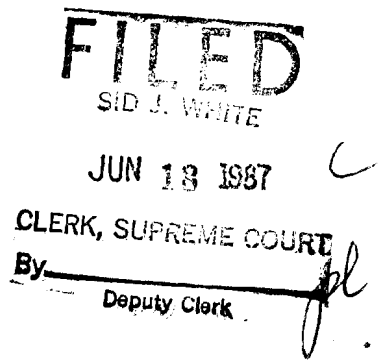
IN THE SUPREME COURT OF FLORIDA

No. 70,533

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



REPLY BRIEF

OF THE MIAMI HERALD PUBLISHING COMPANY

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

In its initial brief the Herald made three basic arguments: First, the Herald showed that the Act exempts "essential services" from taxation, but fails to include newspaper functions within that classification. The failure to classify the publication of news and advertising as "essential" is unconstitutional because it is irrational and because it singles out for taxation the essential functions performed by the press even though no compelling state interest supports this discrimination.

In response, the Governor asserts (at pp.29-30) that since the Legislature was never obligated to exempt all essential services, it could refuse to exempt newspaper functions. This response is simply a non sequitur. The Herald did not argue that the Legislature was required to exempt essential services. The Herald argued only that once the Legislature chose to classify some services as "essential" and thus exempt, it could not decline to exempt newspaper functions without a compelling state interest. Equal protection requires at least a rational basis for every classification, but where, as here, a fundamental right is involved, or the press has been "singled out," a compelling interest, rather than mere rationality, is required to justify the statutory classification.

Second, the Herald showed that the Act irrationally taxes the services performed by independent contractors while exempting identical services performed by employees. When these services involve expression (as in the case of advertising, particularly

political and editorial advertising), the tax discriminates against certain speech. No compelling state interest justifies such discrimination. The only response (pp.34-35 of the Governor's brief) offers the irrelevant homilies that independent contractors and employees perform different roles in the economy and are treated differently by the government for some purposes. No attempt is made to show how these asserted "different roles" support this tax discrimination between identical "services."

Finally, the Herald argued that the Act violates the single subject provision of the Florida Constitution. The response to this argument (pp.10-20 of the Attorney General's brief) claims the Legislature must be free to legislate "comprehensively." This reply simply misses the point. The Legislature is free to legislate comprehensively, but it must do so within constitutional limitations. The Act is precisely the "omnibus" legislation the Constitution forbids.

REPLY TO THE LEGISLATURE'S "STATEMENT OF THE CASE."

The Legislature has filed a 35-page "Statement Of The Case." This voluminous "record" is based solely on documents filed ex parte with the Court which were not made available to the Herald until June 15. An advisory proceeding involving no "case or controversy," and only "advice" concerning the "facial" constitutionality of the Act, should not rely on such a dubious factual predicate.

These "facts" are not relevant to any argument raised by the Herald. The "record" created by the Legislature does not show that the Act is a facially constitutional means of raising revenue. Nothing in these "facts" justifies excluding the press from the classification of essential services exempted from the Act, nor is there support for taxing some speech but not all speech. This voluminous body of material in no way suggests the Act dealt with a "single subject." The fact that counsel for the Legislature placed this mass of material before this Court merely highlights the inappropriateness of resolving this matter through the advisory opinion process, a process which permits no development of a proper factual record.

The Legislature asserts three basic propositions in its "Statement of the Case." First, it claims Florida is facing a revenue crisis. Second, the Legislature asserts that broadening the sales tax base is necessary to stabilize the revenue base across the recessions and "booms" of the business cycle. Third, the Legislature claims the Act is a general tax enacted to solve the revenue shortfall and the cyclical instability of the revenue base, a solution chosen only after a rational public deliberative process which found its "organic origins" in the tangible goods tax of 1949. To the degree the Court considers the Legislature's propositions masquerading as facts relevant to the constitutional issues raised here it should also consider the following:

1. While an increase in tax revenue was necessary this year, there is no fiscal crisis in Florida. The Legislature admits

that a one penny increase on the preexisting sales tax base "would have raised almost the same revenues" as projected under the Act. (Leg.Br. at 17) The Florida business community supported the one cent increase, but not the tax on advertising services.

2. Neither the tax on the publication of advertising nor the newspaper circulation tax is necessary. The Legislature itself admits the tax on advertising would account for only 1.4% of the revenue raised by the sales tax, while the newspaper circulation tax would provide so little revenue it does not register on the Legislature's pie charts. (Leg.Br. App. at A-1, 2).

3. The invalidation of the newspaper taxes, which help Florida so little and hurt the press so much,[1] would make good economic sense. The press and advertising industry provided the Sales Tax Commission with several econometric studies which demonstrated that a tax on advertising would necessarily increase the cost of making sales and therefore reduce sales activity. This reduction in sales would in turn reduce sales tax revenue, and the reduction in gross sales caused by the tax would seriously damage the Florida economy. The proponents of the tax produced no contrary economic studies or evidence of any kind.

4. There is no reason to believe that the Act will reduce the instability in sales tax revenue caused by fluctuations in

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[1] Although the revenues extracted by the newspaper taxes are inconsequential to Florida relative to the total dollars produced by the sales tax, their economic impact is concentrated initially on a very few media companies. The testimony before the Sales Tax Commission was that the press would have to close numerous bureaus, lay off employees, and reduce news coverage. Marginal newspapers and broadcasters would be put out of business.

the business cycle. The Act purports to tax primarily business related services, but business expenditures fluctuate with the business cycle.[2] The "broadened" tax would extract revenues from more transactions, but these transactions are not more stable.

5. A tax on advertising would not stabilize the tax base. Advertising expenditures fluctuate dramatically with the highs and lows of business cycles.[3]

6. The Legislature claims the Act is the result of intense studies by the Zwick Commission, the Sales Tax Commission, and the Speaker's Advisory Committee. In fact, while these groups examined Florida's growth problems or conducted public hearings, none of these groups studied the economic impact of repealing any exemption. Despite its statutory mandate to do so, the Sales Tax Commission acknowledged it performed no economic impact studies:

"Unfortunately, the Commission had only a limited

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[2] The Legislature's brief relies on two authorities for the proposition that the Act will create greater stability of the revenue base. Walby & Williams, The Impact of Florida's Sales Tax on Services (undated 2-page typeset document) (publication status unstated in original, not cited in brief, and unknown); Zingale & Davies, Why Florida's Tax Revenues Go Boom or Bust, And Why We Can't Afford It Anymore, 14 Fla.St.U.L.Rev. 433 (1986). Neither authority supports this proposition. The former is a two-page document lodged with the Court, but cites no source and gives no indication it was written with knowledge of the tax base of the Act. The law review article merely states that revenue base fluctuations can be reduced only by broadening all three of Florida's tax bases: income, wealth, and sales. The Act does not do that.

[3] The appendix to this brief documents the substantial business cycle fluctuations of advertising expenditures. The Herald gratefully acknowledges the assistance of Kenneth M. Clarkson, Professor of Economics, University of Miami, in preparing this material.

amount of time and Staff, precluding technical economic impact studies." Commission Report at 2.

Each of these bodies suffered the same failing: they recommended exemptions be repealed based on the assumption that repeal would have no adverse impact on the economy.

7. The Act is not a "general tax" resulting from a gradual and rational process of broadening the sales tax base. The truth is that the sales tax has from the beginning been honeycombed with political exemptions, aptly known as "turkeys" to the public, legislators, and lobbyists. Since 1949 there have been 94 statutory amendments to Chapter 212 which create or expand exemptions, while only 35 "broaden" the base.[4]

8. The enactment of the Act embodied some of this state's worst legislative practices of the past quarter century. The tax and its exemptions were formulated almost entirely out of the sunshine. Drafts of the Act were withheld both from the public and from Senators and Representatives until shortly before important votes had to be cast. It is a classic example of "logrolling," deal-making, and confusion. The Act exempted haircuts, banking services, phosphate rock, crustacea bait, artificial commemorative flowers, certain transportation and warehousing services, forestry services, potash, virtually all banking ser-

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[4] The Legislature's brief erroneously suggests there had been 83 amendments because it reviewed only exemptions to § 212.08 Florida Statutes; it ignored exemptions to Sections 212.02, 212.03, 212.031, 212.04, 212.05 et seq. Even regarding Section 212.08, 56 amendments narrow the base, while 26 broaden it.

vices, insurance services, motion pictures services, real estate sessions, and a myriad of others.

But not newspapers.

ARGUMENT

I. PROPONENTS MISSTATE AND FAIL TO RESPOND TO THE HERALD'S "ESSENTIAL SERVICES" CLASSIFICATION ARGUMENT.

The Governor argues that no law required that the Legislature create a category called "essential services," and contends that services which one could term "essential," such as "electricity, gas and sanitary services," are taxed.[5] The Governor concludes that by "choosing to exempt a few 'essential' services while taxing most others, including those provided by the media, the Legislature has not singled out the press for special treatment."[6]

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[5] The Governor's assertion that electricity is an essential service and is not exempted is the proverbial "strawman." No one yet, to the Herald's knowledge, has claimed that receipt of electricity is a fundamental right. In fact electricity is a regulated industry, one over which the state has immense control far exceeding the power to tax because the authority of government is necessary to provide it on a monopoly basis. Further, Puget Sound Power & Light Co., 291 U.S. 619 (1934), cited by the Governor, holds only that a municipality which competes with a private utility is not prohibited from imposing a license tax on the utility "merely because it fails or is unable to tax its own property or business. . . ." (at 623).

[6] The Governor's argument, in its entirety, is:

> First, there is absolutely nothing in state or federal law that requires that "essential" services -- whether they are or however they are defined -- be exempt from taxation. Electricity, gasoline, telephone services have all been subject over the years to a broad range of taxation. See, e.g., Puget Sound Power & Light Co. v. City of Seattle, 291 U.S. 619, 54 S.Ct. 542 (1934).

Thus, an analysis based upon whether a service is

The short answer to the Governor's proposition is that the Herald never contended the Legislature had to create a category called "essential services." The Herald merely observed that the Legislature in fact chose to create the category, and once it elected to do so it was subject to the strictures of the Equal Protection Clause. As stated by the Fourth Circuit Court of Appeal in upholding an Equal Protection challenge against an argument similar to that made by the Governor here: "the 'greater includes the lesser' argument (i.e., if the Board may exclude all members of the public it may admit only those it cares to hear for whatever reasons) has been rejected."[7]

The Equal Protection Clause requires the Legislature, whenever dealing with a non-fundamental right, to show a legitimate purpose and a rational basis for the distinctions drawn:

> In the equal protection context,...if the State's purpose is found to be legitimate, the State law

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> "essential" begs the question. The question is whether there has been an unconstitutional discrimination here. Numerous services that one would classify as "essential" are taxed under the Florida statute, including electric, gas, and sanitary services. By choosing to exempt a few "essential" services while taxing most others, including those provided by the media, the Legislature has not singled out the press for special treatment. And, as already shown, absent such discrimination, the provision of limited exemptions from a general tax raises no First Amendment problems.

Gov. Br. at 29-30.

[7] Henrico Professional Firefighters v. Bd of Sup'rs, 649 F.2d 237, 246 (4th Cir. 1981). As Professor Tribe notes, the black letter rule of law is "any governmental discrimination must be tested against the fundamental requirement of equal protection." L. Tribe, Constitutional Law § 16-1, at p.994 (1978).

> stands as long as the burden it imposes is found to be rationally related to their purpose...[8]

That obligation, when dealing with a fundamental right such as speech, is both to show a valid purpose and to meet the "strict scrutiny" test.[9]

A. Excluding Newspapers From The Classification of Exempt Essential Services Serves No Legitimate State Purpose.

The Legislature did not have a valid purpose in classifying newspapers and advertising as "non-essential" in light of the Legislature's expressed election not to tax "essential services." As the Herald showed in its Initial Brief, no valid purpose has been shown for failing to acknowledge the essential function of news (including advertising) in a democratic society.

In Metropolitan Life Ins. Co., supra, 105 S.Ct. at 1682-83, the Supreme Court struck down an Alabama statute imposing a lower tax rate on domestic insurance companies than on out-of-state insurance companies because it failed the test of exhibiting a "legitimate state purpose." Id. See also, e.g., City of

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[8] Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985), reh'g. denied, 471 U.S. 1120.

[9] Strict scrutiny is applied to statutes which affect fundamental rights in an equal protection challenge. . . [A] law must be "necessary to promote a compelling governmental interest."

Memphis Pub. Co. v. Leech, 539 F.Supp. 405, 412 (W.D. Tenn. 1982). Accord, e.g., Williams v. Rhodes, 393 U.S. 23, 30-31 (1968); Community-Service Broadcasting, etc. v. F.C.C., 593 F.2d 1102, 1122 (D.C. Cir. 1978); Henrico Professional Firefighters, supra; Greenberg v. Bolger, 497 F.Supp. 756, 778 (E.D.N.Y. 1980).

Cleburne v. Cleburne Living Centers, 473 U.S. 432, 105 S.Ct. 3249 (1985) (objectives of zoning ordinances not a permissible basis under Equal Protection Clause for different treatment of group home for mentally retarded); Bacchus Importers, Ltd. v. Dias, 468 U.S. 263 (1984) (encouraging development of Hawaiian liquor industry is an illegitimate purpose under Commerce Clause); Zobel v. Williams, 457 U.S. 55 (1982) (Alaska's apportionment of benefits in recognition of contributions of residents "is not a legitimate purpose" under Equal Protection Clause); U.S. Department of Agriculture v. Moreno, 413 U.S. 528 (1973) (no legitimate purpose under Equal Protection Clause because asserted purposes not rationally related to the statutory classification and legislative history reveals improper purpose to harm a politically unpopular group). Since there is no legitimate purpose for classifying news and advertising as non-essential, the Act is unconstitutional.

B. The Classification Of News And Advertising As Non-essential Is Irrational.

The classification of news and advertising as "non-essential" also fails the "rational basis" test. The Act's purpose is presumably to raise revenue while excluding essential services from the burden of taxation. Though the Act certainly raises revenue, the legislative classification of the "essential services" provided by newspapers is not a rational means to achieve that end. The Act also exempts a host of "non-essential" services. How, under any "rational basis" standard, can the sale of phosphate rock,

virtually all commercial banking services, and hairstyling be deemed "essential," but news and advertising (particularly political and editorial) not?

C. The Act's Exclusion Of Press Functions From The Category Of Exempt Essential Services Violates First Amendment-Equal Protection.

Once the First Amendment is implicated, the Equal Protection standard takes on special meaning, often expressed in the shorthand phrase, "First Amendment-Equal Protection," to underscore the fundamental rights strand of the analysis. The proponents of the tax ignored both the shorthand phrase and its significance. The significance is that a test employing heightened scrutiny must be applied to this classification. Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983); Arkansas Writers' Project, Inc. v. Ragland, ___ U.S. ___, 107 S.Ct. 1722, 95 L.Ed. 2d 209 (1987)). The Act, insofar as it classifies news and advertising as a "non-essential service" meets no standard for heightened scrutiny, and the proponents of the tax do not argue to the contrary.

II. PROPONENTS OFFER NO MEANINGFUL RESPONSE TO THE HERALD'S ARGUMENT THAT THE ACT UNCONSTITUTIONALLY DISCRIMINATES BY TAXING ONLY CERTAIN ADVERTISING SPEECH IN VIOLATION OF THE FIRST AMENDMENT.

The Act discriminates between identical services performed by independent contractors and employees. The first category is taxed, the second is not. The result, when applied to the Act's tax on advertising, is that some advertising is taxed, some is

not, which means some speech is taxed and some is not. As the Herald's Initial Brief showed, this violates the principles of First Amendment-Equal Protection.[10] The Governor responded that employees and independent contractors "play different roles" in the economy and in society and historically have been regulated and taxed "differently in a variety of ways."[11]

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[10] As the Louisiana Court of Appeals said this year of a "general" sales tax which taxed magazines but not newspapers:

> Louisiana's tax on magazines but not newspapers is defended as being a "general sales tax," not a special tax on publishing. But where a general sales tax applies unequally to different forms of speech protected by the Constitution, the name used by the state is irrelevant and immaterial. By whatever name, a tax that provides "differential taxation of the press," is treatment that the United States Supreme Court found "would have troubled the Framers of the First Amendment." Minneapolis Star, 460 U.S. at 583, 103 S.Ct. at 1376.

Louisiana Life, Ltd. v. McNamara, 504 So.2d 900, 906 (Ct. App. La. 1987).

[11] The Governor's argument, in its entirety, is:

> The challengers further complain that services provided by independent contractors are taxable, whereas services provided to an employer by employees are not taxable. They argue that "[i]f a store's employees prepare and mail a piece of direct mail advertising, no tax applies. If that same speech is in an advertisement placed in the Herald, it is taxed." Brief of Herald at 14. This argument is misconceived.
>
> The Legislature, to be sure, could have enacted any one of a variety of measures to raise revenue. The method it chose was to tax the sale and use of services provided by those engaged in the business of providing services. Those persons and organizations include independent contractors and other business enterprises. These entities, in turn -- including the Miami Herald -- all rely upon employees to perform the services provided.

The Governor's bromide is true, but affords no justification under this state statute for differential taxation of identical services performed by these two classes of persons. Nobody contends that the legal relationship of employees to their employer and of independent contractors to the user of their services is the same. Therefore disparate treatment of these relationships is permissible for certain purposes. But the Act imposes no tax on these relationships. It imposes a tax on services, and exempts services on the basis of the fortuity of who performs them. When the services are identical, there is no rational justification for taxing only some of those identical services and not taxing others. The only authority cited by the Governor in support of his "response" is United States v. Lee, 455 U.S. 252 (1982). But Lee was a Religion Clause case which held that "The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest."

> Precisely because they play different roles in our economy and in our society at large, the federal and state governments regulate and tax employees and independent contractors differently in a variety of ways. See, e.g., United States v. Lee, 455 U.S. 252, 102 S.Ct. 1051 (1982) (rejecting challenge under the free exercise of religion clause to the imposition of social security taxes on employers who do not qualify for statutory exemption applicable to self-employed members of religious groups who oppose such taxes). That the general application of these neutral economic laws may impact differently on persons or businesses affected by such laws is an intrinsic feature of our complex economy, and this provides no basis for invalidating such laws on First Amendment grounds.

Gov. Br. at 34-35.

455 U.S. at 258. Since this advisory opinion issue involves neither religious liberty, nor any essential overriding governmental interest, it is difficult to imagine how this case supports the Governor's position.

The simple fact is, by reason of the disparate treatment of services of independent contractors and employees, the new tax is to be imposed on advertising speech published by a newspaper, a broadcaster, or any other independent contractor but is not imposed on advertising prepared and disseminated by the advertiser itself. If a retail tire distributor's employees prepare and mail a piece of direct mail advertising, that act is free of tax. If that same speech is disseminated through an advertisement in the Herald, a tax is imposed.[12] Similarly, if a powerful utility directly mails editorial or political advertisements to its customers, such expression is not taxed. But if the utilities' views are opposed by individuals, who ordinarily lack the apparatus for direct mail and who must publish their opposition in newspaper editorial advertisements, the opponents' speech is taxed. This disparity of treatment violates both First Amendment-Equal Protec-

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[12] The Governor states this proposition is "misconceived." The Governor is wrong. The proposition is a statement of fact as to what advertising services are taxed by the Act. In fact the Governor really is saying only that "These entities [all business enterprises] -- including the Miami Herald -- all rely upon employees to perform the services provided." Gov. Br. at 34 (emphasis in original). It is this statement which is misconceived, or irrelevant. In fact, some businesses depend on employees to provide the identical services that independent contractors provide to other businesses.

tion and "ordinary" Fourteenth Amendment equal protection analysis.

A. The Discrimination Against Independent Contractors Serves No Legitimate Purpose And Is Irrational.

In its Initial Brief, the Herald first tested the disparity of treatment under the "mere rationality test" and showed the discrimination failed. The Herald noted that the Sales Tax Exemption Study Commission had cited three purposes for the exemption from tax of employee services, (i) consistency, (ii) prevention of excessive tax pyramiding, and (iii) prevention of loss of jobs. See Commission Report at 48, quoted in Herald Br. at 15-16. The Herald then tested the disparate treatment against these purposes and concluded:

> 1. The employee service exemption does not "provide for consistent tax policy." Herald Br. 16-17;
>
> 2. The employee service exemption is not rationally related to preventing "excessive tax pyramiding." Id. 17-18;
>
> 3. The employee service exemption is not rationally related to preventing "the loss of jobs." Id. 19-20;
>
> 4. The ad tax should be invalidated for the same reasons the United States Supreme Court invalidated the taxes at issue in Metropolitan Life, supra, Williams v. Vermont, 472 U.S. 14 (1985), and Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985).

The Governor offered no reply.

In addition, the Herald demonstrated that the stated purposes could not have been the true purpose of the employee services exemption, since the exemption cannot be reconciled with "consistent tax policy," let alone "tax fairness."

The Justices of this Court may conclude the Act's purposes are illegitimate when considering the employee/independent contractor classification in the advertising context (the approach taken in Metropolitan Life Ins. Co., supra, and the other "purpose" cases cited above). The Justices may conclude the employee service exemption in the advertising context simply bears no rational relationship to the stated and presumptively legitimate aims (the approach taken in Williams, supra, and Hooper, supra).[13] In either case the employee service exemption must fail.

B. The Discrimination Against Speech Published By Newspapers Violates First Amendment-Equal Protection.

Since the discrimination fails the "rational basis" test, a fortiori, it fails the First Amendment-Equal Protection test when applied to the fundamental right of speech.[14] The proponents of the tax do not address that test even arguendo, relying on their erroneous contention the "rational basis" test applies. Their contention is that the tax imposed by the act is "neutral." The issue here is, however, not the tax, but the classification. The differential classification (i.e., taxing one and not taxing

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[13] Described in detail in the Herald's Initial Brief, at 9-10, 20-21.

[14] Except for a single citation to Williams v. Vermont, supra, for an entirely different (and inapposite) proposition, see Gov. Br. at 64, proponents of the tax do not even cite, much less discuss, the United States Supreme Court's Metropolitan Life-Williams-Hooper trilogy examined in the Herald's Initial Brief. Nor do they mention the phrase, First Amendment-Equal Protection, or attempt to apply that doctrine.

the other) between identical services of independent contractors and employees in the context of advertising speech, must bear "strict scrutiny": a compelling state interest served by the narrowest means is required. There is none. Since the proponents of the tax proceed under the misapprehension no fundamental rights are involved, they fail to examine the employee service exemption under First Amendment-Equal Protection.

The explicit assumption of the Sales Tax Study Commission, in recommending exemption from tax of employee services identical to those performed by independent contractors, is that Florida companies may freely choose to have services performed by an employee or an independent contractor.[15] An advertiser has no such choice if it desires to publish its advertisement to the public through print or broadcast media. Thus the relationship of the Herald and its advertisers must always be one of independent contractor. As such, the application of the independent contractor classification, as applied to advertising, is necessarily a tax on publication.

In this respect, differential burdens imposed on the press by the employee service exemption, as compared to any other service and any other industry (including the legal profession), are enormous. The irrationality of that result is self-evident wholly

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[15] See Commission Report at 48, quoted in Herald Br. at 15-16. The example used there is a Florida company's choice between hiring inside counsel or retaining outside counsel. See, id. Similarly, the explicit assumption of the "Hellerstein Report" (at 13 n.15) is that "many of the same services can be provided by either employees or by independent contractors." Quoted in Herald Br. at 18 (emphasis added).

apart from First Amendment values. When those values are taken into consideration, those differential burdens are not merely irrational, but nightmarish.[16] The Justices need not, however, impugn the Legislature's motives (see also, e.g., Arkansas Writers', supra,) or discern a sinister purpose in order to strike down the employee service exemption insofar as it applies to advertising. Even if the proponents of the tax were to articulate a true rational basis for the employee service exemption generally, the exemption would still be unconstitutional on its face as it applies to advertising and the press because it effectively singles out the print and broadcast media and taxes the act of publishing advertising.

The so-called "glitch" bill further "singles out" the press for taxation. While the tax purports to be a levy on advertising, the "glitch bill" has exempted the "creative services" provided by ad agencies in producing the advertising.[17] Thus the tax is a media tax which falls on the publication and broadcast of advertising expression. The Act cannot constitutionally do this, as proponents appear to recognize. See Gov. Br. at 36 n. 17.

"In essence, the Legislature has selected who may exercise First Amendment rights free of taxation, and who may not."

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[16] Contrary to the Governor's suggestion, the Herald has never asserted "that the press is . . . free from all state-imposed financial burdens," Gov. Br. at 35. The Herald pays corporate income, sales, real property, tangible personal property, and intangible personal property taxes.

[17] See Ch. 87-72, § 3, Laws of Fla. (amending Act by adopting new subsection (10) to Section 212.0595).

Louisiana Life, supra (following Police Department of City of Chicago v. Mosley, 408 U.S. 92 (1972), and Minneapolis Star, supra) (decided prior to Arkansas Writers', supra).[18] That selection violates First Amendment-Equal Protection in the absence of a compelling state interest imposed through the least intrusive means. No such interest is shown here.

III. CHAPTER 87-6 VIOLATES THE SINGLE SUBJECT REQUIREMENT PRESCRIBED BY ARTICLE III, SECTION 6 OF THE FLORIDA CONSTITUTION.

The Herald's Initial Brief explained that Chapter 87-6 contravenes the single subject requirement of Article III, Section 6 of Florida Constitution as construed by Gaulden v. Kirk, 47 So.2d 567, 575 (Fla. 1950). Herald Br. at 23-32.

The Attorney General argues that the Legislature must have freedom to legislate "comprehensively." AG's Br. at 16-19. While the Legislature must have latitude to perform its duties, its latitude is circumscribed by the Constitution. The single subject provision of the Florida Constitution is expressly designed to limit legislative power and to regulate the content of laws. Where a law violates Article III, Section 6, it will be invalidated.

The Legislature is therefore free to legislate as comprehensively as it wishes -- so long as it complies with constitutional

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[18] Louisiana Life struck down the Louisiana taxation of magazines while exempting newspapers. The tax was labelled a "general sales tax" but the court found the title was irrelevant. If the tax taxes different forms of speech differently, it is invalid.

requirements. The question is whether Chapter 87-6 exceeds the limits of Article III, Section 6.

A. Article III, Section 6, Applies to Tax Legislation.

In his brief, the Attorney General states that "no tax legislation has ever been struck down for violation of the single subject requirement." AG's Br. at 17.

The Attorney General is incorrect. The cases are set out in the margin.[19]

Plainly the single subject provision has been applied to invalidate tax legislation. Even if it had not, the Legislature is obliged to comply with a constitutional provision.

B. Chapter 87-6 Is Contrary To The Single Subject Provision As Construed By This Court In Gaulden v. Kirk.

This Court has already construed the single subject provision in the context of Florida's Sales Tax Act. Gaulden v. Kirk, 47 So.2d 567, 575 (Fla. 1950); Herald Br. at 24-27. The 1949 Legislature adopted three taxation acts: the Sales Tax Act (Chapter 212, Florida Statutes); Cigarette Tax Provisions (Chapter 210,

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[19] E.g., Rouleau v. Avrach, 233 So.2d 1 (Fla. 1970) (occupational license tax); Thompson v. Intercounty Tel. & Tel. Co., 62 So.2d 16 (Fla. 1952) (portion of sales and use tax); City of Orlando v. Johnson, 160 Fla. 622, 36 So.2d 209 (1948) (local tax on fuel oil); Lee v. Bigby Electric Co., 136 Fla. 305, 186 So. 505 (1939) (license tax); Colonial Inv. Co. v. Nolan, 100 Fla. 1349, 131 So. 178 (1930) (filing of tax returns); Pilot Equipment Co. v. Miller, 470 So.2d 40 (Fla. 1st DCA 1985) (amendment to sales tax).

Florida Statutes); and Gasoline Tax Provisions (originally Chapter 208, now Chapter 206, Florida Statutes). The effective date of the Sales Tax Act was contingent on all three acts becoming law. This Court in Gaulden rejected the argument that the contingent effective date integrated the three acts into a single law for purposes of the single subject provision.

The Gaulden Court made it clear that the three separate enactments -- sales, cigarette, and gasoline taxation -- could not constitutionally be integrated into a single law. The Court expressly rejected the contention advanced by the Attorney General here:

> No single law could possibly be invented which would meet constitutional requirements and at the same time contain all of the essential features of a comprehensive legislative program on any subject which effects the general welfare so vitally as does taxation. . . . It was essential, therefore, in enacting its program that the Legislature provide a separate law for each subject with which it dealt.

Id. at 575 (emphasis in original for word "single"; emphasis supplied for remainder of quotation).

In response, the Attorney General has quoted a different segment of the same paragraph from the Gaulden decision. AG's Br. at 19. The language quoted by the Attorney General makes reference to "it," but fails to define what "it" is. "It" actually referred only to the 1949 Sales Tax Act and not to the "comprehensive tax program" consisting of three separate laws -- the sales tax, the cigarette tax, and the gasoline tax.

Taken out of context, the Attorney General's quotation could be read to condone the placement of a comprehensive tax program

into a single bill, but the remainder of the same paragraph (which we have just set forth above) makes clear that this Court's ruling was the opposite. For proof one need only compare the Attorney General's Brief at 18-19 with Gaulden, 47 So.2d at 575, quoted above.

Chapter 87-6, like Gaulden, involves the sales tax and the gasoline tax. But Gaulden explicitly stated the gasoline tax and the sales tax could not be in the same act without violating the single subject clause. Chapter 87-6 also involves a host of other taxes, listed in the Herald's Initial Brief at 27-30, which extend far beyond the subjects dealt with in, and the boundaries allowed by, Gaulden.

C. The Components of Chapter 87-6 Do Not Have a "Natural And Logical Connection".

Implicitly recognizing that Chapter 87-6 contravenes the Gaulden decision, the Attorney General discusses at length cases from other subject matter areas, notably the tort and insurance cases of State v. Lee, 356 So.2d 276 (Fla. 1978), Chenoweth v. Kemp, 396 So.2d 1122 (Fla. 1981), and Smith v. Department of Insurance, 12 F.L.W. 189 (Fla. April 23, 1987), revised, 12 F.L.W. 277 (Fla. June 5, 1987). AG's Br. at 13-16.

The Attorney General's discussion of those cases reveals he had made a fundamental error in construing the single subject provision. The Attorney General argues that a law may include matters which have no "specific connection to each other so long as the connection with the subject is present." AG's Br. at 13.

It is here that the Attorney General departs from the prior decisions of this Court. This Court repeatedly has held that "The term 'subject of an act' within this provision means the matter which forms the groundwork of the act and it may be as broad as the Legislature chooses as long as the matters included in the act have a natural or logical connection." Board of Public Instruction v. Doran, 224 So.2d 693, 699 (Fla. 1969) (emphasis added; citation omitted); Smith v. Department of Insurance, 12 F.L.W. at 190; State v. Volusia County Industrial Development Authority, 400 So.2d at 1225; Chenoweth v. Kemp, 396 So.2d at 1124; State v. Lee, 356 So.2d at 276.

This Court has construed the rule to require inquiry to determine whether the component parts of the act have a "natural and logical connection" with each other.[20] In addition to the cases setout in the margin, an illustration of the application of this principle is found in Bunnell v. State, 453 So.2d 808 (Fla. 1984). There, this Court examined the contents of Chapter 82-150, Laws of Florida, and concluded that "the subject of section 1 has no cogent relationship with the subject of sections 2 and 3 and that the object of section 1 is separate and disassociated from the objects of sections 2 and 3." Id. at 809 (citations

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[20] E.g., Chenoweth, supra, 396 So.2d at 1124 ("these provisions do relate to tort litigation and insurance reform, which have a natural or logical connection") (emphasis added); accord, Smith, supra, 12 F.L.W. at 190-91 ("Tort reform provisions and the insurance regulatory provisions are 'properly connected'"); State v. Lee, 356 So.2d at 282; State v. Volusia County Industrial Development Authority, 400 So.2d at 42-43 ("the areas included in the 1980 amendment are logically related"); Pilot Equipment Co. v. Miller, 470 So.2d at 42-43.

omitted); accord, Colonial Investment Co. v. Nolan, 100 Fla. 1349, 131 So. at 180 (1930) ("no proper connection between the two subjects appears").

The Attorney General concedes, as he must, that the "case of Colonial [Investment] Company v. Nolan, [supra] . . . prohibits 'omnibus' legislation," but claims that the "limitation is not properly defined [and] the word 'omnibus' is used out of context in that [Herald] brief. . . in an apparent attempt to circumvent current case law." AG's Br. at 15-16 (brackets added). The Colonial decision is, of course, a decision of this Court, and the context in which the quotation is used is one in which this Court said, "The object of this constitutional provision . . . was to prevent hodgepodge, logrolling, and omnibus legislation." 131 So. at 179. The term "omnibus bill" is defined in standard reference works as "a legislative bill that includes a number of miscellaneous provisions or appropriations." Webster's Third New International Dictionary (1976).[21]

What the Attorney General advocates is precisely what is forbidden by the Constitution. The Attorney General asserts that the Legislature can adopt an "omnibus" title to serve as an umbrella for otherwise unrelated taxing measures. That is imper-

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[21] Other definitions of "omnibus bill": "A legislative bill covering various and miscellaneous subjects. A bill purporting to amend many sections of a code." Ballentine's Law Dictionary (3d ed. 1969) (citation omitted); "A legislative bill including in one act various separate and distinct matters, and frequently one joining a number of different subjects in one measure in such a way as to compel the executive authority to accept provisions which he does not approve or else defeat the whole enactment" Black's Law Dictionary (5th ed. 1979).

missible. There must be sufficient logical interrelationship among the parts of the act so that the act only contains "one subject and matter properly connected therewith . . . ." Art. III, § 6 Fla. Const.

In the present case, the Attorney General makes no effort to demonstrate a logical interrelationship among the various parts of Chapter 87-6. See AG's Br. at 17. The multitude of provisions in Chapter 87-6 was summarized in the Herald's Brief at 27-30. Merely to enumerate them is to demonstrate their multifarious nature.[22]

D. The Attorney General's Remaining Arguments Are Without Merit.

At the outset of his brief, the Attorney General states that in the present matter, "the Justices have only been requested to render their opinion as to the facial validity of the Act." AG's Br. at 7. A few pages later, however, the Attorney General makes a non-record, non-facial argument: "There is no suggestion that the Act's provisions produce fraud or surprise; that they were

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[22] In its brief the Legislature itself has defined the "subject" of the 1987 legislation:

> [T]he principal thrust of these two chapters [ch. 87-6 and 87-72] is to extend the existing sales and use tax imposed by Chapter 212 to services. Hence, for descriptive purposes the 1987 legislation is sometimes called the "service tax."

Leg. Br. at 20 n.43.

There is no discernible, logical relationship between the "service tax" and the remainder of Chapter 87-6.

carelessly or unintentionally adopted; that the earmarks of logrolling were present; or that the Act joined different provisions in such a way as to compel the Executive to accept the good with the bad, or that it was timed to do so." Id. at 11.

For several reasons, the Attorney General's argument is misdirected. First, the single subject provision was adopted so that omnibus or multifarious laws could be invalidated on the basis of a facial, objective review, without the need for judicial inquiry into the underlying circumstances of the legislative process.[23] Second, the Attorney General cannot argue that this Court is confined to a facial review, and simultaneously make assertions about the nature of the deliberative process employed by the Legislature. Third, if inquiry is to be made regarding the legislative process, then circumstances exist which suggest carelessness and logrolling.[24] Nor is the absence in the initial briefs of charges of logrolling anything more than an acknowledg-

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[23] This is not to say that evidence could not be submitted in a true case or controversy.

[24] For example, on April 22, 1987, the United States Supreme Court decided Arkansas Writers' Project, Inc. v. Ragland, 107 S.Ct. 1722 (1987), which struck, on First Amendment grounds, the Arkansas Sales Tax as it applied to certain publications in that state. The rationale of that decision is directly applicable to Florida. On April 23, 1987, the Legislature passed Chapter 87-6, and it was signed into law the same day. In deference to the importance of the Constitutional right, prudence would have dictated a more deliberate course.

The Chairman of the Florida House of Representatives' Finance and Tax Committee was later publicly quoted as saying, "'I think there is probably a First Amendment problem [with the circulation tax].' . . ." The Miami Herald, May 27, 1987, at 7A.

ment by the commenting parties that the advisory opinion process is confined to facial review.

The Attorney General also incorrectly attributes to Professor Ruud "the observation . . . that '. . . an argument based on the one subject rule is often the argument of a desperate advocate who lacks a sufficiently sound and persuasive one.'" AG's Br. at 16, citing Ruud, No Law Shall Embrace More Than One Subject, 42 Minn.L.Rev. 389, 447 (1958).

That is an outrageous misquotation, for that is not Professor Ruud's view. Professor Ruud was in fact a supporter of the single subject rule. However, in his 1958 law review article, Professor Ruud commented that a relatively small number of single subject challenges had been sustained throughout the United States as of that date. Id. He then offered the following practice pointer (presumably based upon Texas experience): "This seems to justify courthouse lore to the effect that an argument based on the one subject rule is often the argument of a desperate advocate who lacks a sufficiently sound and persuasive one. To the extent that this argument is considered the hallmark of a weak case, the advocate may consider it wise to use it very sparingly." Id.

In the next paragraph of his analysis, Professor Ruud speculates about the relatively small number of reported cases and comments, "The simple answer may be that legislatures have shown a remarkable compliance with the spirit and letter of the rule."

Id. He concluded that the single subject provision has a beneficial effect. Id. at 452.[25]

Not only does the Attorney General's selective quotation of Professor Ruud do violence to the message being communicated, more fundamentally that misquotation disparages the value and utility of the single subject provision of the Florida Constitution. That is, at best, an inappropriate argument for a constitutional officer.

Chapter 87-6 contravenes the limitations set by Article III, Section 6, of the Florida Constitution. The Governor should be so advised.

CONCLUSION

For the foregoing reasons, the Justices of this Court should advise the Governor the newspaper and advertising tax provisions of the Act are unconstitutional, or should advise the Governor the entire Act is unconstitutional, or advise the Governor that the Justices decline to render an advisory opinion.

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[25] Professor Ruud concluded that "The one-subject rule does not invite much litigation. Therefore, its benefits are obtained at comparatively little cost in negative results. While the one-subject rule is indirect and only partial in its attack on the mischief at which it is aimed and while it does produce some negative results, it seems to exert a sufficiently wholesome influence to deserve being retained in the state constitutions." Ruud at 452.

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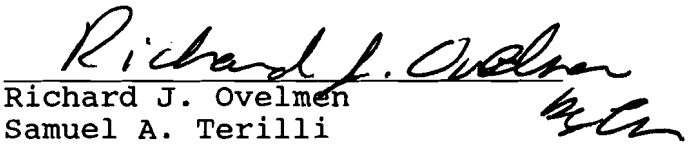

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