IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,533

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

BRIEF OF THE FLORIDA SENATE
AND THE FLORIDA HOUSE OF REPRESENTATIVES

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INTRODUCTION

This brief is filed on behalf of the Florida Senate and the Florida House of Representatives, collectively "the Legislature".

The Governor's request for Advisory Opinion raises seven separate questions. An eighth point has been raised by opponents contesting the advisory opinion process. This brief does not address each point. Counsel for the Legislature have coordinated their efforts with counsel for the Governor and the Attorney General to insure complete coverage without needless duplication. We adopt and support the arguments of the Governor and the Attorney General.

In this brief we attempt to provide a full background for the justice's opinion, drawing entirely on public records now lodged with the justices and available to all counsel. We also address a number of the issues raised in the Governor's request.

Since there are now eight questions and 19 briefs of the Opponents, the Legislature and the Governor have collaborated on a document filed herewith and entitled, "Index of All Constitutional Arguments Presented on the 1987 Tax Law." We respectfully suggest that this document will prove extremely helpful in identifying the issues presented.

Finally, we have filed with the Court copies of public records which provide the background of the contested legislation. One of the documents lodged with the Court integrates the 1987 changes into Chapter 212, Florida Statutes incorporating Chapter 87-6 and 87-72, Laws of Florida.

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STATEMENT OF THE CASE

Florida depends upon the revenues generated by its sales tax. The significance of the sales tax to a rapidly growing Florida is enormous. As Drs. James Zingale and Thomas R. Davies have observed:

> ...[T]here are only three widely used and generally accepted tax bases upon which a tax structure can be created: income, wealth and sales.[1]

Income and wealth are largely beyond the Legislature's taxing power. Article VII, Section 5 of Florida's constitution precludes any tax on the incomes of natural persons and Article VII, Section 1 prohibits the state from levying an ad valorem tax on real or tangible personal property.[2] Thus, Florida **must** rely heavily upon an excise tax on sales.

This forced reliance on taxing sales has dictated the growth of the sales tax since 1949. More and more categories of sales

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[1]Zingale and 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, 444 (1986). Dr. Zingale, a Ph.D. in Economics, has for sixteen years been an employee of the Florida Legislature. Among the posts held by Dr. Zingale have been Staff Director of the Senate Finance & Tax Committee, Director of the Division of Economic & Demographic Research of the Florida Legislature and Chairman of the State Revenue Estimating Conference. Dr. Zingale is currently the Staff Director of the House Appropriations Committee and Staff Vice-Chair for Fiscal Affairs & Oversight of the National Conference of State Legislatures.

[2]Since 1968, the taxation of real and personal property by local governments has also been restricted by the provisions for millage caps. Article VII, § 9, Fla. Const.

transactions have been drawn into Florida's tax base. The tax originally looked to retail sales of tangible personal property. But as Florida grew and its essentially agrarian economy evolved into a more complex, service oriented economy, the sales tax looked more broadly to sales of services.

This organic process is carried out at a technical, statutory level by adjusting those transactions exempted from the tax. The sales tax was originally levied upon sweeping categories of transactions--all sales of tangible personal property, all admissions, all rentals.[3] The tax was then fine-tuned by way of exemptions, exceptions to the general rule that all transactions will be taxed.

From its inception, then, the Florida sales tax base contained exemptions. Indeed, it contained many exemptions. Each of the three broad categories taxed (tangible personal property, transient accommodations, and admissions) included exemptions. Admissions to racetracks were exempted,[4] as were transient rentals where the guest stayed six months or more.[5] But the bulk of the exemptions were from the sales tax on property.

The original exemptions were sweeping. They included

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[3]Ch. 26319, §§ 3, 4, 5 Laws of Fla. (1949) tax all transient rentals; all admissions; and all retail sales of tangible personal property. These provisions are now found in §§ 212.03, .04 and .05, Fla. Stat. (1985).

[4]Ch. 26319, § 8, Laws of Fla. (1949).

[5]Ch. 26319, § 3, Laws of Fla. (1949). The present version is found at § 212.03(4), Fla. Stat. (1985).

clothing costing less than $10; cigarettes; beer, wine and liquor; all fuels; automobiles; all communications services; professional services; and advertising and newspaper circulation.[6]

These and many other exemptions not listed suggest that the 1949 sales tax accommodated diverse political concerns, carefully balancing the need to raise revenue with the desire to exempt those things deemed worthy of exemption or taxed in another manner.[7] The 1949 compromise was not to be the last word. Instead, it proved to be the beginning of a dynamic process. Since 1949 each and every session of the Legislature (save the 1976 session) has added at least one chapter[8] to the laws of Florida fine-tuning these exemptions. All told, from 1949 through the beginning of the 1987 session the exemption section has been amended 83 times. The point is that the sales tax remains in a constant process of evolution and refinement.

The tax act now under attack is but the 84th step in a journey launched September 30, 1949. The movement is in a direction consistent with the overall pattern of sales tax evolution: A gradual expansion of the tax base by the elimination

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[6]Ch. 26319, § 8, Laws of Fla. (1949).

[7]In 1943, Florida enacted a three cent sales tax on cigarettes. Ch. 21946, Laws of Fla. (1943). In 1935 alcoholic beverages were taxed, Ch. 16774, Laws of Fla. (1935), and in 1921, Florida began to tax fuels. Ch. 8411, Laws of Fla. (1921).

[8]In 1979 ten separate amendments were passed.

of exemptions.[9]

The Three Types of Exemptions.

For purposes of analyzing the sales tax, its many exemptions may be divided into three broad categories: structural exemptions; transactional exemptions; and user exemptions. Structural exemptions are those designed to avoid systemic inequities. For example, the definition of "retail sale" contained in Section 212.02(3) operates to exempt from the sales tax many wholesale transactions, thereby addressing the systemic problem of pyramiding.

Transactional exemptions reflect the Legislature's judgment that certain products or services should not, on policy grounds, be taxed at the retail or any other level of sale. Food is one such example. Some transactions are not taxed by the sales and use tax because they already carry a tax burden in the form of other taxes. Examples are severance taxes and insurance premium taxes.[10] Most of the evolution has involved the scope of these transactional exemptions.

Finally, the law provides exemptions for certain purchasers, who generally fall into the category of "charities." These

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[9]This is not to suggest that each and every one of the 82 earlier amendments broadened the base. Sometimes the base was narrowed when the Legislature was persuaded of the need for a new exemption. E.g., Ch. 82-219 added the present § 212.052 to encourage basic research and development activities.

[10]Chapters 211, Part II (severance tax on minerals) and 624, Part IV (premiums tax), Fla. Stat. (1985).

exemptions originated in the earliest sales tax legislation, and presently appear at Section 212.08(7), Florida Statutes (1985). The exemptions encompass "religious, charitable, scientific, educational, and veteran's institutions"[11] and provide them with broad protection from the operation of the sales or use tax.[12]

The legislation under review affects many transactional exemptions and some structural exemptions. These changes are discussed in the section of this brief entitled "Operation of the Tax." The user exemptions are largely unaffected by the passage of Chapter 87-6.[13]

Revenue Crises and Legislative Response.

A revenue crisis has been the catalyst for major sales tax revisions. On three occasions--1949, 1969 and 1987--the Legislature has confronted the prospect of tax revenues insufficient to

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[11] § 212.08(7)(a), Fla. Stat. (1985).

[12] Connected with the user exemption is a narrower seller exemption, applying solely to churches. § 212.08(7)(a)1.a, Fla. Stat. (1985). For the same reasons the 1949 Legislature adopted the broader user exemptions, it enacted this narrower seller exemption. A "church" is thus exempt from sales tax on property, admissions and now on services that it sells.

[13] Minor amendments were made in Ch. 87-72, Laws of Fla., to remove provisions arguably discriminating against out-of-state charities. In the main, the Legislature has again ratified the principle that these organizations will be relieved of the burden of sales or use taxes because of the state's interest in the completion of their charitable work. These exemptions are part of a large group which was preserved by the Legislature as a result of the extensive fact-finding and deliberation which preceded the passage of Ch. 87-6.

meet a bare continuation budget.[14] In each instance the Legislature faced a stark choice: either raise the rates under the pre-existing tax structure, or hold down those rates by broadening the tax base. From a policy perspective, the question was whether to extract more taxes from the same people, or to bring others formerly exempted into the taxpaying process. This question, in turn, concerned the proper division of the burden of the increase between businesses and individuals.

A brief review of the Legislative responses to the two earlier crises will set the stage for a more detailed review of the events leading up to the action taken by the 1987 Legislature. We will show that the 1987 Legislature continued the tradition established by their historic counterparts of choosing an expanded tax base in lieu of higher rates, and a fair division of tax burden between businesses and individuals.

The 1949 Experience.

When newly-elected Governor Fuller Warren gave his state of the State speech to the Legislature on April 5, 1949, his news was bleak. Despite business prosperity in Florida, the State stood on the brink of insolvency. This "strange paradox"[15] arose because Florida's initial post-war growth was financed from

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[14]Florida must, of course, operate under a balanced budget. Art. VII, § 1(d), Fla. Const.

[15]J. of the H. of Rep. (April 5, 1949) at 6.

budget surpluses accumulated during the war years.[16] Once the surplus was spent, the state found that the pre-war tax system could not finance post-war growth.

Governor Warren's principal theme was that Florida business was not paying its own way. "Taxes on business in Florida contributed only 11.9% of Florida's total 1948 taxable income, against an average of 18.3% in the United States as a whole."[17] He proposed a complex package of taxes, including a 5% tax on transient lodging and admissions (to be borne largely by tourists), and increases in the premiums tax, the utility gross receipts tax, the documentary stamp tax, and the franchise tax on corporations. He added:

> If the Legislature can, and does, provide the revenue by other means, except a general sales tax, I shall not object.[18]

The Legislature rejected the Governor's plan for a hodgepodge of high taxes. In a special session beginning September 7, 1949[19] the Legislature considered, but rejected, a constitutional amendment permitting a capped personal income tax. Instead, despite the Governor's objection to a general sales tax, the

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[16]The State spent some $33 million in excess of tax revenues (about 15% of the Governor's proposed $206 million 1950-51 biennium budget) during 1948-49

[17]J. of the H. of Rep. (April 5, 1949).

[18]Id. at 10 (emphasis supplied).

[19]J. of the H. of Rep. (Sept. 7, 1949) at 1. The call was by proclamation signed August 16, 1949, and was for "the sole purpose of consideration the enactment of laws and proposing constitution amendments which will raise or provide sufficient revenue to defray the expenses of government. . . ."

Legislature passed Chapter 26319, the Florida Revenue Act of 1949. The tax rate was set at three percent, as contrasted with the five percent rate proposed by the Governor on a narrower base of transactions. The Governor signed the Bill on September 30, 1949.[20]

The 1968-69 Experience.

In 1969 the Legislature again faced a minimum continuation shortfall. Following the 1968 teachers' strike the 1968 Legislature amended the sales tax in two ways: first, by increasing the rate from three to four percent; and second, by substantially broadening the existing base to include, among other things, commercial rents and the pure services provided by telephone and telegraph companies.[21] The 1968 amendments expired by the terms of the amendment itself on June 30, 1969.[22] However, in the waning hours of the 1969 session, the Legislature re-enacted the 1968 changes without any sunset provision. The same basic pattern was retained. The revenues were raised by simultaneously increasing the rate and broadening the base. Though it con-

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[20]A complete copy of the correspondence received by the Governor following the effective date (Nov. 1, 1949) can be found in the State Archives. Most of the writers complained, especially tourists who objected to the tax on hotel and restaurant meals. Many threatened never to return to the Sunshine state unless the tax was repealed.

[21]Ch. 68-27, §§ 3, 6, Laws of Fla.

[22]Id. at § 18. This foreshadowed the wholesale sunsetting enacted in Chapter 86-166, discussed infra pp. 11-12.

sidered eliminating the exemption for advertising,[23] the Legislature refrained for the time being from doing so.

The 1987 Experience

Florida now finds itself, once again, with a tax base inadequate to meet its obligations. Growth pressures from extraordinary numbers of immigrants have created pressing needs for schools, health care, prisons and many other essential services. "The New Federalism" has begun to limit federal spending and return many responsibilities to the states. State and local governments have been called upon to make up the lost federal monies.

Despite efforts to keep up with growing revenue demands,[24] Florida's tax structure has continued to be insufficient and unstable. Drs. Zingale and Davies observe:

> Broad based sales taxes now exhibit the same properties as a personal income tax. Narrow-based sales taxes, on the other hand, will respond more radically to the business cycle, and revenues will not keep pace with economic growth.

They conclude:

> Florida's tax base is one of the most restrictive in the country.[25]

Faced with the inescapable facts of the huge and rapid

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[23]H.B. 1189, J. of the H. of Rep. (April 25, 1969) 252. See also, S.B. 1262, J. of the Sen. (May 6, 1971) 259.

[24]In 1982 the tax rate was raised to its present level of 5 percent. Ch. 82-154, Laws of Fla. This provided only short-term relief. One-half of the additional revenue went to local governments.

[25]Zingale, supra note 1, at 457 (emphasis added).

growth of services as a percentage of the total economy and a proportionately decreasing tax base, the Florida Legislature was compelled by fiscal prudence to examine the expansion of the state's tax base. Its attention focused on services.

The Expansion of Taxable Services

From its inception in 1949, the sales tax reached services to the extent that they were "part of the sale" of tangible personal property.[26] This rule is familiar to any Floridian who has paid automotive repair bills. The full charge for repairing a transmission is (and was) taxed even if only a screw or spring was replaced.[27] In many transactions, then, the tangible personal property was merely the tail wagging the dog.

The extension of this rule to a broader range of services was inhibited by two exemptions built into the original 1949 Act. Both advertising and professional services (including legal fees) were specifically exempted.[28] In the absence of this exemption, the will delivered by the attorney to his client, or the hard copy delivered by the advertising agency to the media, could serve the same tax function as the "spring in the transmission."

In 1968 the Legislature took its first tentative steps

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[26]Ch. 26319, § 2(d), Laws of Fla. (1949).

[27] "Sales price also includes the consideration for a transaction which requires both labor and materials to alter, remodel, maintain, adjust, or repair tangible personal property." § 212.02(4) Fla. Stat. (1985).

[28]Ch. 26319, § 8, Laws of Fla. (1949).

towards making a wider range of services taxable by extending the sales tax to a variety of telephone and telegraph services, even though they involved no sale of tangible personal property. This category of independently taxable services expanded gradually over the next 17 years to reach such communication services as cable television services; beepers, pagers and the like; and teletype and computer exchange services.[29]

The 1986 Repeal Legislation.

In 1986, the Legislature set the stage for a hard look at the problem of a narrow sales and use tax. It adopted Chapter 86-166, Laws of Florida, "sunsetting" most of the existing transactional exemptions effective July 1, 1987, and allowing one year for an intensive study of exemptions. A Sales Tax Exemption Study Commission was established to take testimony and make recommendations. This 21 person Commission (only seven of whom were legislators) heard extensive testimony and issued a report dated April 6, 1987. To achieve its stated objectives--including the provision of a less regressive tax, protection of the competitive position of Florida industry, provision of an attractive economic development environment, and avoidance of excessive pyramiding--the Commission made a number of recommendations, notably the elimination of many exemptions to the sales and use tax.

When the legislature convened in 1987, it was faced with the

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[29] § 212.05(5), Fla. Stat. (1985).

political imperative of reconsidering the massive repeal of exemptions effected in 1986. Early in the legislative session, Chapter 87-6 was passed. Its principal effect is to broaden the base of the services taxed under Chapter 212. Prior to Chapter 87-6, only a handful of services were taxable. After Chapter 87-6, a majority of services become taxable.

The Need for Taxes in 1987

During the 1980's Florida was sliding down the list of states arranged by comparative incidence of taxation. In 1986, Florida ranked 40th in state and local taxes as a proportion of personal income[30] and 44th in per capita state taxation, down from 41st in 1981. Drs. Zingale and Davies note that:

> In 1970, Floridians paid 4.4% of their personal income to state general revenue taxes. This proportion increased to 5% in 1971 after enactment of the corporate income tax. It declined steadily to 4% by 1981-82 and then increased to 4.3% by 1984-85 after major changes in the tax laws. ... [F]or the fifteen year period from 1970 to 1985, the tax burden as measured by tax paid as a percentage of personal income declined.[31]

In 1985, the Legislature passed a law stating objectives to be achieved under a State Comprehensive Plan. The ambitious goals contrast with a dispassionate assessment of the present status of public service efforts in Florida. The Legislature set

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[30] Taken from Florida's Tomorrow: Strategies for the Future published by the Florida House of Representatives in 1987, page 20. This document has been lodged with the Court.

[31] Zingale, supra note 1, at 453.

out objectives in 23 discrete areas,[32] covering eleven pages of the statute books.

The Plan provided no detailed procedure for achieving these goals. The State Comprehensive Plan Committee (popularly known as the "Zwick Commission") composed of 21 Florida political and business leaders, was charged with assessing the costs of the plan and recommending specific ways to finance it.

The Zwick Commission was not alone. Others, including editorial writers, urged Florida to look to the future. The Speaker of the House of Representatives appointed an Advisory Committee on the Future consisting of 46 citizens and seven legislators.

As these groups were formulating an agenda for the future, legislative leaders were facing a familiar problem--a considerable shortfall in revenue. The state needed 521 million new dollars merely to meet the continuation budget for the immediate future. If modest salary increases were to be appropriated, the shortfall would increase to over $751 million. Without new funding, Florida could not approach, much less attain, the goals of the state comprehensive plan.

In February 1987 the Zwick Commission ended its 18 month

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[32]They are: education, children, families, the elderly, housing, health, public safety, water resources, coastal and marine resources, natural systems and recreational lands, air quality, energy, hazardous and non-hazardous materials and waste, mining, property rights, land use, public facilities, cultural transportation, governmental efficiency, the economy, agriculture, tourism and employment.

study with a report which found:[33]

> • The growth of Florida is relentless. Since 1980, we have averaged 893 new residents every day.
> ...6,268 every week.
> ...27,163 every month.
> ...325,960 every year.
>
> * * *
>
> • What they don't bring are the roads, the bridges, the schools, and all the vast and varied human services needed to realize [their] dreams.
>
> * * *
>
> ... our low tax rates and our undue reliance on a narrow-based sales tax keep us from having the stable and reliable flow of governmental revenues that is needed to attract and accommodate quality growth.
>
> * * *
>
> • ....To compete successfully, we need a stable source of revenue for state government in Florida that will keep pace with the demands of our growing state. ...failure to "sunset" most of the tax exemptions for sales of services as scheduled in 1987 would eliminate the sales tax as a possibility and leave just two choices for the state -- a business receipts tax and a personal income tax.

In March 1987, one month after the Zwick Commission report, the Speaker's Advisory Committee on the Future added its thoughts. Scenarios developed by committee staff and incorporated in "The Sunrise Report" showed revenue shortfalls in

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[33] Keys to Florida's Future: Winning In a Competitive World, pp. 1-4, 6-8, 19.

1986-1991 and pressed the need for "significantly higher taxes." In connection with the process of reassessing Florida's tax structure, the Department of Revenue retained a noted scholar of state and local taxation, Professor Walter Hellerstein, to examine the legal issues. He provided a model law from which the Legislature could work in closing exemptions.[34]

Awareness of the problems caused by the revenue shortfall did not begin with the Zwick Commission. As shown above, the Legislature had been wrestling with the revenue problem for some time and had responded by increasing taxes on a regular basis.[35]

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[34]Professor Hellerstein's biographical sketch is among the public documents lodged with the Court. His name is familiar to everyone who works in this area and all lawyers who read court opinion in this area will recognize that he is frequently cited by the courts. See, e.g., Complete Auto Transit v. Brady, 430 U.S. 274, 287, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977); Commonwealth Edison Co. v. Montana, 453 U.S. 609, 616, n.5, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981).

[35]The legislature has struggled with tax increases for virtually every legislative session and the history of tax increases shows the issue of revenue was constantly on the agenda:

Recent Tax Increases,
(in millions of dollars)

Year of Session	Total Amount Raised	Major Tax Source Increased
1979	5.2	Sales Tax
1980	31.0	Gross Receipts Tax (Speedup)
1981	68.1	Sales Tax (Dealer Allowance) Documentary Stamp Tax
1982	811.5	Sales Tax (1 Cent)
1983	512.2	Sales Tax (Speedup), Corporate Income Tax, Beverage Tax, Motor Fuel Tax
1984	50.9	Corporate Income Tax
1985	142.5	Sales Tax, Documentary Tax
1986	145.2	Cigarette Tax, Sales Tax

The 1987 Legislative Session.

In contrast to their predecessors of 1949, the 1987 Legislature and Governor Martinez had the benefit of exhaustive planning and fact finding when they set out to craft a solution for Florida's urgent revenue needs. Legislators, lobbyists, editorial writers and thousands of other citizens had participated in the development of a solution. There was essential agreement among the major groups responsible for recommendations to the Legislature (the Zwick Commission, the Speaker's Committee on the Future, the Sales Tax Exemption Study Commission) that the elimination of exemptions for most services were appropriate solutions to the crisis. The legislators were prepared to face the challenge of enacting a tax which, though unpopular, would significantly broaden the base of the sales and use tax, eliminate some of the regressivity of that tax, and thereby begin to provide for the needs of Florida.

The Breadth of the 1987 Tax

The principal thrust of the Chapter 87-6 is to broaden the base of taxable services. Four objectives are thereby accomplished: increased revenue; improved stability; potential for expansion; and reduced regressivity.

First, the $521 million minimum continuation budget shortfall is eliminated. The State Revenue Estimating Conference concluded that the tax will provide the State with some $1.154

billion in annual revenue in 1988-89.[36] This fiscal objective could have been accomplished without base-broadening. A one penny increase in the tax rate, from five to six percent, would have raised almost the same revenues.[37] But the base-broadening approach accomplishes other objectives that a naked rate increase cannot. It adds needed stability to the state's revenues. Economists have made a convincing case that the purchase of goods declines sharply during recessions, while "the consumption of services . . . has been growing regardless of prevailing economic climate."[38] What is more, the base-broadening approach accomplishes another forward-looking objective: as Florida moves toward an information-based economy, the expansion of taxable services ensures that state revenues will keep pace with the overall growth of Florida's spending obligations. Finally, base-broadening improves the equity of taxation by making the sales tax less regressive.

With 87-6 Chapter 212 now reaches a solid majority of the potential services tax base. The appendix contains charts showing that Chapter 87-6 reaches over 70% of the potential service tax dollars. Exemptions are, to be sure, continued for some services, especially those consumed disproportionately by

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[36]Walby & Williams, The Impact of Florida's Sales Tax on Services. This document has been lodged with the Court.

[37]The estimates indicate that a penny increase in the sales and use tax on the existing base would raise 1.2688 billion dollars.

[38]Walby & Williams, supra note 36. See also, Zingale, supra note 1, at 438-49.

individuals. The Legislature has determined that the medical services exemption should be maintained for reasons of fairness. Another example is motor carriers, who, while exempt from the service tax, are subjected to an "in lieu" tax on diesel fuel in the same legislation.[39] Taxes on services are now in parity with tangible property, both in the range of 70-75% of all possible transactions.

The graphs in the appendix tell the story better than words can convey. The tax is a true general tax.

The Practical Difficulty of Base Broadening.

In the business of raising taxes, it is hard to find volunteers. Even with the detailed background studies and bleak revenue predictions there was no public consensus on how best to raise revenue. The best tax is always the one paid by the other fellow.

The many interests which favored the continuation of special exemptions were vocal. Those favoring the tax exemptions for advertising and attorney's services were particularly so. Some of those opposing the tax asserted the unconstitutionality of the entire approach to taxation. Some industries and professions maintained that they were immune from taxation and threatened suits.[40]

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[39]Ch. 87-6, § 39, Laws of Fla.

[40]The President of The Florida Bar warned that the tax would be fought on legal grounds:

> You will be in court a long time before you

Different arguments were advanced by other interests. Lawyers for Time, Inc. gave an opinion letter stating that the elimination of the exemption for advertising was a case of "clear" unconstitutionality,[41] and a number of interests opposed to that tax told the House appropriations Committee that a tax on advertising would violate the First Amendment.[42]

The legislature considered all of these arguments. The 1987 Tax Act passed over massive opposition.

It was against this background that the Governor submitted his request for an advisory opinion. The Governor acknowledged the dangers posed by the challenges to Florida's governmental functioning. In his request to this Court the Governor stated:

> see any money coming out of the legal profession, if ever.

Tampa Tribune, April 15, 1987. In April of 1987 the President of the Bar said in an address to a Senate committee:

> What you're now considering is a tax that's never been enacted in these United States for over 200 years.
>
> In the 211 years of our history there never has been a tax on legal services...

The **Florida Bar News**, May 1, 1987 at 1. This statement may have inadvertently overlooked New Mexico, N.M.Stat.Ann.,ch 7-9-3 (1978), and Hawaii. Haw.Rev.Stat. § 237-2,3,7 (1985). Both states tax attorneys' fees. The New Mexico tax was upheld following a constitutional attack by an attorney. Lougee v. New Mexico Bureau of Revenue, 42 N.M 115, 76 P.2d 6 (1938). In May 1987 the Florida Bar filed suit challenging the constitutionality of the Act.

[41]That letter is included in the materials lodged with the court.

[42]**Orlando Sentinel**, January 8, 1987.

> The consequences of this revenue source being invalidated are staggering. If judicial determination is delayed and the statute invalidated, it is foreseeable that no corrective action could be taken during the 1987-88 budget year so as to balance the budget. Moreover, if the taxes are collected and the statute or portions of it are invalidated, the liabilities created by refund claims would be severely disruptive of the state's finances.

OPERATION OF THE TAX

Chapter 87-6[43] extends the existing sales tax to the sale and use of a broad range of services consumed in Florida. The fundamental effect of the tax is simple: the sale or use of services consumed in the state is taxed; the sale or use of those consumed outside the state is not. The new tax reaches the consumption of services in Florida and nothing more.

The Structure of the Tax.

The main question asked in determining if a service will be taxed is whether "the benefit of the service is enjoyed in this state." § 212.059(2), Fla. Stat. as created by Ch. 87-6, Laws of Fla. If and only if the answer is yes will a tax result. The complementary operation of two formally separate taxes, a sales

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[43]Ch. 87-6, Laws of Fla. as amended by Ch. 87-72. Although a number of provisions affect Chapter 212's application to sales of tangible personal property, rentals and admissions, the principal thrust of these two chapters 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".

tax and a use tax, work in harmony to produce the desired result. The sales tax reaches sales of services which are made in this state for ultimate consumption here.[44] The use tax reaches services purchased out-of-state but consumed within Florida. Id. The amount of tax imposed on a given transaction will be the same, whether it is technically imposed by the sales tax or the use tax.

Potential purchasers of services thus have no tax-induced incentive to purchase their services outside of Florida, for they will pay the same tax on services used in Florida regardless of where the services are purchased. Cf. United States Gypsum Co. v. Green, 110 So.2d 409, 412 (Fla. 1959). The Legislature recognized that the application of the use tax to services purchased outside of the state created a risk of multiple taxation because the same services might have been exposed to a sales tax in the state of purchase. The service tax fully avoids any risk of multiple taxation by extending the existing tax credit mechanism. Anyone purchasing services in another state who has paid a sales or use tax on the services there receives a full credit against his Florida tax for such payment. See § 212.06(7) as amended by Ch. 87-6 § 12, Laws of Fla. Cf. Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 252-53 (1937).

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[44]The operative taxing provision, § 212.059(1)(a), technically reaches the retail sale of every service where the sale takes place within the state, regardless of where the service will be consumed. However, one of the key structural exemptions, found in § 212.0592(1), restricts the actual reach of the sales tax to transactions in which the service is used in Florida. See infra page 28.

Even though the tax paid is the same under either the sales or the use tax, there is an important practical distinction in their operation. When a service is sold in Florida the tax is generally collected by the seller, who adds the tax to the consideration paid for the service.[45] See §§ 212.059(3)(a), 212.06(2)(k), 212.12, as created by Ch. 87-6, §§ 1, 12, and 17, Laws of Fla.[46] When services are sold outside Florida for use within the state, the tax on the use of the services is "self accrued" and remitted by the purchaser of the service. § 212.059(3)(b), as created by Ch. 87-6 § 1, Laws of Fla.

This feature of the tax deserves special emphasis, for it a source of confusion to many of the opponents. There is simply no **obligation whatever on the part of sellers to collect a use tax.**[47] Although the Legislature has the power to require out-of-

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[45]An exception relates to the sale of a service in Florida by a Florida service provider to a multistate business. The statute contemplates that multistate businesses will obtain an exempt purchase permit. § 212.0593(1) as amended by Ch. 87-6, Laws of Fla. If the multistate purchaser presents this certificate to the Florida vendor, then the vendor is exempted from collecting the tax. Instead, the multistate business self accrues the tax and remits payment to the Department.

[46]The same rule obtains with regard to taxes on sales of tangible personal property in the state.

[47]This contrasts sharply with the operation of the use tax in Florida and other states as applied to sales of tangible personal property, where the statutory scheme generally requires the out-of-state vendor to collect the use tax. See Scripto, Inc. v. Carson, 105 So.2d 775 (Fla. 1958), aff'd 362 U.S. 207 (1960), holding that Florida could compel a Georgia seller not doing business in Florida to collect Florida's use tax on tangible personal property sold to Florida residents.

The single exception to this general rule of no-use-tax-collection by sellers involves interstate transportation services. A limited obligation to collect use tax is provided in §

state service providers to participate in the use tax collection process,[48] it chose not to do so in large part to relieve the multistate businesses from the responsibility for collecting use tax.

The determination whether a sales tax or a use tax applies to a given transaction turns on whether the sale is made in or out of Florida. While the place of a sale of tangible personal property is readily determined under traditional legal rules, the place where services are sold is not intuitively obvious. Thus, Chapter 87-6 contains rules for making this determination. Basically, the service is deemed to be sold where the service provider incurs most of his costs.[49]

Where the Service is Used or Consumed.

To put the issue in some perspective, it is often harder to tell where a service is used than it is to tell where tangible personal property is used. Tangible property generally has a specific physical situs. It is generally used where it is. On the other hand, services have no intrinsic physical situs. Thus,

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212.059(5)(b). None of the Opponents assail this provision. A similar provision proposed for advertising services was eliminated after the print media persuaded the Legislature to do so.

[48]Scripto, Inc. v. Carson, supra.

[49]The sale of a service is in Florida if (1) the service is performed wholly in-state, or if (2) the greater proportion of the service, based on costs of performance, is performed in Florida. § 212.059(1)(b), as created by Ch. 87-6, § 1, Laws of Fla.

the service tax establishes criteria for determining the extent to which a service is used or consumed in Florida and, consequently, the extent to which it is taxable here.

Some services are closely connected to tangible property. For these services the Legislature determined that the service is deemed used where the property is located. For example, if the service relates to real property, the purchased service is presumed to be enjoyed in the state where the real property is located.[50]

Other services taxable under the 1987 legislation cannot so easily be connected with tangible property. Thus, the new law provides additional criteria for determining where these "generalized" services are used. For individual consumers, most services are deemed used where the service is performed.

A similar rule applies to business purchasers which are located in only one state. If they are a Florida business, then the benefit of the service is presumed to be enjoyed here and either a sales tax (if sale was made in Florida) or a use tax (if it was not) will be due. § 212.0591(9)(b)5, as created by Ch.

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[50]This common sense real estate rule applies to individuals and businesses alike. § 212.0591(9)(a)1 and (b)1, as created by Ch. 87-6, Laws of Fla. Two additional "situs specific" rules apply to businesses (but not individuals). If a business purchases a service directly related to tangible personal property, then the benefit of the service is presumed to be enjoyed in the state in which the property has acquired a business situs (if the property has acquired such situs). § 212.0591(9)(b)2. If a business purchases a service that directly involves sales to a service purchaser's local market, then the benefit of the service is presumed to be enjoyed in the state where the purchaser's market exists. § 212.0591(9)(b)3.

87-6 § 2, Laws of Fla. On the other hand if the purchaser is doing business exclusively in another state, then the benefit of the service is presumed to be enjoyed in that other state and no service tax is due.[51]

The most difficult case presented to the Legislature was that of a multi-state business purchaser, especially one doing business both in Florida and elsewhere. Where is a "generalized" service (such as overhead) purchased by a multistate business really used?

The Legislature turned to a measurement already existing in Chapter 220, the corporate income tax provisions.[52] The apportionment rules were simply borrowed from chapter 220 and incorporated into the use tax. § 212.0591(9)(b)4, as created by Ch. 87-6, Laws of Fla. For example, purchases of legal services relating to federal income tax liability or accounting services relating to the preparation of an annual report would generally fall into this category. The multistate business purchaser would pay a tax on the service equal to five percent of the charge for the service multiplied by the business's Florida corporate income tax apportionment percentage.

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[51]This is true even if the service is performed in Florida by a Florida provider. While such a transaction is normally subject to sales tax (because most of the costs of performance are incurred here), the out-of-state purchase exemption would apply. § 212.0592(1), as created by Ch. 87-6, Laws of Fla.

[52]The apportionment formulae are contained in Part IV of chapter 214. It is well established as a matter of federal constitutional law that these formulae do not burden interstate commerce. See, e.g., Northwestern Portland Cement Co. v. Minnesota, 358 U.S. 450, 462-63 (1959).

This apportionment formula is necessarily inexact.[53] The corporate tax apportionment formulae measure roughly the extent to which a "typical" multistate business is conducting business here. The Legislature determined that for two services--advertising and interstate transportation-- a more accurate apportionment formula could be applied while still minimizing the administrative burdens of compliance. Proceeding under the same general principle that underlies the taxation of the sale or use of other services---that the sale or use of services should be taxed where the benefit of the service is enjoyed---the Legislature determined that the most appropriate measure of enjoyment of the benefit of advertising services is the media market coverage. The Legislature therefore provided that the price of advertising should be apportioned to Florida based on the proportion of the Florida market coverage of the provider to its total market coverage.[54]

To illustrate, if a business paid $100,000 to a nationally-

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[53]See, Container Corp. of America v. Franchise Tax Board, 463 U.S. 159 (1983).

[54]Market coverage means average circulation (taking into account regional editions when appropriate) in the case of print media, and population in the case of broadcast media. The original House version of the bill, PCB FT 87-11:a (2/11/87), provided a different rule for broadcast media. There market coverage meant "average hourly number of viewing or listening households, in the case of broadcast media." § 212.059(9)(b). This proposal to use Nielsen and Arbitron ratings was changed at the request of broadcast industry representatives, who maintained that such ratings changed so frequently as to make compliance overly burdensome. § 212.0595(4)(a), as created by Ch. 87-6 § 1, Laws of Fla.

-circulated magazine with ten percent of its circulation in Florida to run an advertisement in the magazine, the business would be obligated to remit a tax of $500 to Florida ([$100,000 service tax base] x [10% Florida apportionment percentage] x [5% tax rate]). As in the case of other services that are sold to business purchasers outside Florida and used within the state, it is the advertiser, not the magazine, who is obligated to remit the $500 to the state. § 212.0595(6), as created by Ch. 87-6 § 6, Laws of Fla.[55] Conversely, if the advertiser has no tax nexus in Florida no Florida service tax is due. Contrary to the assertions of numerous opponents, if a New York restaurant sporadically advertises in the national edition of the New York Times, neither the Times nor the restaurant has any obligation to report or remit the Florida service tax. § 212.0595(6), Fla. Stat.

Transportation is another service susceptible to a more precise apportionment formula. Here the Legislature determined that transportation services are enjoyed within Florida based on the ratio of Florida miles travelled to total miles travelled. § 212.059(5), Fla. Stat. It must be stressed, however, that the same service tax is imposed on all multistate businesses. The sole difference between the tax as applied to advertising and transportation is that these services are, by their very nature, susceptible of a more accurate determination of where they are in fact used.

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[55]If the advertising is sold in Florida, then the sales tax on the advertising service is collected and remitted by the media provider. § 212.0595(5), as created by Ch. 87-6, Laws of Fla.

The Structural Exemptions.

a. **Services Used Out-of-state.** Consistent with its overriding purpose to tax only the sale or use of services whose benefit is enjoyed in Florida, Chapter 87-6 provides an exemption for the sale of services purchased within the state for use outside the state. § 212.0592(1), as created by Ch. 87-6, § 3, Laws of Fla. For example, if a Florida engineering firm designs a bridge to be erected in Georgia, no tax is imposed even though all engineering services are performed in Florida.

Again, it is useful to contrast these provisions with the existing tax on sales of tangible personal property. The tax on services is more narrowly circumscribed than the typical sales and use tax on tangible personal property. A sale of tangible personal property made within this state is taxable, even if the purchaser promptly removes it to another state.[56] Moreover, apportionment is not generally provided for the tax on the sale or use of tangible personal property in Florida that is used in part in other states.[57]

b. **Sale for Resale.** The Legislature gave considerable attention to the question of whether, and if so to what extent, a

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[56]Very limited exemptions are found in existing law for motor vehicles, airplanes or boats sold in Florida to non-residents. § 212.08(10) and (11); § 212.05(1)(a)2, Fla. Stat. (1985).

[57]Isolated instances of apportionment of sales tax on tangible personal property can be found under existing law for vessels and vehicles used in interstate or foreign commerce. § 212.08(8) and (9), Fla. Stat. (1985). These exceptions, in the case of tangible personal property, prove the general rule stated in the text of this brief.

sale of a service should be exempted from tax when the purchaser incorporates the service into a larger product (or service) which he in turn will sell. Any solution demands balancing two competing policies. On the one hand, a broad sale for resale exemption avoids the tax-on-tax or "pyramiding" effect. On the other hand, such a rule would all but eliminate the payment of the service tax by everyone but the individual retail consumer. This is because virtually every business sells some product or service. In some sense, then, every service purchased by a business is incorporated into something which is resold.

The Legislature drew a fairly narrow sale for resale exemption, thereby maintaining a relatively broad service tax base for businesses. All else being equal, a narrower base for businesses would have required a broader base for individuals in order to generate the same revenue. To qualify for the exemption, five conditions must be met. The most significant of these is the requirement that the purchaser of the service does not consume the service but rather acts as a broker in procuring the service for his customer or client. § 212.02(19), as created by Ch. 87-6 § 7, Laws of Fla.[58]

Two examples serve to demonstrate the scope of this sale for

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[58]The other four conditions are: (1) the purchaser of the service buys the service pursuant to a written contract which identifies the client or customer for whom the purchaser is buying the service; (2) the purchaser of the service separately states the value of the service in his charge for the service on its resale; (3) the service will be taxed on its resale; and (4) the service is purchased pursuant to a resale permit by a person primarily engaged in the business of selling services.

resale exemption. First, automobile body work billed to an automobile mechanic by the body shop which repaired the owner's car would not be taxable to the mechanic if the mechanic resells the body work to the customer by separately stating such charges on his invoice. In this case, the mechanic acts as a broker and does not consume the service rendered by the provider of the body work. On the other hand, if a Tallahassee lawyer prepares an opinion letter in Tallahassee which he sends by courier to his client in Miami, the exemption would not apply to the courier charge, whether or not the attorney separately bills his Miami client for the courier. In this case, the attorney pays the tax because he consumes the service of the courier as part of his rendering the larger service to his client.[59]

c. Use Tax Where Purchaser has no Florida Tax Nexus. While not a true structural exemption, we point out here that the service tax does not apply to out-of-state purchases of services where the user has no Florida tax nexus. §§ 212.0591(1)(b), .0595(6), as created by Ch. 87-6 §§ 2, 6, Laws of Fla. Even

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[59]It is useful to compare the treatment of the courier charge with the treatment of tangible personal property used by the attorney in rendering this service. The attorney paid sales tax on his stationery on which the letter is written, as well as sales tax on his rental payments to the lessor of his word processor. The charge to his client reflects, to some extent, the cost of these materials together with sales tax he has paid. When the service tax is imposed on his entire fee (including that portion conceptually attributable to the sales tax paid on the tangible personal property used) some pyramiding results. Likewise, some pyramiding results when the tax is imposed on his entire fee, including the separately stated charge for courier service. See generally, Report to the Florida Legislature (Dep't of Revenue, March 1987) pp. L-104 to L-110.

without this express legislative declaration, federal case law requires this result in any event, for Florida is prohibited by the Federal Constitution from taxing those lacking the requisite Florida tax nexus. See, Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). While the Legislature intended that the reach of the tax extend to the limits permitted by the Federal Constitution, the Legislature clearly did not intend to exceed constitutional limits.

Policy Based Exemptions.

Beyond the structural exemptions discussed above, the Legislature provided for a variety of transactional, or policy-based, exemptions. In accord with its expressed intent not to tax "essential services" and "to make the sales tax on services fair and equitable," Chapter 87-6 (Preamble), the Legislature exempted, among other things, occasional and isolated services by those not engaged in business (e.g., neighborhood babysitters), § 212.0592(3), as created by Ch. 87-6 § 3, Laws of Fla., agricultural services, § 212.0592(6), educational services, § 212.0592-(9), governmental services, § 212.0592(10), local and suburban passenger transportation services, § 212.0592(20), sanitary services, § 212.0592(22), health services, § 212.0592(12), social services (including day care), § 212.0592(24), and religious services. § 212.0592(31). Moreover, the Legislature maintained the existing exemptions for sales of food and medicine.

Finally, the Legislature recognized that extending Florida's

sales tax to services could create situations, at least in application, that would raise federal constitutional issues. In enacting the savings provision of Section 212.0591(2), the Legislature intended that Chapter 87-6 should not be construed to exceed federal constitutional limitations. Thus scenarios conjured up under an extreme application of Chapter 87-6 to hypothetical fact situations simply will not arise under Chapter 87-6 when the Department of Revenue implements the statute within the intended constitutional limits. Moreover, Section 219.0591-(10), as amended by Ch. 87-72, expressly provides that if any exemption should be struck down on grounds of facial unconstitutionality, then it is the Legislature's intent that the exemption itself be eliminated without invalidating the rest of Chapter 87-6.

SUMMARY OF ARGUMENT

Chapter 87-6[60] is not a new tax on advertisers, lawyers or contractors. It is an extension of the existing Florida sales and use tax to a variety of services previously exempted. Before 87-6 only a handful of services were subject to sales tax. Now the majority of non-essential services consumed in this state become taxable. This extension was not whimsical, but rather is the culmination of an unprecedented study of how the sales tax can respond to urgent demands brought on by Florida's growth. Chapter 87-6 meets the short-term demand of avoiding an unbalanced budget for the fiscal year 1987-88 in a way designed to minimize the regressivity of the sales tax as a whole.

The many arguments that Chapter 87-6 violates the First Amendment are without merit. Florida clearly has the power to tax advertisers. State taxes on newspapers and advertisers were in effect in the 1780's. A federal tax on newspaper delivery was adopted in 1792. The historical arguments raised by the Opponents confuse the loathsome unrepresentative taxes imposed by Parliament with taxes passed by representative bodies.

The Opponents' arguments that the tax is discriminatory as applied to advertisers is misplaced. Prior to Chapter 87-6 the sales tax applied sporadically to advertising. It reached newspaper inserts, political signs, bumper stickers and a handful of other advertisements. The thrust of Chapter 87-6 is to

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[60]All references in this brief to Chapter 87-6 refer to that chapter as amended by Chapter 87-72, effective generally July 1, 1987.

produce a level playing field, so that **all** advertising used in Florida is taxed equally, saving only the retained, historically defensible exemption for purchases of all goods and services (including advertising) by charities. Chapter 87-6 is carefully drafted to avoid any content based discrimination, and tailored to avoid any constitutionally proscribed disclosure.

The Legislature has the power to join eleven other states in taxing newspaper circulation, and two other states in taxing attorneys'fees. The distinctions made by the Legislature in exempting some attorneys' fees from the tax is based on sound public policy.

Chapter 87-6 expands the existing, constitutionally approved excise tax on sales and uses, and is in no way a proscribed tax on the income of natural persons. It is wholly transactional in nature, and does not seek to measure profit or gain. Moreover, Chapter 87-6 contains structural exemptions, such as the out-of-state sale exemption, wholly inconsistent with any rational income tax.

Finally, the advisory opinion process is, if anything, a vehicle better suited to complex, <u>vel non</u> constitutional litigation than is a discrete case or controversy. This Court has traditionally provided for a speedy review of controversies presenting grave peril to Florida's welfare, sometimes through the advisory opinion process and sometimes through the use of extraordinary writs. There is no reason now to retreat from established sound practice.

ARGUMENT

I.

USERS OF ADVERTISING SERVICES, LIKE USERS OF OTHER SERVICES, MAY BE TAXED; THE LEGISLATIVE CLASSIFICATIONS RAISE NO FIRST AMENDMENT OR OTHER CONSTITUTIONAL PROBLEMS.

The Governor's brief answers most of the wide-ranging attacks on the elimination of the advertising exemption. See, particularly, Point Two of the Governor's Brief. We focus on the issue of legislative power, and address first the Opponent's most radical contention, the assertion that the First Amendment bars any tax on advertising and/or the media.

A. Historical Evidence Supports a First Amendment Interpretation Which Gives Representative Bodies the power to Tax Newspapers and Advertisers.

1. There Is No Record Of Popular Opposition To Taxation Of Newspapers In America Prior To The First Amendment, So Long As Such Taxation Was Mandated By Representative Assemblies.

The Florida Press Association (FlPress) brief at 11-19 asserts that the First Amendment is the embodiment of a long tradition of popular opposition to taxation of the press in America. This assertion is not supported by the historical evidence.

Prior to the Revolution Massachusetts (in 1755) and New York (in 1756) passed stamp duties on newspapers. The only opposition to these revenue measures came from "the people most immediately

affected" -- namely the printers in the colonies.[61] By contrast, an excise tax on liquor passed in Massachusetts in the previous year had ignited an enormous public outcry.[62] The stamp taxes in Massachusetts and New York were repealed simply because they failed to produce the desired revenue:

> [T]he revenue from the act was not large, and much of it was consumed by [the commissioner's] salary, purchase of a stamp machine, and other expenses....[T]here is little evidence that the stamp taxes levied by Massachusetts and New York were particularly unpopular, except perhaps in the sense that all taxes were unpopular....[63]

In 1765 England's Parliament passed the famous Stamp Act on legal documents, certificates, and other paper items, including newspapers, issued within the American colonies. Unlike the public indifference greeting the earlier state stamp taxes, the reaction to the British tax was immediate and violent.[64] Throughout the colonies, angry mobs forced stamp collectors to resign their posts. Had not Parliament repealed the tax in 1766, the American Revolution would likely have arrived a decade

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[61]M. Thompson, Massachusetts and New York Stamp Act, 3 ser. 26 **Wm. & Mary Q.** 253, 257 (1969). Thompson's work is a detailed examination of these acts.

[62]P. Boyer, Borrowed Rhetoric: The Massachusetts Excise Controversy of 1754, 3 ser. 21 **Wm. & Mary Q.** 328 (1964). When New York passed its stamp tax, even the printers were unable to build a solid phalanx of opposition: Hugh Gaines, publisher of the New York Mercury, urged subscribers to pay the stamp tax as a patriotic duty. Thompson, supra note 61, at 257.

[63]Thompson, supra note 61, at 257.

[64]Thompson, supra note 61, at 257, suggests that the lack of popular resistance to the state stamp taxes encouraged Parliament to pass its stamp tax.

early.[65]

The FlPress brief at 14-17 asserts that American resistance to the Stamp Act of 1765 derived from and focused upon opposition to taxation of the press. This bald suggestion contradicts the overwhelming weight of historical scholarship. As is well known, American publicists premised their opposition to the Stamp Act on the English constitutional principle that no man should be taxed without his consent. "No Taxation Without Representation" (not "Stop the Ad Tax") was the rallying cry of the Sons of Liberty.[66]

The American colonies did not ground their objections on Parliament's choice of the tax base. Had Americans objected in particular to taxation of newspapers, Parliament would have been delighted to redirect its tax to other commodities. Indeed colonial agents communicated the willingness of the colonial assemblies to levy their own stamp duties, if only Parliament would forebear to tax the colonies directly.[67]

Following the Revolution, Massachusetts passed a state tax on newspapers and other documents in 1785, followed by a tax on advertisements in 1786. The FlPress brief at 17-19 cites to historical scholarship dating from 1873 and 1906 in order to show that these acts were unpopular. The most recent historical investigation of these acts suggests the contrary. When the tax

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[65]See generally E. Morgan & H. Morgan, The Stamp Act Crisis: Prologue to Revolution (1953).

[66]Id.

[67]Id. at 76-86.

2. The First Amendment Was Not Intended By The Framers To Prevent Taxation Of The Press.

In the absence of a received tradition of opposition to taxation of newspapers, determination of the original meaning of the First Amendment press clause requires inquiry into both the immediate background and aftermath of its ratification.

The FlPress brief accurately reports that a number of Antifederalists -- notably the Virginians, George Mason and Richard Henry Lee -- explicitly argued against permitting Congress power to tax the press. But considered more broadly, the ideas of the Antifederalists were of small constitutional significance. Students of the First Amendment have been impressed neither by the force nor the harmony of Antifederalist rhetoric on freedom of the press. A leading scholar on the origins of the First Amendment, Professor Leonard Levy, concludes that:

> Freedom of the press was everywhere a grand topic for declamation, but the insistent demand for its protection on parchment did not contain a reasoned analysis of what it meant, how far it extended, and under what circumstances it might be limited .... On the issue of freedom of the press, Antifederalists fluctuated between hysterical fears and complaisant indifference.[71]

Professor Levy has shown that the Antifederalists were less than forthright in their demands for a bill of rights. Antifederalists such as Richard Henry Lee, whose thoughts are

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[71] L. Levy, Emergence of a Free Press, 234, 247 (1985). See generally 234-52 on the wide range of Antifederalist views on the subject.

was proposed,

> Newspaper editors, threatened by a tax on their papers, attacked the legislation, comparing it to the infamous Stamp Act of 1765, and stirred up a great deal of dissent. Despite their efforts ... towns favored the act with the representatives of the most commercial-cosmopolitan communities casting the highest percentage of affirmative votes.[68]

The debate over the act "caused less of a division within the [assembly] than had the proposed cider levy."[69] Even as newspaper publishers denounced the legislature, individual citizens denounced the newspapers. Proclaimed one critic:

> I always thought that the [state] constitution, in asserting that 'the liberty of the press is essential to the security of freedom ...' intended to guard the freedom of our citizens; but not to give an exclusive right to any set of men to exempt themselves from the burdens which fall generally on most branches of business in the community.[70]

So long as taxes on newspapers were the product of representative government they were deemed no more obnoxious (except to those who paid the taxes) than taxes on any other branch of business.

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[68]V. Hall, Politics Without Parties: Massachusetts, 1780-1791, at 117-18 (1972).

[69]Id.

[70]Massachusetts Gazette, Apr. 24, 1786 at 4. The press clause referred to is in Mass. Const. Part I, Art. 16 (1780).

highlighted in the FlPress brief at 21-26,

> was less interested in the adoption of a bill of rights than in defeating the Constitution.... Opponents sought to prevent ratification and exaggerated the bill of rights issue because it was one with which they could enlist public support. Their prime loyalty belonged to states' rights, not civil rights.[72]

Antifederalist disquisitions on freedom of the press must be read with this motive in mind. As Professor Levy explains,

> Richard Henry Lee of Virginia, one of the titans among the Anti-Federalists, worried that Congress could destroy freedom of the press by taxing it; but Lee really opposed the possession of the tax power by Congress.[73]

It is a matter of historical record that the Antifederalists did not introduce the Bill of Rights. Rather, it was their federalist rival, James Madison, who pressed the bill of rights upon Congress.[74] Madison culled his federal bill of rights from the various state provisions passed after the Revolution. The Massachusetts Constitution was one of the five that included such a press clause, and it was the Massachusetts legislature that taxed newspapers and advertisements in 1785 and 1786 despite the clause. It seems proper to infer that the Framers, by using equivalent language, were of like minds. Indeed, had the Framers in 1791 intended to override this interpretation they would

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[72]Levy, supra note 71, at 221-22, 233, 257, 266.

[73]Id. at 246-47; O. Chitwood, Richard Henry Lee: Statesman of the Revolution, 177 (1967).

[74]Levy, supra note 71, at 257.

presumably have done so by recourse to more precise, differentiative drafting.

This interpretation is buttressed by the statement of another prominent Federalist, Alexander Hamilton. Hamilton answers an Antifederalist charge that a Federal Constitution without a bill of rights posed a threat to freedom of the press:

> To show that there is a power in the constitution by which the liberty of the press may be affected, recourse has been had to the power of taxation. It is said that duties may be laid upon publications so high as to amount to a prohibition. I do not know by what logic it could be maintained that the declarations in the state constitutions, in favor of freedom of the press, would be a constitutional impediment to the imposition of duties upon publications by state legislatures. It cannot certainly be pretended that any degree of duties, however low, would be an abridgement of the liberty of the press. We know that newspapers are taxed in Great-Britain, and yet it is notorious that the press no where enjoys greater liberty than in that country. And if duties of any kind may be laid without a violation of that liberty, it is evident that the extent must depend upon legislative discretion, regulated by public opinion; so that, after all, general declarations of liberty of the press will give it no greater security than it will have without them.[75]

Hamilton's commentary is significant on several counts: (1) It evidenced the Framers' understanding that state press clauses

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[75]**The Federalist No. 84**, (A. Hamilton), reprinted in M. Kammen (ed.), The Origins of the American Constitution, 239n (1986). Emphasis added. The reaction of the Antifederalists to the First Amendment was equally telling: they greeted its passage with dismay. Richard Henry Lee transmitted the federal Bill of Right "with grief" to the Virginia legislature, still hoping for consideration of "real and substantial Amendments." Levy, supra note 71, at 264. See also 259-66.

did not abridge the power of state legislatures to tax the press; (2) It likewise evidenced their understanding that the inclusion of such a "general declaration of liberty of the press" in the federal Constitution would have the same non-effect; and (3) It evidenced the policy judgment of a major American economic thinker that the impact of a tax upon the press would have no chilling effect upon the dissemination of knowledge in American society.

Within a year of passage of the Bill of Rights Congress exercised its power to tax the press. It passed a special postal charge (under consideration since 1790) for delivery of newspapers through the mails. Many publishers claimed that the Act violated the First Amendment.[76] The author of the First Amendment disagreed. Though he considered "the tax on newspapers" to be an "article of grievance," James Madison based his opposition to the postal bill on policy, not constitutional, grounds. The tax, he wrote to Thomas Jefferson, was "not ... satisfactory: first, because too high; secondly, because suspected of being an insidious forerunner of something worse."[77] By contrast, when Congress passed the Sedition Act in 1798, Madison branded it "unconstitutional" under the First Amendment.[78] Madison thus drew an implicit constitutional distinction between Congress'

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[76]D. Stewart, The Opposition Press of the Federalist Period, 460-64 (1969).

[77]Letter from J. Madison to T. Jefferson (12 June 1792) in 1 Letters and Other Writings of James Madison 561, see also 572 (1865).

[78]R. Ketcham, James Madison: A Biography, 393-403 (1971).

power to tax the press generally and its power to persecute individual publishers.

In sum, historical evidence overwhelmingly supports the view that the First Amendment was neither originally intended nor initially interpreted to curtail legislative power to tax the press.

B. The Taxation of Services, Including Information Services, is a Logical Step as Florida Moves Increasingly to a Service Economy.

Much of what has been written by opponents is based on public relation campaigns mounted by media. The very term "ad tax" is calculated to confuse, suggesting that the Legislature has targeted advertising for a new tax. The elimination of the exemption for certain advertisers is not a new tax. It is simply another step in development of the sales tax underway for thirty-nine years.

The Zwick Commission report made clear that close scrutiny of the existing service exemptions was needed if Florida is to keep pace with growth. The 1987 economy of Florida is much more of a "service economy" than that of 1949, or even 1968. When the Legislature seeks to spread the tax burden and to assure that all elements of the economy carry a fair share, it is only logical to eliminate the exemption on services, including advertising services.[79]

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[79]There are major forces always at work in the consideration of taxes. Over the long term, political and economic forces tend to eliminate exemptions because of the pressure from increased revenue demands.

C. The Elimination of the Advertising Exemption Does Not Create a Special or an Onerous Burden on Advertising.

The advertisers suggest that the tax is directed at communication and will be so onerous as to hamper the flow of information.

The Opponents' argue that the elimination of the advertising exemption accounts for 13% of the new revenues generated by Chapter 87-6. We believe the correct number is 11%, and note that the elimination of construction-related exemptions will produce a higher portion of the new tax. We believe a more relevant number is the total contribution of advertising to all revenues raised by Chapter 212. The elimination of the exemptions for advertising will raise no more than 1.5% of the total sales and use tax revenues. See Appendix. The 5% tax will no doubt be a burden to advertisers just as the 5% tax is a burden to the other elements of the economy, many of which have been carrying a share of the tax burden since 1949. To an industry enjoying significant annual rate hikes well in excess of inflation, a 5% tax should not be crippling.[80]

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[80]The November 17, 1986 issue of Advertising Age reported the following:

Average annual price increases

Prices	1983	1984	1985	1986	1987*
Consumer prices	3.2%	4.3%	3.6%	1.9%	3.2%
GNP deflator	3.9	3.9	3.3	2.7	3.1
Media cpms					
Network tv	8.9	13.0	7.8	4.0	4.0

D. The 1987 Legislature Eliminated Unfairness From The Taxation of Advertising.

This Court has established beyond any doubt that the power of the Legislature to make distinctions is at its height when dealing with taxation; it need be shown only that some rational basis exists for a tax distinction. E.g., Eastern Air Lines, Inc. v. Department of Revenue, 455 So.2d 311, 314 (Fla. 1984), cert. dismissed 106 S.Ct. 213 (1986). The opponents, apparently misled by their own hyperbole, argue that the elimination of the advertising exemption creates a special tax containing exemptions incompatible with Arkansas Writers Project v. Ragland, 55 U.S.L.W. 4522 (1987). They thereby seek to avoid the rational basis test.

Chapter 87-6 does not **create** a problem under the Ragland decision; it **eliminates** such a problem. Before the 1987 legislation some commercial advertisements were exempt from taxation while others were taxed. Consider the following: Until the 1987 Act becomes effective, one encounters a prime example of discrimination in taxation every time he picks up his Sunday newspaper. Included in that paper are a number of advertisements. Some of these are taxed. Some are not. The distinction is between those advertisements which are printed in, say, The

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Spot tv	8.1	9.7	6.1	3.8	4.3
Cable tv	n/a	14.0	8.0	8.0	4.0
Magazines	7.8	8.1	7.9	5.0	4.0
Newspapers	9.0	9.0	7.0	7.1	6.0

*estimated
Source: McCann-Erickson

Tallahassee Democrat and those loose-leaf advertisements which are inserted into the paper. A food ad in the Democrat food section is exempt, the food ad insert distributed at the same time is taxed.[81]

Discrimination is also apparent in political advertisements as well. Under existing law, a candidate who seeks to get her message out with bumper stickers will pay a tax. § 212.08 (7)(e)(i), Fla. Stat (1985). If she purchased a spot radio advertisement with the same message, there is no tax. Prior to the 1987 Act, an organization which promotes a ballot issue by having leaflets and brochures printed will pay a tax. § 212.08 (7)(e)(i), Fla. Stat (1985). The same organization will not be taxed if it purchases newspaper advertising.

The 1987 Act corrects these discriminations and other communication-related discrimination as well. Those who are taxed--advertisers--are taxed under the same rate as other consumers of services, and the law is carefully crafted to avoid any governmental inquiry into content as a basis for the imposition of taxes. Moreover, by eliminating discriminatory exemptions, the 1987 Act cures many theoretical problems under the Ragland decision.

E. The Exemption of Churches and Charities is Constitutional.

The Opponents attempt to discredit exemptions for churches and charities, claiming that these exemptions are equivalent to

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[81]Fla. Admin. Code Rule 12A-1.34 (1982).

those which led to the invalidation of a tax in Arkansas Writers' Project v. Ragland, 55 U.S.L.W. 4522 (1987).

The Court in Ragland held that a state statute (1) which taxed the Arkansas Times magazine and as many as two other magazines (but which did not tax magazines generally), and (2) which required an evaluation of content, violated the First Amendment.

Chapter 87-6 does not create the exemption for religious and certain other charitable organizations. This is a feature, now contained in Section 212.08(7)(0), Florida Statutes, which can be traced back to Section 8 of the Florida Revenue Act of 1949. Similarly, the exemption of the state and its political subdivisions is now contained in Section 212.08(6), Florida Statutes. The only amendment to these sections is the inclusion of the term "services" within the scope of the preexisting exemption. Ch. 87-6, § 14, Laws of Fla.[82]

The Miami Herald pays sales tax on its equipment purchases (such as word processors) while the Catholic Church and Dade County do not. The Herald collects sales tax on advertising sold to Eastern Air Lines but not that sold to the church or the state. Chapter 87-6 simply expands an existing distinction.

The decision in Walz v. Tax Commissioner, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970), demonstrates the fallacy of the Opponents' argument. In Walz the Court upheld an ad valorem

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[82]See also supra note 13, concerning technical amendments made by Chapter 87-72.

tax exemption for "real or personal property used exclusively for religious, educational or charitable purposes" stating:

> The legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility. New York, in common with the other States, has determined that certain entities that exist in a harmonious relationship to the community at large, and that foster its 'moral or mental improvement', should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes. It [has] granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical and patriotic groups. 397 U.S. at 672-73.

The law of federal income taxation exemplifies how certain differential treatment is not unconstitutionally discriminatory. Since federal income tax is structurally quite different from the state's sales tax, an exact parallel may not be found. Still, a few analogies are helpful. First, the Internal Revenue Code has long discriminated between publications of tax-exempt organizations (such as National Geographic) and taxable organizations (such as Time Magazine). The income of the former is exempt while that of the latter is not.[83]

A second case which counters the discrimination argument is Regan v. Taxation With Representation, 461 U.S. 540, 103 S.Ct.

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[83]A variation on this theme is the extent to which advertising revenues from publications of tax-exempt organization are taxable under section 511 of the Code as "unrelated business taxable income." The key is whether the advertising is "substantially related" to the conduct of the organization's tax exempt purposes. Treas. Reg. § 1.513-1(d)(2).

1997, 76 L.Ed.2d 129 (1983). Taxation With Representation (TWR) was organized as a not-for-profit corporation formed to consolidate the operations of two affiliates. One was described in Section 501(c)(3) of the Code; the other in Section 501(c)(4). The difference is significant. Gifts to a Section 501(c)(3) are tax-deductible (Section 170(c) of the Code) while gifts to a Section 501(c)(4) are not. The price, however, is that Section 501(c)(3)'s are severely restricted in their ability to lobby. Since TWR was formed largely to lobby Congress on public interest tax matters, the Internal Revenue Service denied its application for Section 501(c)(3) status. TWR brought an action for a declaratory judgment, alleging that Section 501(c)(3) violates the First and Fifth Amendments.

The alleged First Amendment violation is as follows: Lobbying is a fundamental First Amendment right. TWR may not lobby if it is to have Section 501(c)(3) tax exempt status. Veterans organizations, which also lobby, are tax exempt under Section 501(c)(19).[84] Two different First Amendment challenges were raised. First, TWR argued that Congress cannot deny a benefit to someone because she exercises a First Amendment right. Second, it argued that discrimination between (3)'s and (19)'s is invidious, and should be reviewed under the strict scrutiny test.

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[84]Veterans groups were chosen for comparison because contributions to § 501(c)(19)'s, like those to § 501(c)(3)'s, are tax deductible to individual contributors. There are minor variations in the extent of the deductibility, as discussed in footnote 8 of the Court's opinion. Contributions to § 501(c)-(4)'s are generally not deductible by individuals.

The Court held that Congress denied TWR nothing; it "simply refused to pay for the lobbying out of public monies [that is, out of contributions subsidized by means of a tax deduction.]" 461 U.S. at 545.

F. Under the Act, If The Court Finds That An Exemption Causes A Constitutional Problem, The Court Should Strike The Exemption.

The only exemptions are those for churches and charities, traditional in Florida since 1949 and commonly found in tax laws and approved by the courts. The Legislature is confident that it has eliminated all unconstitutional exemptions within the area of advertising. To safeguard Chapter 87-6, however, the Legislature has provided a measure to control the construction of the Tax. Chapter 87-72, Section 2, Laws of Florida, states:

> It is the intent of the Legislature to exempt from the tax on services only those services for which exemptions are expressly provided. Therefore, if any exemption is declared facially unconstitutional by a court of competent jurisdiction, it is the intent of the Legislature that the exemption be deemed inoperative as to all persons and not expanded to encompass services or persons not expressly exempted from the tax.

If the opponents were to convince the Court of their discrimination argument, they would thereby achieve the elimination of the exemptions granted to churches and charities. § 212.08, Fla. Stat.

Thus a successful Ragland argument would result in taxation of churches and charities but would not result in relieving the opponents from paying their share of Florida's tax burden.

II.

THE LEGISLATURE HAS THE POWER TO TAX CIRCULATION.

Prior to the 1987 Tax Act, magazines and other periodicals sold over the counter were subject to sales tax. § 212.05(7)(e)(i), Fla. Stat. (1985). The Act eliminates exemptions on sales of goods which had favored certain newspapers, thereby eliminating this discrimination and applying the circulation tax to virtually all newspapers and all periodicals.[85] Florida now places newspapers and magazines on an equal footing and joins a number of other states currently taxing newspaper and magazine circulation: Alabama, Arizona, Hawaii, Idaho, Kansas, Kentucky, North Carolina, Oklahoma, Texas, Virginia, and West Virginia.[86] Chapter 87-6 makes the sales tax more equitable. There is no substantial argument against this tax.

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[85]Under Section 212.08, Florida Statutes (1985), whereas the sale of a magazine over the counter is subject to a sales tax a newspaper sale is not taxed. Fla. Admin. Code Ann. Rule 12A-1.008 (1987).

[86]All cites to St. & Loc. Tax Serv. (P-H): Ala., Para. 21,290; Ariz., Para. 21,290; Haw., Para. 21,181.40; Idaho, Para. 21,744; Kan., Para. 21,181; Ky., Para. 21,290; N.C., Para. 21,181; Okla., Para. 21,575; Tex., Para. 21,290; Va. Para. 21,290; W. Va., Para. 21,290.

III.

ATTORNEYS SERVICES MAY BE CONSTITUTIONALLY TAXED.

The opponents[87] to taxing attorney's fees advance arguments which rely on the constitutional right of access to the courts (Article I, Section 21, Constitution of Florida) and the right to counsel (Article I, Section 16, Constitution of Florida). It is asserted that the 5 percent tax on attorneys' fees denies litigants basic rights. This portion of our brief supplements the submission by the Governor.

A. The Right of Access to Courts has never provided an absolute Right to Counsel.

The lawyer Opponents cannot be arguing that the tax will close the courts. Indeed, the revenues generated may make it possible to keep the courts open and even to open new courts. Rather, they are suggesting that the tax on attorney's fees will intrude on the right to counsel.

Their attack on the 1987 Tax Act is based on the principles guaranteed by Article I, Section 21 of the Florida Constitution which states:

> The courts shall be open to every person for redress of any injury and justice shall be administered without sale, denial or delay.

Florida courts have never held that the right of access to courts entitles all citizens to counsel in all cases. Rather, most cases decided by Florida courts deal with the power of the

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[87]The opponents who make their argument are the Fla. Bar (pp. 16-19), CrimDef (pp. 27-29) and Carver (pp. 8-12).

legislature to change substantive law. Kluger v. White, 281 So.2d (Fla. 1973); Smith v. Dept. of Insurance, 12 F.L.W. 189 (Fla. 1987). The holdings indicate that substantive law may be changed so long as alternative remedies are provided.

Opponents' assertion requires that the Court take two leaps. First, the Court must construe right of access to include right of counsel. Second, the Court must determine that attorney fee arrangements, in both civil and criminal cases, present obstacles to the right of access--two leaps across an abyss.

Opponents may wish the Court to use this occasion to establish the legal doctrine that "access to courts" gives a citizen an absolute right to counsel. The Court may rightly be reluctant to expand right of access to such a degree.

B. The Tax Dues does not Impermissibly Interfere with the Right to Counsel.

Opponents' arguments depend on the view that arrangements between lawyer and client are essentially inelastic, bound by rigid pricing which prohibits compromise or accommodation. They focus on the unlikely situation where a client sees a lawyer and is able to pay the lawyer's base fee, but has no funds remaining to pay the 5 percent tax. Opponents maintain this client is denied legal service and is therefore denied the right to counsel and right of access to the courts. This, of course, assumes that the lawyer and the client are totally rigid about the fee, the terms of payment, etc., and that there can be no agreement on a sum within the means of the client. If this is truly the case, the client will be forced to find a lawyer he can afford, a

situation not unprecedented before the Tax Act. Assuming arguendo that some client cannot hire a particular lawyer or that, in the extreme, there may be one who cannot obtain any counsel, we do not concede that even this improbable situation would justify the limitation of the Legislature's constitutionally granted power to levy an excise tax. The Bar and the courts have the power and the responsibility to take measures preventing any denial of the right to counsel or of access to the courts. Indeed the opposition should, if sincere on this point, advocate the regulation of attorney fees to ensure that counsel and access are not being denied. The silence of the Bar on this issue is good evidence that there is no real danger of loss of rights.

The arguments of the opposition would imply that because taxes have the effect of increasing the costs of legal services, any charge (whether a fee or a tax) paid for the provision of those services are unconstitutional interferences with the right to counsel. In fact a percentage of every dollar paid by clients to Florida attorneys is already remitted to the State in the form of sales and other taxes on things such as rent or ownership of office space, purchase or lease of business machines, supplies, printing, etc. Despite increasing the cost of legal services, such taxation has never been successfully challenged as an interference with the right of access to the courts or to counsel.

We note also that there are many existing ways in which the citizen's choice of counsel is circumscribed. Our rules regard-

ing authorized practice of law prohibit a client's selection of an advocate who has not met this Court's requirements for law school and the bar exam. There are rules adopted by this Court restricting the rights of lawyers from other states to practice here. Additionally, there are ethical rules from this Court which prevent lawyers from representing persons when there is a conflict of interest. The Florida Bar acquiesces in these intrusions into the right of a client to obtain the representation of a particular person; indeed, the Bar is the principal proponent of most of them. There is no doubt that these same rules often inhibit a client from obtaining the services of a particular representative.

C. The Process of Discriminating Among Legal Services is Not Suspect.

In earlier base-broadening actions the Legislature made "second order" distinctions. To illustrate, in the 1969 legislation[88] some of the then-existing exemptions were removed only in part. Although sales of most fuels became taxable, sales to public utilities and sales of special fuels remained exempt.

The Legislature points to its earlier practice of partial repeal in response to some disturbing suggestions made by Opponents. For example, a brief suggests that the partial repeal of the exemption for legal fees is flawed in part because the exemption is retained for fees paid in a criminal case where

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[88]Ch. 69-222, 1969 Laws of Fla.

charges are dismissed or the client is adjudicated not guilty.[89]

The Legislature is called upon to make difficult choices in considering taxation. Sales tax exemptions are a natural result of the political process, a healthy sign of the Legislature's ability to accommodate broad policy needs to specific state interests. By enacting a partial repeal, the Legislature further refines the scope of the original exemption, adapting it more precisely to the needs of the State. The process of evolution and refinement continues. Were a partial repeal analyzed differently, this Court would put the Legislature in the position of having to make coarse distinctions where more refined ones are possible.

The particular distinction attacked here responds to concerns raised by The Florida Bar. The Legislature is concerned with the expense incurred by a criminal defendant who is formally charged with a crime, but who is not convicted.[90] In a utopian world with infinite resources, the Legislature may well choose to reimburse such a person for all his legal expenses. But here, in the real world, the Legislature deemed it appropriate to take the

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[89] § 212.0592(27)(a), as amended by Chapter 87-6. See, FlaBar Brief at 4-11.

[90] Opponents criticize the Legislature's choice of the "charged-but-not-convicted" standard. Why not provide for those who are merely investigated, or for those who are only partially convicted? The formal charging of a defendant is a well-accepted "bright line." Fees attributable to pre-charging investigation would involve tough questions of allocation which the Legislature chose not to address. Similarly, horrendous allocation questions would be raised by any attempt to measure the "relative degree of conviction" of a defendant.

first step of reimbursing him for sales tax paid. This is consonant with the broader rule that, in civil cases, the victor's sales taxes are to be taxed as part of costs.[91]

IV.

THE EXTENSION OF THE TAX TO USERS OF ADDITIONAL SERVICES IS NOT A PERSONAL INCOME TAX.

Two opponents argue that Ch. 87-6 imposes a tax on the income of natural persons in violation of Article VII, Section 5(a) of the Florida Constitution. Their broad-based attack is wholly without merit. Chapter 87-6 neither in form, nor in substance, imposes a tax on income. It does impose an excise tax, measured by the sales price of services consumed.

When this court was presented with a broad constitutional challenge to the Revenue Act of 1949, this same issue was raised and rejected. Chapter 212 imposes a permissible excise tax, not a prohibited income tax. Gaulden v. Kirk, 47 So.2d 567 (1950). While not wholly dispositive of the opponents' arguments, it must be stressed that the statute under attack in this proceeding is the same basic statute attacked in Gaulden. Chapter 87-6 is an extension of the existing sales and use tax to a broad range of services previously exempted. This court's reasoning in Gaulden applies equally here:

> The tax levied by the statute here under attack is none the less an excise tax, because the amount of the tax to be paid is measured by the compensation received for

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[91]Chapter 87-6, § 42, Laws of Fla., discussed infra p. 63.

the . . . services sold. 47 So.2d at 574.

Notwithstanding Gaulden, the opponents seek to prove that the service tax is somehow fundamentally different from the existing sales tax.[92]

They begin with the undoubted proposition that the name of the tax is not determinative. If the Legislature were to pass a personal income tax and disingenuously label it *An Excise Tax on the Consumption of Services in Florida*, we do not deny that this Court could, and should, look to the substance and operation of the tax. But a search for the substance of this new tax law reveals nothing more than a permissible excise tax imposed on the consumption of services in Florida. City of Lakeland v. Amos, 106 Fla. 873, 143 So. 744 (Fla. 1932).

A. An Income Tax Would Tax the Seller, not the Buyer.

The typical service transaction reached by Chapter 87-6 involves a provider of services and a consumer of services. The provider, not the consumer, of a service is the one who receives income. The attorney who earns a fee realizes income. The

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[92]The personal injury plaintiffs attempt to distinguish Gaulden on the grounds that it upheld the Revenue Act of 1949 not as "a tax upon personal property or services, but upon the privilege of selling the same...." Carver Brief at 21, citing Gaulden at 574. Of course, the quoted passage in no way supports their assumption that the converse is true, i.e. that a tax that is not a privilege tax is therefore an income tax. More importantly, the Carver brief misinterprets the Court's meaning. The quoted passage is not an attempt to characterize the Revenue Act taxes; rather, it is an explanation of the Act's rationale. Turning aside arguments that the taxes were unconstitutional property taxes, the Court explained that the taxes were not levied on the property, but on the legal privilege to sell goods and services, with the tax to be measured by the amount to which the privilege was exercised.

newspaper selling advertising realizes income.

If the new act imposed a tax on the provider, then the income tax argument would have some facial plausibility.[93] Chapter 87-6, however, imposes its tax on the transaction, not on the service provider. In the case of the sales tax, the seller adds the tax to his charge and collects it from the buyer. In the case of the use tax, the seller has no connection whatever with the taxing process. We fail to see how a tax so purposefully unconnected with the recipient of income[94] could be "in substance" a tax on income.

Florida Contractors rely in their brief on State v. Keller, 140 Fla. 346, 191 So. 542 (Fla. 1939), which overturned a professional license tax of the City of Tampa in which the amount of the license tax was measured by the gross receipts of the professional. The vitality of Keller was called into question by Gaulden v. Kirk, and, we would submit, critically undermined by this Court's decision in Volusia County Kennel Club v. Haggard, 73 So.2d 884, 886-87 (Fla. 1954), holding that a state gross receipts tax upon dog tracks "is not an income tax." Moreover, since Volusia County Kennel Club the Legislature has authorized counties and municipalities to levy license taxes for "engaging

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[93]The income tax argument was perhaps plausible under Chapter 86-166, as applied to employee salaries and wages. See, Jacobs, Florida's New "Income" Tax, 14 Fla. St. U.L. Rev. 491 (1986). That skeletal tax has grown into a comprehensive tax bearing no indicia of a proscribed income tax.

[94]See also Rep't to the Legislature pages L- 135-37 (Fla. Dep't of Revenue, March 1987) for a more detailed discussion.

in or managing any business, profession, or occupation," Chapters 205.033, 205.042, Florida Statutes, and such taxes need not be at a flat rate. Thus, Keller does not stand as an obstacle even to a tax imposed on the service provider. A fortiori, it is no obstacle to the even less objectional sales tax imposed here on the purchasers and users of services.

B. The Indispensable Elements of an Income Tax, Gain and Time, are Absent from Chapter 87-6.

The opponents begin by confusing two distinct concepts: Income and gross receipts. Gross receipts, or gross sales, is the starting point for measuring income. The key difference is that income takes into account the costs incurred in producing the gross receipts. While all businesses have gross receipts, not all businesses have income, or at least not all have positive income.

Courts and economists have long recognized that the concept of "income" involves some consideration of profit or gain. The United States Supreme Court has held repeatedly that, "Income may be defined as the **gain** from capital, from labor or from both combined."[95] The federal income tax system acknowledges this fact by excluding from gross income the cost of goods sold, revealing that a notion of "gain" is implicit in the common use of the term income. "[G]ross income means the total sales, less the cost of goods sold..." Treas. Reg. § 1.61-3. No such

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[95] Stratton's Independence, Ltd. v. Howbert, 231 U.S. 399, 415, 34 S.Ct. 236, 58 L.Ed. 285 (1913) (emphasis supplied). This passage is quoted in the more celebrated case of Eisner v. Macomber, 252 U.S. 189, 207, 40 S.Ct. 189, 64 L.Ed. 521 (1920).

allowances are to be found in Chapter 87-6, which taxes transactions without regard to profitability. Thus, opponents' characterization of the tax on services as a "tax on gross income" is without foundation in any current understanding of that term.[96]

The consideration of time is another characteristic of income taxes that is wholly absent from the tax on services. Taxes based on income "customarily tax gross or net income realized during the year, not individual transactions." Hellman v. Director, Division of Taxation, 2 N.J. Tax 240, 247 (1981). This point was noted by the Massachusetts Supreme Judicial Court in construing that state's first income tax law:

> In its ordinary and popular meaning, "income" is the actual wealth which comes to a person during a given period of time. At any single moment a person scarcely can be said to have income. The word in most, if not all, connections involves time as an essential element in it measurement of definition. Trefry v. Putnam, 227 Mass. 522, 116 N.E. 904, 907 (1917).

The Florida service tax does not use any measure of gain or loss over a period of time; on the contrary, it is totally transac-

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[96]The brief of the Florida Association of General Contractors (AGContr) equates a "gross receipts" tax with a "gross income" tax, citing City of Deland v. Florida Public Service Co., 119 Fla. 804, 161 So. 735 (1935), as authority. Their reliance on this case is unwarranted for at least three reasons: (1) Unlike the Florida Sales tax, the tax in this case was not collected from the buyer, and, remarkably, the seller was prohibited from passing along the tax to consumers indirectly through price increases. Only under this narrow factual setting would a "gross receipts" tax parallel a "gross income" tax; (2) any language equating a gross receipts tax with a gross income tax is mere dictum, since the court expressly held the tax "unreasonable" because the prohibition on passing the cost along, not because of the constitutional prohibition against income taxes. 161 So. at 739; (3) the Court also noted that a privilege or excise tax could properly be measured by gross receipts. Id.

tional in nature.

C. A Consideration of the Tax Base Shows that Income is Not Taxed.

Any true income tax imposed on a service provider must be logically related to some comprehensive concept of profits realized over time. The greater the service provider's profits, the greater should be his tax. An examination of two of the structural exemptions identified in the Operation of the Tax portion of this Brief shows that no rational income tax would include such exemptions.

The first is the out-of-state sales exemption of Section 212.0592(1), Florida Statutes. This exemption is well suited to accomplish the Legislature's objective not to harm Florida service providers operating in the national market. The Florida engineering firm charges no service tax on the Georgia bridge. Such a provision would be wholly irrational in an income tax law. Why would income earned wholly within Florida be taxed differently according to the domicile of the client? We know of no income tax law that contains such a feature.[97]

The second is the sale for resale exemption. § 212.02(19), Fla. Stat. Such an exemption makes good policy sense in a consumption tax, for the breadth of the exemption will affect the amount of pyramiding inherent in the tax structure. But it makes

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[97]This is not to be confused with exemptions for foreign source income, such as is found in Section 911 of the Internal Revenue Code of 1986. This exclusion applies to income earned abroad, and is designed to prevent double taxation of the same income by two countries.

no sense whatever in an income tax. Why would a service provider's income be affected by whether his purchaser will somehow resell the service? Again, we know of no income tax law that contains such a feature.

D. The Tax on the Client Argument is without merit.

The contention is made by one opponent[98] that taxes upon litigation awards are a tax upon the client's (not the lawyer's) income, at least to the extent that the award includes some allowance for lost wages. This strained attempt to dress the service tax in the clothes of an income tax is an interesting exercise. It is correct (and thus distinguishable from the other income tax attacks) in recognizing that the tax is imposed on the purchaser of the service, not the provider of the service. But it does not take into account Section 42 of Chapter 87-6. This provides that in addition to other costs awarded to the prevailing party in litigation, there must also be awarded "[a]ny sales or use tax due on legal services provided to such party, notwithstanding any other provision of law to the contrary."[99] In short, it is the defendant who will pay the sales tax on the plaintiff's fees in the hypothetical conjured up by the opponents.

Finally, the Opponents argue that the sales tax cannot be distinguished from an income tax merely because the tax is directly collected from purchasers, relying upon the "economic

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[98]Carver Brief at 15-21.

[99]§ 57.071(3), Fla. Stat., as amended by Ch. 87-6 § 42.

reality" that all taxes are eventually passed along to the consumer. Of course, they cite no case authority holding that the down-the-line economic ripple effect of a tax is determinative of its legal nature. The inference of this argument, taken to its logical extreme, would lead to the absurd conclusion that all taxes are in effect income taxes. The effect of such a holding, in light of the prohibitions of Article VII, Section 5 of the Florida Constitution, is obvious. Our opponents might as well argue that the real property ad valorem taxes paid by businesses are actually income taxes because they are passed on and thus reduce the disposable income of consumers.

The tax remains a pure excise tax and must be sustained as such.

V.

THIS COURT HAS AUTHORITY TO CONSIDER A REQUEST FOR ADVISORY OPINION AND THERE ARE COMPELLING REASONS TO EXERCISE THAT JURISDICTION.

At least seven Opponents argue that this Court should not render an Advisory Opinion in response to the Governor's request. Under the Florida Constitution an advisory opinion involves the executive and judicial branches. The Legislature is a consitutional bystander to the process.

The Governor's brief addresses this issue in some detail, for it is the Governor's request that triggered this proceeding. The Legislature would make four broad observations on this point.

A. The Wisdom of the Advisory Opinion Process is Not at Issue.

Much of what is said by the opponents concerns the wisdom of the advisory opinion process. This may be an appropriate point for academic discussion, but for the present it is an issue settled by the Florida Constitution. This Court is given jurisdiction to render advisory opinions and, since the 1968 revision to the Florida Constitution, this process is much more akin to the type of adversary proceeding we see in declaratory judgment actions.[100]

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[100]In 1971, the court referred to the revised advisory opinion provision, stating "[the] Constitution of 1968 enlarged to some extent the power of this court to be of assistance, and our Rule 2.1(h) adopted in pursuance of such organic power has enabled us to treat such requests in somewhat the nature of an adversary proceeding by receiving briefs and arguments from interested persons." In re Advisory Opinion to the Governor, 243 So.2d 573, 576 (Fla. 1971).

B. The Tax Injunction Act Favors Resolution of State Tax Questions in State Courts.

The Opponents suggest that this Court give an incomplete answer to the Governor: Do not, they urge, answer any federal constitutional questions. Their arguments ignore the policy set for our dual court system by the Tax Injunction Act of 1937, codified as 28 U.S.C. § 1341. This Act forbids any federal court injunction against state taxes so long as the state offers "a plain, speedy and efficient remedy."

As to the questions of facial unconstitutionality, we respectfully submit that the remedy provided through the advisory opinion process is "plain, speedy and efficient." Although this proceeding is advisory only, it is fairly clear that a decision against the Governor's position would trigger a rapid reworking of Florida's tax structure.

On the other hand, if the challengers fail here, they have available to them other "plain, speedy and efficient" mechanisms to contest the application of Chapter 87-6. California v. Grace Brethren Church, 457 U.S. 393, 102 S.Ct. 2498, 73 L.Ed.2d 93 (1982); Winicki v. Mallard, 783 F.2d 567 (11th Cir. 1986).

C. The Advisory Opinion Process is a Superior Vehicle for a Vel Non Decision.

This brief has frequently compared 1949 with 1987. One final comparison may be useful. This Court considered, and rendered a decision upholding, the constitutionality of the Florida Revenue Act of 1949 within months of its passage. Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950). Mr. Gaulden, an

innkeeper jailed for refusing to comply with the recordkeeping and tax collection duties imposed by the 1949 act, argued that the 1949 Act violated some 26 discreet provisions of the Florida (and three provisions of the Federal) Constitution.[101]

In form Gaulden came to this Court as a "true" case or controversy. It is submitted that a close reading of the decision shows that it was, in substance, a vel non decision on the constitutionality of the 1949 act. The record before the Court in Gaulden was a mere 27 pages, most of which was boiler-plate. Virtually every issue raised by the Opponents in this proceeding was at least touched by Mr. Gaulden, and resolved by this Court.

In terms of process, the advisory opinion procedure seems palpably superior to a Gaulden-type review of a "true" case or controversy. Under this Court's present rules Mr. Gaulden's attorneys would receive 50 pages and 20 minutes to raise 29 discreet consitutional issues. By contrast this proceeding has already produced 19 briefs in opposition, reflecting a wide range of interests, arguments and legal talent that simply could not be presented in an ordinary appeal.

We have already argued that the legislative process leading to Chapter 87-6 was an improvement over other legislative

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[101] 47 So.2d at 570-71. The attacks included: illegal income tax; unconstitutional delegation; equal protection violations (exemptions allegedly arbitrary); due process violations; burdens on interstate commerce; and impermissible imprisonment for debt. Only the last point was peculiar to Mr. Gaulden; the rest were in effect generic attacks on the vel non issue.

endeavors in the tax area. The one-year intensive study of the issue is in sharp contrast to the passage of a retail sales tax in the waning moments of the 1949 special session. Similarly, it is submitted that this judicial process represents a substantial advance from 1949. We take issue with those opponents who argue that this constitutionally authorized advisory opinion is somehow a second-class vehicle for the resolution of the vel non question. By retaining jurisdiction and evaluating the arguments of all interested parties this Court will improve the judicial process for resolving constitutional attacks on new or revised taxing systems.

D. Important Public Law Controversies are often Resolved through Extraordinary Proceedings.

The 1987 Legislature chose to raise the necessary revenue by broadening the base of Chapter 212, instead of simply raising the existing rate while retaining the same tax base. We have explained that this decision was the culmination of a long, deliberative process which took into account the interests of fairness (making Chapter 212 less regressive) and economic stability (a tax on services ameliorates the 'boom or bust' feature of a tax base measured principally by retail sales of tangible personal property).

The decision to broaden the base necessarily meant adding new classes of taxpayers to the existing tax rolls. It was here that the Legislature met with extraordinary opposition. Much of this opposition was political and was resolved through the ordinary legislative process. But much of the opposition was

legal. The Legislature was advised by some of the most respected and powerful law firms in the nation of the "clear unconstitutionality"[102] of significant portions of Chapter 87-6.

Those responsible for the welfare of this state would be remiss were they to trivialize these objections. If these Opponents are correct in their constitutional assessment, then the potential for great disruption in the operation of the state is only too clear. Without the revenues from Chapter 87-6, the state could not defray its expenses for the 1987-88 fiscal year.

If, as is suggested by these opponents, the service tax is not only unconstitutional but is **"clearly"** unconstitutional, then they should embrace the advisory opinion process as the ideal vehicle for resolution.[103] Any fatal structural flaw in the tax would be promptly identified by the Justices and the Legislature could promptly reconvene and make provision for constitutionally adequate revenues.

On the other hand, if the service tax survives vel non scrutiny, the "as applied" challenges to the service tax will proceed normally. Such challenges, which the Legislature believes to be inevitable in the evolutionary process of expanding any tax base, may succeed in part; they may not. But the

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[102] E.g., Opinion letter of Messrs. Cravath, Swaine & Moore dated April 3, 1987. This document has been lodged with the Court.

[103] The Legislature is somewhat baffled by the posture of some of these critics. Messrs. Cravath, Swaine & Moore take the position on brief that this court should decline to render an advisory opinion, notwithstanding their earlier certainty of unconstitutionality.

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revenue impact of any successful as applied challenges would be peripheral. The fiscal integrity of the state would not be in peril.

The Governor's brief contains an excellent analysis of the advisory opinions undertaken by this Court on earlier occasions. We adopt that argument. We also urge the Court to look at the broader question and to reflect on the other instances when the Court has used its authority to solve public law questions expeditiously.

As the Governor's brief demonstrates, at times the vehicle used has been the Advisory Opinion. For instance, the court has helped prevent crisis in the question of executive clemency, In re Advisory Opinion of the Governor Civil Rights, 306 So.2d 520 (Fla. 1975); the question of whether the Fourth District Court of Appeal was constitutionally created, In re Advisory Opinion to the Governor Request of June 29, 1979, 374 So.2d 959 (Fla. 1979); and questions relating to the Governor's appointment power as, for instance, In re Advisory Opinion to the Governor, 225 So.2d 512 (Fla. 1969).

The Advisory Opinion process is not, however, the only route by which important public law questions have reached this Court. In Brown v. Firestone, 382 So.2d 654 (Fla. 1980), the court recognized Hyatt Brown, the Speaker of the House, as a citizen and taxpayer for purposes of a mandamus action--thereby taking jurisdiction of a significant budget dispute which turned on the Governor's power to veto portions of a General Appropriations

act.

A decade earlier, the Court entertained an extraordinary writ proceeding contesting Governor Kirk's power to appoint judges and issue beverage licenses. Pettigrew v. Kirk, 243 So.2d 147 (Fla. 1970). Like Brown, this case was brought by the Speaker of the House and--again like Brown--it involved significant public law questions.

For some years, this Court has seen its duty in answering important questions which, if left unresolved, threaten mischief for the essential interests of the state. Here there is obvious importance to the state as it is faced with a half billion continuation budget shortfall.

It is proper for the Court to exercise its constitutional powers to answer the Governor's request.

CONCLUSION

The Court should respond to the Governor's May 12, 1987 request, advising him of the facial constitutionality of the 1987 tax.

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CERTIFICATE OF SERVICE

I certify that I have this 8th day of June, served a copy of this brief by mail or by delivery to all counsel of record.

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