IN THE SUPREME COURT OF FLORIDA

Case No. 79,371

STATE OF FLORIDA, DEPARTMENT
OF PROFESSIONAL REGULATION,
BOARD OF ACCOUNTANCY,

Appellant/Cross Appellee,

vs.

RICHARD RAMPELL,

Appellee/Cross Appellant.
_____/

DCA CASE NO.: 89-2668
LOWER CASE NO.:
CL-87 4207 AA

BRIEF OF AMICUS CURIAE FLORIDA INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS IN SUPPORT OF APPELLANT/CROSS APPELLEE

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INTRODUCTION

The Florida Institute of Certified Public Accountants ("FICPA") is a Florida not-for-profit corporation with its principal place of business in Tallahassee, Florida. Founded in 1905, FICPA is an active professional organization of approximately 17,000 Certified Public Accountants ("CPAs"), working to improve the accounting profession and to serve the public better. The FICPA is the fifth-largest state CPA organization in the United States. Its membership is comprised of practitioners in public accounting, industry, government, and education. Other membership categories include associate members, retired CPAs, and CPAs domiciled outside the State of Florida.

One of the primary purposes of FICPA is to encourage the analysis, discussion, and understanding of issues related to the accounting profession. This includes monitoring the scope of services provided by CPAs in Florida and throughout the United States, monitoring legislation affecting the practice of public accountancy, assisting in the development of auditing, accounting and ethical standards, and educating the public with regard to the responsibilities of CPAs. These areas of activity bear directly on the issues now before this Court.

STATEMENT OF CASE AND FACTS

FICPA was not involved in the trial of this matter but participated in the appeal before the Fourth District Court of Appeals as Amicus Curiae in support of Appellant. FICPA has been granted consent to file a brief in this matter as Amicus Curiae in support of Appellant/Cross Appellee ("Appellant") by counsels for Appellant and Appellee/Cross Appellant ("Appellee").

FICPA adopts Appellant's Statement of the Case and Facts.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeals held that Section 473.317, Florida Statutes, which regulates price advertising by CPAs with regard to the provision of attest services, is unconstitutional under the First Amendment. The Fourth District Court erred in finding that the statute does not directly further the State's identified interests and is not narrowly tailored to accomplish its intended result.

Section 473.317 is designed to further the State's interest in the provision of attest services by CPAs and in the practice of public accounting, generally. Attest services refer to the process by which CPAs audit and review the financial statements of an entity and express an opinion as to whether these statements are fairly presented in accordance with generally accepted accounting principles. Only CPAs may perform these services and creditors, stockholders, and others rely upon the opinions of CPAs with regard to such statements.

However, the evidence in the record demonstrates that when price becomes the primary or sole consideration in an entity's selection of a CPA, a substantial deterioration in the quality of attest services occurs. In section 473.317, the State has established procedures for negotiating fees. These procedures require both the CPA and the client to focus on the quality of the attest services to be performed by the CPA prior to his engagement. Pricing information is considered, but only after the client ranks the CPAs based on their ability to provide quality attest services. This approach is consistent with the evidence introduced at the trial level and with applicable Supreme Court precedents.

In addition, the statute in question is carefully tailored and no more extensive than necessary to accomplish its intended purpose. The statute does not prohibit the CPA from

furnishing price information. Nor does the statute prohibit the CPA from advertising generally or soliciting attest services. Rather, it regulates the manner in which pricing information for attest services may be supplied in a competitive selection. As a result, the statute is narrowly tailored and is constitutional.

Alternatively, this Court should declare those provisions of the statute which relate to attest services for governmental bodies to be constitutional. Clearly, the State and its subdivisions are free to decide the manner in which they wish to purchase such services and nothing in the Constitution forbids such.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DECLARING FLORIDA'S REGULATION OF PRICE ADVERTISING FOR ATTEST SERVICES BY CERTIFIED PUBLIC ACCOUNTANTS UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT.

The Fourth District Court of Appeals declared section 473.317, Florida Statutes, unconstitutional under the First Amendment of the U.S. Constitution. Section 473.317 regulates the manner in which CPAs may provide pricing information for their attest services. The relevant provisions provide:

> (1) A licensee shall not make a competitive bid for a professional engagement in which the licensee will attest as an expert in accountancy to the reliability or fairness of presentation of financial information ...
>
> * * *
>
> (4) A licensee may respond to any request from a person or entity for a proposal giving qualifications and other factual information, excluding any quotation as to basis of fee.
>
> (5)(a) If a licensee's proposal in subsection (4) is the only proposal received or accepted by a person or entity, the licensee may negotiate a basis of fee for that engagement. If a person or entity receives more than

> one proposal for the same engagement, the person or entity may rank, in order of preference, the licensee to perform the engagement. The licensee ranked first may then negotiate a contract with the person or entity giving, among other things, a basis of fee for that engagement. Should the person or entity be unable to negotiate a satisfactory contract with that licensee, negotiations with that licensee shall be formally terminated, and the person or entity shall then undertake negotiations with the second ranked licensee. Failing accord with the second-ranked licensee, negotiations shall be terminated and undertaken with the third ranked licensee. Negotiations with the other ranked licensees shall be undertaken in the same manner. Once negotiations have been undertaken with a subsequent licensee, a licensee shall not contract with the requesting person or entity for the same engagement.

Id. The Fourth District found that the statute unconstitutionally restricts the commercial speech of CPAs because it does not advance the State's interest and is not sufficiently tailored to accomplish its intended result. The Fourth District's decision, however, is in error because the statute serves to protect consumers who rely on the opinions of CPAs and is consistent with U.S. Supreme Court precedents.

A. HISTORY OF UNITED STATE SUPREME COURT DECISIONS

In Virginia State Bd. of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976), the United States Supreme Court recognized, for the first time, that the simple communication, "I will sell you the X prescription drug at the Y price," without any editorial comment, was entitled to some degree of First Amendment protection.[1] Virginia had declared it unprofessional conduct for a licensed pharmacist to advertise prescription drug prices. Id. at 749-50. The Court held:

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[1]Before Virginia Pharmacy, the Court had held commercial speech did not have protection under the First Amendment. See, e.g., Valentine v. Chrestensen, 316 U.S. 52 (1942).

> Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Id. at 765. The Court noted that, although protected to some extent under the First Amendment, such speech is, nevertheless, subject to reasonable time, place, and manner regulation, and may be prohibited where false or misleading. Id. at 770-71.

The next year, in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), the Supreme Court reviewed a blanket prohibition on the advertisement of legal services. The attorney had been charged with violating an Arizona State Bar disciplinary rule prohibiting commercial advertising of legal services. Framing its holding narrowly, the Court ruled that a lawyer's truthful newspaper advertisement of fees for routine legal services may not be prohibited. Id. at 384. Relying upon Virginia Pharmacy, the Court reiterated its decision that although commercial speech is entitled to some First Amendment protection, it nevertheless is subject to reasonable regulation.

The Court refined its commercial speech analysis in Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980), and articulated a test for determining the constitutionality of governmental restrictions of commercial speech. There, the Court held that any restriction on commercial speech must serve a substantial governmental interest, must directly further the asserted interest, and must be no more extensive than necessary to achieve the state's interest. Id. at 566. Where the speech concerns an illegal activity or is misleading, the speech may be prohibited. Id.

In Central Hudson, the corporation had opposed, on First Amendment grounds, an order by the New York Public Service Commission banning all promotional advertising intended to stimulate purchase of utility services while allowing informational advertising designed to shift consumption. Applying the above test, the Court found that Central Hudson's advertisement was accurate and related to a lawful activity; that New York had a substantial interest in energy conservation; that the order directly advanced the state's interest in energy conservation; but that the order failed the last prong as the Commission had made no showing that a more limited regulation would not be as effective. Id. at 566-70.

Since Central Hudson, the Court has applied its test to other challenges involving commercial speech. For example, in In re R.M.J., 455 U.S. 191 (1982), the Court invalidated a number of rules which restricted an attorney's ability to advertise truthful information. But the Court noted that a different result could have been reached if experience has shown that advertising is harmful:

> The commercial speech doctrine is itself based in part on certain empirical assumptions as to the benefits of advertising. If experience proves that certain forms of advertising are in fact misleading, although they did not appear at first to be "inherently" misleading, the Court must take such experiences into account.

Id. at 200, n.11.

And in Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989), the Court rejected the least restrictive means approach and held that there need only be a reasonable "fit" of the government's goals and the means chosen to accomplish such. So long as the means chosen are narrowly tailored to achieve the desired goal, courts should not interfere with what regulation is best employed.

B. CENTRAL HUDSON APPLIED.

In applying the test enunciated in Central Hudson to section 473.317, the Fourth District recognized that the State has a substantial interest in maintaining the quality of attest services provided by CPAs, but held that the statute did not directly further the State's interest and was not narrowly tailored to accomplish its objectives. Each of these elements, as it relates to the provision of attest services by CPAs under section 473.317, is explored below.

1. The State has a Substantial Interest in Maintaining the Integrity, Objectivity, and Independence of Certified Public Accountants Providing Attest Services.

As the Fourth District found, the State clearly has an interest in maintaining the integrity, objectivity, and independence of CPAs providing attest services. Attest services refer to the process by which a CPA audits or reviews the financial statements of an entity and expresses an opinion as to whether the entity's financial position and results of operation are fairly presented in accordance with generally accepted accounting principles. Such an opinion may only be issued by a licensed CPA, and its issuance is subject to state regulation and rules. See Florida Accountants Ass'n v. Dandelake, 98 So.2d 323 (Fla. 1957). See also § 473.315, Florida Statutes and Rules 21A-22.001-22.008, Florida Administrative Code.

Unlike an attorney whose duty it is to present his client's case in the most favorable light:

> An independent certified public accountant performs a different role. By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as the investing public. The "public watchdog" function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust.

United States v. Arthur Young and Co., 465 U.S. 805, 817-18 (1984). Sometimes, this means that a CPA must take positions adverse to his client's interest; but it is this independence that makes attest services valuable to commerce within the State of Florida.

Perhaps unlike any other service, the provision of attest services serves a critical link in our free-market economy. Creditors, stockholders, investors, and others rely upon the opinions of CPAs for assurance regarding the financial information of others. Independent certification assists in ensuring that financial statements contain financial information which is fairly presented in accordance with generally accepted accounting principles. Such financial information is essential, in a free market economy, in order to allocate economic resources efficiently. As the Fourth District found, "[t]he use of financial statements attested by CPAs is so frequently used in our economic system to be indispensable." State Dept of Professional Regulation v. Rampell, 589 So.2d 1352, 1356 (Fla. 4th DCA 1991).[2]

Indeed, as the courts have recognized, it is not only the fact, but also the appearance of independence and accuracy by CPAs in their attest capacity, which is so essential to commerce. United States v. Arthur Young, 465 U.S. at 819-20, n.15. Without this appearance and reassurance, creditors and others would have little confidence in an entity's financial statements. Thus, the CPA acts as a balance between the interests of management and the needs of the investment community for objective, accurate disclosure of financial information.

The State's concern with respect to attest services is also evidenced by Chapter 473, Florida Statutes, which governs pubic accountants. The purpose to that Chapter provides:

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[2]This Court recently acknowledged "the heavy reliance" the financial community places upon audited financial statements in First Florida Bank v. Max Mitchell & Co., 558 So.2d 9 (Fla. 1990).

> The Legislature recognizes that there is a public need for independent and objective public accountants and that it is necessary to regulate the practice of public accounting to assure the minimum competence of practitioners and the accuracy of audit statements upon which the public relies and to protect the public from dishonest practitioners and, therefore, deems it necessary in the interest of public welfare to regulate the practice of public accountancy in this state.

§ 473.301, Florida Statutes (emphasis added). Based on the above, the Fourth District correctly found that the State has a substantial interest in the regulation of CPAs and in ensuring that audits are performed in a manner in which creditors and others in the State will have confidence. The Fourth District erred, however, in finding that the statute is not narrowly tailored and does not directly further the State's interest.

2. The Regulation of Price Advertising for Attest Services Directly Furthers the State's Interest.

Section 473.317 provides one of the mechanisms by which the Florida Legislature ensures that audits performed in Florida are performed in a manner in which creditors and others will have confidence.[3] By its provisions, the statute requires, when there is a competitive selection, that the CPA and the entity seeking audit services focus on the quality of the services to be provided before the CPA is retained.[4] Pricing information may only be provided by the CPA

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[3]See also section 473.319 (prohibiting contingency fees for public accounting services); section 473.315 (requiring that an audit be performed in a competent and independent manner). Each of these regulations form a part of the total scheme of regulations necessary to ensure the integrity of audits.

[4]The statute requires the potential client to first rank the proposals in order of preference and to then commence negotiations with the top-ranked firm. Only at the time that negotiations have begun with a firm may that CPA provide a basis of fee for his services. If negotiations fail with that CPA, the client can then negotiate with the second-ranked licensee and receive his basis of fee.

after the proposals have been ranked in order of preference and negotiations undertaken with the CPA. As a result of section 473.317, clients are effectively prevented from "opinion shopping" for the lowest possible price, a recognized problem in the industry. See, e.g., Martin, An Effort to Deter Opinion Shopping, 14 J. Corp. Law 419 (1989); May, Accountants and the SEC: How to Avoid the Appearance of "Opinion Shopping," 15 Sec. Reg. L.J. 154 (1987). Concern about opinion shopping has been expressed by various governmental agencies, including, for example, the Securities and Exchange Commission, which has stepped up enforcement activities against opinion shopping. See Martin, Opinion Shopping, at 419, 430, 431.

A report published by the U.S. Governmental Accounting Office ("GAO"), found that when cost becomes an overriding factor, the technical quality of the audit is reduced by a factor of least 60 percent. See CPA Audit Quality, Framework for Procuring Audit Services, published by the U.S. Governmental Accounting Office, Document GAO/AFMD-87-34 (Aug. 1987) p.30-35 (attached as Appendix D - Exhibit No. 1 to Plaintiff's Exhibit No. 1 - deposition of Louis Dooner). In its report, the GAO found:

> We believe that the auditor selection process requires many subjective judgments. We agree that each firm's technical strengths should first be evaluated and ranked on the basis of the technical criteria before factoring in cost or price to arrive at a final selection. If an audit firm is judged not to be technically qualified to perform the audit, then it should not be selected, regardless of its cost proposal, because the risk of performing a poor quality audit is greatly increased.

Id. at 35 (emphasis added). That report found that when cost became the only consideration given in selecting an auditing firm, 90% of the audits were determined to be of unacceptable audit quality. The percentage of unacceptable audits decreased, however, to 23% when

consideration was given to other factors such as the auditors skill, experience, commitment, and understanding of the auditing requirements. Id.

The State of Florida, by its statute, is legitimately seeking to reduce the number of unacceptable audits performed in this State by requiring CPAs and their clients to focus on the quality of the audit to be provided "before factoring in costs or price to arrive at a final selection." Id. This is in line with the empirical findings and conclusions of the GAO and directly furthers Florida's interest in ensuring the quality of audits performed in this State.[5]

The Fourth District, however, found that the regulation failed the standards established in Virginia Pharmacy and Bates, because the regulation restricts the right to provide pricing information. In Virginia Pharmacy, the issue was whether a pharmacist could advertise: "I will sell you the X prescription at the Y price." Id. at 761.[6] In Bates, the issue was whether a lawyer could advertise pricing information for routine legal services. That right, however, is not involved here, because section 473.317 does not prohibit CPAs from advertising generally their services. CPAs may do so by any number of means, including, for example, direct-mail solicitation. Neither does the statute prohibit CPAs from disclosing their fee before they are hired. Rather, the statute simply regulates, in a competitive selection, the time, place and

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[5]The statute, therefore, clearly furthers the State's interest. It should be noted that the same procedure is utilized in awarding state contracts for architectural and engineering services. See § 287.055(4-5), Florida Statutes (1991).

[6]The Court reserved judgment on whether the advertising by professionals other than pharmacists would be protected, noting a distinction, both historical and function, between the pharmacists' standardized product and the professional services rendered by physicians and lawyers of "almost infinite variety and nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising." Virginia Pharmacy, 425 U.S. 773 n.25.

manner in which such information may be supplied. Florida's strong interest in ensuring that attest services are provided in a manner in which others may have confidence justifies the statute and is directly advanced by it.

In In re R.M.J., 455 U.S. 191 (1982), the Court, in discussing Bates, noted that a different result could have been reached in Bates if experience had shown that the public was in fact misled or deceived:

> The commercial speech doctrine is itself based in part on certain empirical assumptions as to the benefits of advertising. If experience proves that certain forms of advertising are in fact misleading, although they did not appear at first to be "inherently" misleading, the Court must take such experiences into account.

455 U.S. at 200, n.11.

Amicus respectfully suggests that this is that case. The empirical findings set forth in the GAO Report conclude that the provision of pricing information by CPAs in the solicitation of attest services prior to a determination of quality and competence, is misleading and harmful. There can be little doubt that certain entities, if given the chance, would focus solely or to an overriding extent upon the cost of an audit, ignoring entirely the quality of services to be provided. The assumptions that normally justify the free flow of information do not apply here and, if applied, will result in harm to the State and the financial community. In this situation, where experience has proven that harm will result from the unrestricted provision of pricing information, nothing in the Constitution prevents the State from enacting appropriate regulations.

The same conclusion was recently reached in In the Matter of Magdy F. Anis, 599 A.2d 1265 (N.J. 1992), where the New Jersey Supreme Court upheld a prohibition against an attorney

using direct-mail to solicit certain clients. The attorney charged with its violation[7] argued strenuously, and the lower tribunal found, that the decisions of the U.S. Supreme Court clearly permitted an attorney to use direct-mail solicitation and that the prohibition was, therefore, an unconstitutional restriction on protected speech. See, e.g., Bates, 433 U.S. 350; Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988). While acknowledging that those decisions forbid a prohibition of such solicitation, the New Jersey Supreme Court held that those decisions do not prevent a state from prohibiting conduct which experience has shown to be invasive and harmful. Magdy at 1274.[8]

The U.S. Supreme Court has recognized other instances in which a state's interest was directly advanced by a regulation limiting commercial speech. In Central Hudson, where the Supreme Court set forth its test for regulations affecting commercial speech, the Court found that the state's interest in conservation was directly advanced by a general prohibition on a public utility advertising its services.[9] And, in Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985), the Court held that the state could prohibit an attorney from advertising contingent fee arrangements unless certain disclosures were included. Id. at 652-54.

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[7]The attorney had sent a letter to the father of the victim of an airplane disaster the day after his son's remains were identified. 599 A.2d at 1267.

[8]Additionally, in Astro Limousine Service v. Hillsborough Cty. Aviation, 678 F.Supp. 1561 (M.D. Fla.), aff'd, 862 F.2d 877 (11th Cir. 1988), the Eleventh Circuit upheld a prohibition on advertisement of price and solicitation by non-contract taxi operators. Although the court recognized the individual and societal interest in ensuring informed and reliable pricing decisions, it held that those interests did not take precedence over the substantial governmental interest in safety, promotion of commerce and tourism, and revenue raising. Id. at 1566.

[9]The Supreme Court struck the regulation, though, because there was no showing that it was narrowly tailored.

It is not suggested that this statute, by itself, will solve all of the concerns that have been identified to support the statute. However, it cannot be doubted that, as part of the total regulatory scheme, the statute forces both CPAs and clients to focus on factors other than cost when selecting an auditor, including the auditor's skill, experience, commitment, and understanding of the auditing requirements. This approach is in line with the empirical findings of the GAO and directly furthers Florida's interest in ensuring the quality of the audits.

In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), the U.S. Supreme Court commented:

> We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession."

Id. at 792. See also Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), (state bears special responsibility for maintaining standards among its professions). Clearly, the State has a compelling interest in enacting the challenged statute and in maintaining standards for its professions. This Court should grant the State the necessary latitude to enact such regulations.

Also introduced into evidence before the lower court were the depositions of Louis Dooner, past chairman of the Florida Board of Accountancy, and Jerome Schine, past chairman and present member of the Board of Accountancy. Plaintiff's Exhibit No. 1, and Plaintiff's and Defendant's Exhibit E, respectively. They also testified that such regulation is necessary to preserve the integrity and independence of auditing services performed by CPAs and that the statute directly advances that purpose. See, e.g., Dooner at 23, 35, 100-102 ("It prevents

someone from buying through a very, very low bid a particular audit which may lead to streamlining of generally accepted auditing standards and not doing an adequate job." Id. at 101); Schine at 7-10 24, 27 ("Protecting the independence of the CPA in rendering an opinion [requires] that the client should select a CPA based on technical ability." Id. at 27).

The Fourth District, therefore, erred in finding that the statute did not promote a valid governmental interest. The evidence clearly showed that price should not be used as the sole or primary factor in choosing an auditor and the statute furthers that interest.

3. The Regulation of Price Advertising for Attest Services is No More Extensive Than Necessary.

In its decision, the Fourth District also concluded that the prohibition went further than necessary and unnecessarily restricted the flow of pricing information. As the Fourth District recognized, so long as the means chosen are narrowly tailored to achieve the desired goal, courts should not interfere with what regulation is employed. Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989).[10]

Section 473.317 falls within that constitutional standard. It does not prohibit the advertisement or the solicitation of potential clients for accounting services, such as tax advice, management consulting, or bookkeeping services. Neither does the statute prohibit the advertisement or solicitation of potential clients for attest services; rather, it regulates the manner in which pricing information may be supplied in competitive negotiations for attest services. This is simply a time, place, and manner regulation narrowly tailored to ensure the quality and

[10]In Board of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469 (1989), the Supreme Court rejected the least restrictive means approach and held that there need only be a reasonable "fit" between the government's goals and the means chosen to accomplish such.

independence of audits. Competition based on price is permitted, but the CPA and the entity seeking audit services are required to focus first on the quality of the audit to be performed before focusing on the price for such.[11] Numerous other methods are available to convey the CPAs' message, including for example, advertisement and direct-mail solicitation. Because these alternatives are available, the statute does not, as the Fourth District found, restrict the very type of speech to which Virginia Pharmacy was directed.

The Fourth District also erred in holding that other restrictions are available which provide a far greater incentive to ensure quality audits, specifically citing the threat of liability to CPAs from third parties who rely on the audit. Rampell, 589 So.2d at 1360. See, e.g., First Florida Bank v. Max Mitchell & Co., 558 So.2d 9 (Fla. 1990)(expanding liability of CPAs to third parties). The problem with these other restrictions is that often they can only be invoked until after the audit has been performed, circulated to the public, relied upon, and then because of subsequent events, proven incorrect and resulting damage incurred. The State, by section 473.317, is attempting to provide an effective and objective mechanism before the audit is performed to ensure its integrity. The State's compelling interest in such regulation permits it to apply remedies before the fact because remedies after the fact are ineffective.

Thus, there is a clear "fit" between the legislature's ends, and the means chosen to accomplish those ends, which means are narrowly tailored to achieve the desired objective. As such, the statute withstands constitutional scrutiny. Undeniably, the State has a legitimate

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[11]A number of other courts have permitted pricing regulation in other contexts. See, e.g., Astro Limousine Serv., supra, Supersign of Boca Raton, Inc. v. City of Fort Lauderdale, 766 F.2d 1528 (11th Cir. 1985).

interest in maintaining the standards of the accounting profession and it should be given sufficient latitude to do so.

II. THE COURT ERRED IN DECLARING THOSE PORTIONS OF SECTION 473.317, FLORIDA STATUTES WHICH RELATE TO THE LEGISLATURE AND MUNICIPALITIES UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT.

Finally, the lower court erred in declaring unconstitutional those portions of Section 473.317(5), Florida Statutes, which relate to competitive selection for attest services for governmental bodies, including the Legislature and municipalities. Clearly, the State is free to decide the manner in which it wishes to conduct competitive negotiations so as to ensure it receives a competent audit.

Both the State and the United States have enacted similar statutes with regard to other services. See, e.g., § 287.055(4-5), Fla. Stat. (1991)(architectural and engineering services); 40 U.S.C. § 541-44 (architectural and engineering); 41 U.S.C. § 253 (audit services). Nothing in the Constitution prevents a state from identifying how it chooses to buy goods and services and the Supreme Court has recognized other instances where the state has been permitted to engage in activities as a market participant, which it could not engage in as a market regulator. See, e.g., New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 277 (1988).

Further, valid distinctions exist between private and governmental audits. Governmental audits must be filed with the State's Auditor General for review and analysis as to compliance with technical standards, whereas private audits are not. § 11.45(3)(a) (4)(o), Florida Statutes (1991). Similarly, governmental audits are subject to review under Florida's "Sunshine Laws," whereas private audits are not. Sections 286.011 and 119.07, Florida Statutes (1991).

These reasons more than justify the distinction made by the Legislature for distinguishing between governmental and private audits. In addition, section 473.317(5)(b) permits the Legislature and municipalities to re-negotiate with the top three-ranked CPAs after there has been full disclosure of their pricing information. As the Fourth District found, the result of this provision "is to prohibit price information solely in competitive bids for private audits." Rampell, 589 So.2d at 1358. Because pricing information may be supplied for governmental audits and used during negotiations with the three top-ranked firms, the statute does not, even under the Fourth District's analysis, unconstitutionally restrict the commercial speech of CPAs. The court, therefore, erred in extending its holding to include provisions relating to governmental bodies and this Court should declare those provisions constitutional.

CONCLUSION

The Fourth District erred in declaring price advertising for attest services by certified public accountants to be unconstitutional under the First Amendment. The State's substantial interest in maintaining the integrity and independence of CPAs, as well in as regulating professional conduct, is clearly demonstrated by the record below, and the regulation is narrowly tailored to accomplish such purposes. As a result, the challenged statute must be declared constitutional.

Alternatively, this Court should declare those provisions which relate to governmental bodies constitutional.

DATED this 23 day of April, 1992.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to ROBERT MONTGOMERY, and REBECCA L. LARSON, 1016 Clearwater Place, Post Office Drawer 3086, West Palm Beach, FL 33401; PHILIP M. BURLINGTON, 1615 Forum Place, Suite 4-B, Barrister's Building, West Palm Beach, FL 33401; JOSEPH SOLE and KENNETH EASLEY, General Counsel's Office, Department of Professional Regulation, Northwood Centre, 1940 North Monroe Street, Tallahassee, FL 32399-0750; and J. RIMES, Department of Legal Affairs, Suite LL04, The Capitol, Tallahassee, FL 32399-1050, on this 23 day of April, 1992.

KENNETH R. HART

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