by the Florida Supreme Court on the substantive constitutionality of this Florida statute may be seen as inconsistent with previous opinions. As this Court noted in a prior advisory opinion, Florida statutes are "of presumed constitutionality . . . until such presumption is set at rest by a court of competent jurisdiction in a proper adversary proceeding." In re Advisory Opinion to Governor, 113 So.2d 703, 705 (Fla. 1959). See also City of Winter Haven v. A.M. Klemm & Son, 132 Fla. 334, 181 So. 153 (1938), Bonvento v. Board of Public Instruction, 194 So.2d 605 (Fla. 1967).

In the last matter in which this Court addressed a constitutional issue in an advisory opinion, Chief Justice England and Justice Hatchett aptly noted in dissent that

> [n]either the constitutional grant of authority to advise the governor nor our rules of implementation impart a truly

> adversary character to these advisory proceedings, yet in our opinion courts can competently and carefully assert their awesome power to declare legislative acts invalid only in the context of proceedings in which both sides of a clearly-framed issue have been fully and fairly presented.

In re Advisory Opinion to Governor, 374 So.2d 959, 970 (Fla. 1979). In the same matter, Justice Sundberg noted well-founded reasons for declining to render advice upon the constitutionality vel non of a statute in an advisory opinion. Justice Sundberg stated that the authority to be the final arbiter of the constitutional validity of the acts of the legislative and judicial branches "should be exercised with circumspection." Id. at 971.

Justice Sundberg further observed that:

> A proper regard for the separation of powers among the branches of government indicates that the solemn responsibility of passing on the constitutional validity of legislative and executive acts should be exercised within the traditional adversary context, a mode which has proven to be superior for framing the issues and testing the truth of competing claims. This principle is aptly put by Mr. Justice Reed in United Public Workers v. Mitchell, 330 U.S. 75, 90, 67 S. Ct. 556, 565, 91 L. Ed. 754 (1946):
>
> > Judicial adherence to the doctrine of the separation of powers preserves the courts for the decision of issues, between litigants, capable of effective determination . . .

> When the courts act continually within these constitutionally imposed boundaries of their power, their ability to perform their function as a balance for the people's protection against abuse of power by other branches of government remains unimpaired. Should the courts seek to expand their power so as to bring under their jurisdiction ill-defined controversies over constitutional issues, they would become the organ of political theories. Such abuse of judicial power would properly meet rebuke and restriction from other branches. By these mutual checks and balances by and between the branches of government, democracy undertakes to preserve the liberties of the people from excessive concentrations of authority . . . .
>
> It is these very considerations which led former members of this Court to adjure passing upon the constitutional validity of a statute through an advisory opinion to the governor. See In re Advisory Opinion to the Governor, 239 So.2d 1, 12 (Fla. 1970) (Drew, J., separate advisory opinion); In re Advisory Opinion to the Governor, 113 So.2d 703 (Fla. 1959).

374 So.2d at 971, 972.

Because the scope of this Court's review has not been adequately clarified in this matter, interested parties have been compelled to address all conceivable issues, including constitutional questions, that could arise under Chapter 87-6 in the event that the Court chooses to consider any such issue.

In attempting to expand the scope of this Court's review in this advisory opinion beyond acceptable boundaries, the proponents themselves recognize the difficulty of determining constitutional questions when no factual record exists. Although urging the Court to "limit" its opinion to whether Chapter 87-6 is "facially" constitutional (see Brief of Honorable Robert A. Butterworth, Attorney General of the State of Florida at 7 (June 8, 1987)), the proponents nonetheless argue the constitutionality of Chapter 87-6 "as applied" by referencing various hypotheticals and illustrations in support.*/ See, e.g., Legislature's Brief at 26-27.

If the Court chooses to address the myriad of state tax and constitutional issues briefed by the interested parties, then it should, as the Governor suggests, "consider all legal issues which might affect the Governor's duties under the Florida Constitution," including but not limited to "facial"

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*/ Interestingly, and in tacit recognition that Chapter 87-6 was not even "facially" constitutional, the Legislature amended this statute on which the Governor seeks the Court's advice apparently in response to some of the criticisms articulated in the briefs of those opposing the tax. The proponents now ask the Court to confirm the constitutionality of the new version of the Act. For the reasons discussed in the following sections, the amended act also fails to pass constitutional muster. See Sections II-V, infra.

constitutional issues.*/ Governor's Brief at 11. If both federal and state constitutional questions are addressed by the Court, then the PA submits that the Court should find Chapter 87-6 unconstitutional under any kind of analysis. The PA's response to those constitutional arguments follows in the event that the Court chooses to opine on them.

II.

THE ADVERTISING TAX, AS AMENDED, VIOLATES THE RIGHT OF FREE SPEECH UNDER THE FLORIDA AND UNITED STATES CONSTITUTIONS

In apparent recognition of the constitutional flaws of the advertising tax, the Legislature attempted to respond to the criticisms of interested parties and amended section 212.0595 by defining the term "advertising", among other things. "Advertising" is now defined in section 212.0595(10) as

> 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 service of a type customarily performed by an advertising agency.

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*/ If the Court chooses to advise on constitutional questions, the PA submits that the language of the Florida Constitution limits such review to state constitutional questions. See Initial Brief of the PA at 5-10.

The Legislature's effort to remedy the tax's constitutional infirmities falls short of its goal. If anything, the new definition of advertising exacerbates the constitutional deficiencies of the tax. The definition of what constitutes advertising is so vague as to give no guidance on what is to be taxed. Moreover, the amendment excludes "creative services" from the advertising tax which compounds the discriminatory problems of the tax.

Thus, for the same reasons set forth in detail in the Initial Brief of the PA, section 212.0595 of Chapter 87-6, as amended, remains unconstitutional because (1) it discriminates against a form of speech; and (2) it will have a chilling effect on the free flow of speech into Florida. See Initial Brief of the PA at 10-17.

The proponents rely upon the Supreme Court decisions in Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) and Grosjean v. American Press Co., 297 U.S. 233 (1936) to support their position that taxes may be imposed upon the media. See, e.g., Governor's Brief at 18-19. Even assuming, arguendo, that a tax on advertising as such is constitutionally permitted, such a tax on First Amendment rights may in no event be discriminatory. In both Minneapolis Star and Grosjean, the tax schemes at issue were found to be unconstitutional because they did not meet the stringent standards imposed upon a tax which burdens interests protected

by the First Amendment. Those tax schemes were found to be facially discriminatory because there the legislatures singled out an element of the media for taxation without asserting a "counterbalancing interest of compelling importance." Minneapolis Star, 460 U.S. at 585. In Minneapolis Star, the Minnesota legislature singled out and taxed paper and ink products consumed in publication. In Grosjean, the Louisiana legislature in effect singled out only 13 of 124 publishers in the state for taxation.

Similarly, under the amended version of section 212.0595, the Florida Legislature singles out "the service of conveying the advertiser's message" among all forms of speech for taxation. The Florida Legislature has articulated no counterbalancing interest of compelling importance for singling out this portion of the advertising media for taxation.

The proponents of the tax candidly admit that laws which single out the press or target particular members of the press are unconstitutional. Governor's Brief at 21, 24. In fact, the Florida tax does both. While arguing that section 212.0595 does not discriminate against the media or unfairly differentiate among various types of media because it is part of a general tax on the sale of tangible personal property and services (see Governor's Brief at 24), the proponents ignore the practical effect of the tax. In imposing its "general" tax, the Legislature has singled out "advertising" for special

treatment under the tax scheme. It is the only speech-related service to be so singled out.*/

Additionally, the Legislature discriminates within the class of advertisers by applying the tax to services conveying the advertisers' message and exempting from the advertising tax -- without any justification -- the creative services performed by an advertising agency. Thus, the Legislature further arbitrarily differentiates among types of advertising services with the tax, thereby compounding its unjustifiable discrimination. Such a tax cannot be fairly described as an "across-the-board" tax. Indeed, the amended tax embodies the very type of discriminatory scheme that the Supreme Court found repugnant to First Amendment principles in Arkansas Writers' Project, Inc. v. Ragland, 55 U.S.L.W. 4522 (U.S. April 22, 1987).

In Arkansas Writers', the U.S. Supreme Court was concerned with whether a general interest magazine tax that exempted certain newspapers and religious, professional, trade and sports journals was unconstitutional. The Court found that scheme to violate the First Amendment, even though "there [was] no evidence of an improper censorial motive" on the part of the state because the tax targeted and discriminated against a small group within the press. 55 U.S.L.W. at 4524. Here,

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*/ Moreover, the tax cannot be viewed as a general tax because there are many more exclusions from the tax than services which are actually taxed.

the proponents' attempt to label the advertising tax as a part of a general "across-the-board" tax cannot hide the fact that the advertisers' portion of the tax discriminates among a small selected group of taxpayers, and therefore is unconstitutional under the reasoning in Arkansas Writers'.

Moreover, those activities of the advertising industry that remain subject to the advertising tax under amended section 212.0595 are not specified. In contrast, the sales and use statute upheld by the Supreme Court of Iowa in Lee Enterprises, Inc. v. Iowa State Tax Comm'n, 162 N.W.2d 730 (1968), and relied upon in support of the Florida tax in the Governor's Brief (at 22-23), identified with particularity the types of advertising services that were to be subject to the tax. Among the services specified were newspapers, directories, shopper's guides, magazines, point-of-purchase performance advertising, printing and binding, and promotion and direct mail. Id. at 734. The Florida advertising tax, on the other hand, is devoid of such specificity. Instead, the Legislature defines the term "advertising" generically as "the service of conveying the advertiser's message." Advertisers will be unable to discern whether a particular service is subject to the tax and may as a result be compelled to limit or discontinue advertising in Florida due to this uncertainty. The chilling effect on the exercise of First Amendment rights under these circumstances is virtually self-evident.

III.

THE ADVERTISING TAX VIOLATES THE DUE PROCESS CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS BECAUSE IT IS UNDULY VAGUE

The proponents of the advertising tax contend that its provisions are not susceptible to a due process challenge on vagueness grounds. Citing to the recently enacted amendments to section 212.0595, the proponents argue that by further defining the term "market coverage"*/ and by adding a definition of the term "advertising", the Legislature has immunized the advertising tax from the opponents' due process challenge. Governor's Brief at 36.

It is apparent that the Legislature's eleventh-hour amendment of the advertising tax represents a belated but unsuccessful effort to cure impermissibly vague provisions. Not only are these recently enacted amendments insufficient to remedy the vagueness of the provisions of the advertising tax, but the amendments themselves equally offend the due process clauses of the Florida and United States Constitutions.

The definition of advertising,**/ although presumably intended to clarify the advertising tax, serves only to

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*/ The constitutional infirmity of the Legislature's definition of market coverage under the Commerce Clause is addressed in Section V, infra.

**/ See p. 8, supra, for the definition of "advertising."

obfuscate it further. By its terms, this definition inexplicably differentiates among types of advertising which are subject to the advertising tax. As noted earlier, while the service of "conveying the advertiser's message" is taxed, "creative services of a type customarily performed by advertising agency"*/ are exempt from the advertising tax and treated differently. Although the Legislature's objective in enacting the advertising tax was supposedly to implement "purely and simply a nondiscriminatory across-the-board tax on services, which reaches advertising as one of those services," this arbitrary differentiation between types of advertising services creates even more confusion. Governor's Brief at 39.

Apart from creating vague distinctions between types of services, this definition also offends due process because it fails to identify with sufficient particularity those activities that the Legislature deems to fall within the taxable service of "conveying the advertiser's message."**/ Moreover,

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*/ This exemption from the advertising tax for so-called "creative services" is itself vague as the Legislature has failed to define its meaning.

**/ For example, it still remains unclear whether mandatory product labeling on over-the-counter drugs would constitute "advertising" insofar as such labeling may be seen as "convey[ing] the advertiser's message." Contrary to the Governor's assertions, the PA does not contend that the Florida Department of Revenue may attempt to use the advertising tax to regulate the labels of its over-the-counter drugs. Governor's Brief at 37. Rather, the PA argues that because the definition of "advertising" is so vague, its members do not have fair notice as to whether mere labeling of over-the-counter drugs is subject to taxation. Initial Brief of the PA at 19.

the impermissible vagueness of the terms contained in the advertising tax cannot be remedied by reference to "commonly understood meanings in the trade or in the statutory context in which they are used." Governor's Brief at 37. Prior to its exclusion by the Legislature from the definition of "advertising," it is arguable that the commonly understood meaning of the term included the creative services of an advertising agency.

Thus, the advertising tax remains unconstitutionally vague and confusing. It is impossible for persons engaged in advertising services to discern what types of advertising services are subject to tax and which activities constitute "advertising" under this newly created definition. The vagueness of the advertising tax and its failure to give fair notice are particularly fatal because persons who violate its provisions are subject to potential criminal liability. See Kolender v. Lawson, 461 U.S. 352, 361 (1983). This Court should find, therefore, that the advertising tax violates the due process clauses of the Florida and U.S. Constitutions.

IV.

THE PROPONENTS OF THE ADVERTISING TAX HAVE FAILED TO DEMONSTRATE THAT THE TAX DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSES OF THE FLORIDA AND UNITED STATES CONSTITUTIONS

The proponents further assert that the classification scheme contained in Chapter 87-6 does not violate the equal protection clauses of the Florida and U.S. Constitutions because "the power of the Legislature to make distinctions is at its height when dealing with taxation." Legislature's Brief at 45. The proponents posit that in seeking to broaden Florida's tax base, it is "only logical to eliminate the exemptions on services." Thus, the proponents conclude on the basis of these premises that the requisite rational basis exists for the classifications as enacted in Chapter 87-6. Legislature's Brief at 34, 45; Governor's Brief at 29 n.12.

Contrary to the proponents' position, however, the Legislature's power to create classifications in enacting tax statutes is not unbridled.*/ Indeed, its power to legislate is greatly circumscribed when imposing a tax on persons or entities, like advertisers, who are exercising their rights to freedom of speech under the Florida and U.S. Constitutions. It

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*/ As stated by the Supreme Court in Arkansas Writers', "[a] power to tax differentially, as opposed to tax generally, gives a government a powerful weapon against the taxpayer selected." 55 U.S.L.W. at 4524.

is well-established that where a state statute affects the fundamental right of freedom of speech, its imposition cannot be justified merely by showing, as the proponents have alleged here, that the tax bears a rational relationship to a legitimate state objective. See Minneapolis Star & Tribune Co., 460 U.S. at 581-83. Rather, a statute, like the advertising tax, which infringes on First Amendment rights is unconstitutional unless it can be demonstrated that a compelling state interest requires the classification. See Regan v. Taxation with Representation of Washington, 461 U.S. 540, 547 (1983).

The proponents of the advertising tax have wholly failed to meet their heavy burden to show that a compelling state interest requires the classification scheme at issue.*/ With respect to the exemption for one form of speech -- qualified motion pictures under section 212.0592(18) -- the Governor avers that this classification is justified because "the creation of a motion picture industry is a high state priority." Governor's Brief at 33. Moreover, the Governor claims that the

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*/ This Court should reject the proponents' argument that since classification is a necessary part of a State's power of taxation, the objective of increasing the State's coffers justifies any resultant discrimination. Legislature's Brief at 12, 16. The U.S. Supreme Court recently enunciated in Minneapolis Star that when a State exercises its power to tax, the objective of raising revenue is insufficient to justify differential treatment of interests protected by the First Amendment. 460 U.S. at 586. See also Shapiro v. Thompson, 394 U.S. 618, 633 (1969) (equal protection clause prohibits a State from accomplishing the goal of fiscal integrity by creating invidious distinctions between classes).

movie industry offers "qualitatively greater benefits . . . in terms of employment opportunities and an infusion of capital." Id. at 33 n.15 (emphasis added).

To the extent that employment and revenue factors uniquely qualify motion picture services for exemption, these same factors should similarly qualify advertising services for exemption under the proponent's own standards. As preliminary studies have revealed, the advertising industry is economically important to Florida and the imposition of the advertising tax may result in a net loss of jobs and personal income for the State. See Initial Brief of the PA at 13. This Court should view the selective exemption granted to motion pictures services as an arbitrary and discriminatory classification which, on its face, favors one group over another. No compelling justification is offered by the proponents to support the differential treatment of advertising and motion picture services.

Apart from motion pictures and the other forty broad categories of services which are exempt, the recently enacted definition of advertising creates a new classification affecting First Amendment rights which also offends equal protection. Section 212.0595(10) singles out one type of advertising service for the advertising tax -- the service of conveying a message -- while treating another type of service -- the creative services of an advertising agency -- differently. This classification violates equal protection not only because

on its face it accords differential treatment to one group in the exercise of their First Amendment rights, but the Legislature has failed to advance any justification for targeting only a portion of the advertising services industry for taxation under the special tax. See Arkansas Writers', 55 U.S.L.W. at 4524.

V.

THE PROPONENTS HAVE FAILED TO DEMONSTRATE THAT THE ADVERTISING TAX DOES NOT IMPERMISSIBLY BURDEN INTERSTATE COMMERCE AND IT IS THEREFORE UNCONSTITUTIONAL UNDER THE COMMERCE CLAUSE OF THE U.S. CONSTITUTION

To withstand challenge under the Commerce Clause, the proponents must show that the advertising tax "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). Because the proponents have not adequately demonstrated that the advertising tax meets all of the Complete Auto Transit requirements, it cannot survive scrutiny under the Commerce Clause.

The first prong of the Complete Auto Transit test requires that interstate businesses have a "substantial nexus with the State before any tax may be levied on [them]." Commonwealth Edison Co. v. Montana, 453 U.S. 609, 626 (1981).

(emphasis in original). Recognizing that the advertising tax exceeded the State's constitutional taxing jurisdiction under the Commerce Clause, the Legislature amended its provisions to require that an out-of-state advertiser have a nexus with Florida before being subject to tax. See Governor's Brief at 59-60. Section 212.0595(6) now provides: "If advertising is not sold in this state, but is used in this State, the advertiser shall self-accrue the use tax imposed by this section and remit the tax directly to the department, if the advertiser has nexus for tax purposes with this state . . . ." (emphasis supplied).

In Burger King Corp. v. Rudzewicz, 471 U.S. 462, 478 (1985), a precedent relied upon by proponents (Governor's Brief at 6), the Supreme Court declared that an individual's contract with an out-of-state party alone cannot establish sufficient minimum contacts in the individual's home forum. Here, although the Legislature claims to have been cognizant of "the peculiarities of interstate advertising," conspicuously absent from the amendment to section 212.0595(6) is notification to advertisers as to which activities provide a substantial nexus for tax purposes in the State of Florida. Governor's Brief at 29. The Legislature's attempt, therefore, to ameliorate the advertising tax's constitutional infirmities by the insertion of a nexus requirement is too inexact to satisfy the first prong of Complete Auto Transit.

The apportionment formula similarly suffers from imprecision. The Legislature states that in enacting the advertising tax, it proceeded on the general principle "that the sale or use of services should be taxed where the benefit of the service is enjoyed." Legislature's Brief at 26. Accordingly, the Legislature determined that "the most appropriate measure of enjoyment of the benefit of advertising services is the media market coverage." Id. The recently amended definition of market coverage now provides: "'market coverage' means average circulation within the geographic area of distribution for the publication in which the advertisement appears, in the case of print media, and means population within the signal reception area of the broadcaster, in the case of broadcast media, measured as prescribed by the department by rule." Section 212.0595(4)(b). The apportionment formula in turn utilizes market coverage as its basis of measurement. Section 212.0595(4)(a) provides that:

> [t]here shall be included in the measure of the tax imposed by this section that proportion of the sales price or cost price which is equal to the proportion of market coverage within Florida to the total market coverage for the most recently completed accounting year of the service provider. However, in the case of new or restructured service providers, the department may prescribe by rule another time period or proportion that fairly reflects Florida market coverage.

This apportionment formula as applied to advertising in interstate commerce is not sufficiently fair or precise in its allocation to meet the second prong of Complete Auto Transit test. Contrary to the proponents' position, the definition of "market coverage" does not necessarily reflect whether the benefit of the advertising service in all industries to be affected is actually "enjoyed or consumed" by Floridians. The development of an adequate factual record here would have aided this Court in determining the "consumption" in Florida of advertising by different industries and allowed this Court to ascertain whether the apportionment formula is in fact fair. Like the apportionment formula which the Supreme Court struck down in Hans Rees' Sons, Inc. v. North Carolina, 283 U.S. 123, 134 (1930), Florida's advertising apportionment formula "operates as to reach [sales or use of services] which are in no just sense attributable to transactions within its jurisdiction."

Contrary to the Legislature's expess intent, the apportionment formula as applied to advertising in interstate commerce merely reflects the potential audience within reach of the services as opposed to the actual audience. Because it is important to focus on "the practical effect of a challenged tax" in reviewing Commerce Clause challenges to state taxes, this Court must rule that the practical effect of the advertising apportionment formula is unfair and overly burdensome on

interstate commerce. Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 443 (1980).

Under the fourth prong of the Complete Auto Transit test, the measure of the tax must be reasonably related to the services provided by the State "since it is the activities or presence of the taxpayer in the state that may properly be made to bear a 'just share of state tax burden.'" Commonwealth Edison Co. v. Montana, 453 U.S. 609, 626 (1981). Since the proponents have not shown that "the measure of the tax is related to the extent of the taxpayer's contact with the state," Governor's Brief at 68, Florida cannot constitutionally extract a tax from advertisers engaged in interstate commerce. Nor does the apportionment formula in measuring the amount of the tax appear to take account of whether services are in fact being provided to the advertiser by the State. Rather, each advertiser is arbitrarily assigned the same proportion of the national total as its Florida component, irrespective of whether it receives any benefits from the State.

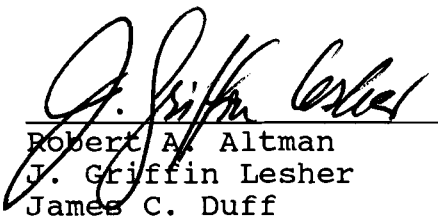
The advertising tax on its face violates the Commerce Clause because it imposes an undue burden on interstate commerce. A review of its provisions relating to the vague requirement of a taxing nexus and its imprecise apportionment formula based on market coverage demonstrates that, by its terms, the advertising tax fails to meet the requirements of Complete Auto Transit. Accordingly, this Court should find the tax invalid under the Commerce Clause.

VI.

CONCLUSION

For the foregoing reasons, The Proprietary Association, Inc. respectfully urges this Court to decline to review the constitutionality of Chapter 87-6 in an advisory opinion. If the Court expands its review to constitutional issues, it is urged that the Court advise that the advertising tax enacted thereunder is unconstitutional under the free speech, due process and equal protection clauses of the Florida Constitution. Furthermore, should the Court choose to address the federal constitutional issues, it is further urged that the Court advise that the advertising tax violates the First Amendment, the Due Process and Equal Protection Clauses, and the Commerce Clause of the U.S. Constitution.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief Of The Proprietary Association, Inc. Concerning Chapter 87-6, Laws Of Florida, was mailed, first class postage prepaid, on this 18th day of June, 1987, to the following:

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