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January 9, 1990

The Honorable A. V. "Bill" Hardt  
Arizona State Senator  
State Capitol - Senate Wing  
Phoenix, Arizona 85007

Re: 190-004 (R89-079)

Dear Senator Hardt:

You ask for our opinion as to the constitutionality of A.R.S. § 39-204(C)(2). You question the constitutionality of A.R.S. § 39-204(C)(2) because the statute requires a county to publish its public notices in a newspaper which is printed in the county, or if no such newspaper exists, in an adjoining county. We conclude the statute is constitutional.

Chapter 2 of Title 39, Arizona Revised Statutes, entitled "Printing and Publication" is a general statute containing provisions for the printing and publication of public notices when no specific statute is applicable. One of these general provisions, A.R.S. § 39-204(C)(2), provides:

C. If the place of publication of the notice is not specified, publication shall be:

.....

2. If by a county officer, board, or commission, or by any person in a county, in a newspaper printed and published within such county. If no such newspaper is printed and published within the county, publication may be made in a newspaper of general circulation in the county which is printed in an adjoining county.

The term "newspaper" means:

[A] publication regularly issued for dissemination of news of a general and public character at stated short intervals of time. Such publication shall be from a known office of publication and shall bear dates of issue and be numbered consecutively. It shall not be designed primarily for advertising, free circulation or circulation at nominal rates, but shall have a bona fide list of paying subscribers.

A.R.S. § 39-201. As with all statutes we are asked to consider, we approach our review with the presumption that the statute is constitutional and that any doubts will be resolved in favor of its constitutionality. State v. Arnett, 119 Ariz. 38, 48, 579 P.2d 542, 552 (1978); see also Arizona Downs v. Arizona Horsemen's Found., 130 Ariz. 550, 554, 637 P.2d 1053, 1057 (1981) (courts have duty to construe a statute so as to give it, if possible, a reasonable and constitutional meaning).

A similar challenge to a Florida public printing statute was made in American Yearbook Co. v. Askew, 339 F.Supp. 719 (M.D. Fla.) (three-judge district court), summarily aff'd, 409 U.S. 904 (1972). In Askew, the American Yearbook Company, which had no printing plants in Florida, challenged the constitutionality of a state statute which required that all of the public printing of the State of Florida be done in Florida. The district court rejected American Yearbook's challenge that the statute violated the Commerce Clause and Equal Protection provisions of the United States Constitution. The court stated:

[I]n framing specifications for its printing work, the state performs a proprietary function and stands in the shoes of a private party who is entitled in most instances to choose where and by whom his printing will be done.

. . . .

In addition to federal authorities, there are numerous state court cases holding legislation similar to the Florida printing statutes valid in the face of a Commerce Clause challenge. Particularly worth noting is that three of these decisions upheld statutes which required that certain printing for the state or, in one instance, any county thereof, be done within the state or county.

Askew, 339 F.Supp. at 722, 724 (footnotes omitted).

Arizona subscribes to the Askew decision. In City of Phoenix v. Superior Court, 109 Ariz. 533, 514 P.2d 454 (1973), the Arizona Supreme Court considered and upheld a bidding statute which gave a preference to contractors who had paid taxes within the past two years. The court stated:

The "5% preference" statute was held constitutional by this Court in Schrey v. Allison Steel Mfg. Co., 75 Ariz. 282, 255 P.2d 604 (1953). The Court held that there was a reasonable basis for the privilege granted, and the statute provided a classification which allowed not only a domestic contractor but also a foreign one to qualify. We continue to follow the holding in Schrey.

The constitutionality of a somewhat similar type of statute has been upheld in American Yearbook Co. v. Askew, 339 F.Supp. 719, affirmed, 409 U.S. 904, 93 S.Ct. 230, 34 L.Ed.2d 168 (1972) in which the U. S. Supreme Court affirmed the decision of a three-judge federal court which upheld the constitutionality of a Florida statute requiring all public printing of the state to be done in the state. The Askew decision upholds the authority of the state and its subdivisions to prescribe the conditions under which work of a public character will be done. The Askew decision supports our holding in Schrey.

City of Phoenix, 109 Ariz. at 535, 514 P.2d at 456. And in Schrey, the court stated:

The legislature has the right to regulate the letting of contracts for public works to be constructed by the state or its political subdivisions. State v. Senatobia Blank Book & Stationery Co., supra [115 Miss. 254, 76 So. 260], wherein the law limited the right to award printing contracts to worthy and capable printing establishments in the state actually engaged in the printing business and paying taxes thereon in the state. In holding the law constitutional, the court said:

"That the Legislature has the power to enact laws regulating the letting of contracts for its printing and that of

its subdivisions is not and cannot be questioned. That the county is a subdivision of the state is also not questioned.["]

Schrey, 75 Ariz. at 287, 255 P.2d at 607.

The Arizona Supreme Court's conclusion that a state may determine with whom it does business finds support in a trilogy of United States Supreme Court decisions in which the Court formulated its market participant doctrine. See Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976); Reeves, Inc. v. Stake, 447 U.S. 429 (1980); White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983). Under this doctrine, if a state is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities.<sup>1/</sup> In Alexandria Scrap, the Court stated:

[U]ntil today the Court has not been asked to hold that the entry by the state itself into the market as a purchaser, in effect, of a potential article of interstate commerce creates a burden upon that commerce if the state restricts its trade to its own citizens or business within the state.

We do not believe the Commerce Clause was intended to require independent justification for such action.

. . . .

Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.

Alexandria Scrap, 426 U.S. at 807-809, 810 (footnotes omitted).

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1. Congress has the power to regulate commerce. U.S. Const. art. I, § 8, cl. 3. When Congress acts, its legislation controls over conflicting state regulation pursuant to the Supremacy Clause. When Congress does not act, however, the Supreme Court must determine to what extent a state's action affecting interstate commerce constitutes an unreasonable interference with the purpose of the Commerce Clause, that is, to protect the flow of interstate commerce. This court check on state regulatory action is known as the dormant Commerce Clause power. See 1 R. Rotunda, J. Nowak and J. Young, Treatise on Constitutional Law, Ch. 11 (1986 and Supp. 1989).

The Court, in *Reeves*, again determined that the Commerce Clause did not limit a state's activities where the state was a participant in the market.

The basic distinction drawn in *Alexandria Scrap* between States as market participants and States as market regulators makes good sense and sound law. . . . There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market. . . . The precedents comport with this distinction.<sup>2/</sup>

*Reeves*, 447 U.S. at 436-437 (footnotes omitted). Finally, in *White*, the Court noted that when a state or local government enters the market as a participant, it is not subject to the restraints of the Commerce Clause. *White*, 460 U.S. at 208.

We conclude that when a county seeks bids for advertising of its public notices, see A.R.S. § 11-255 (county to contract for advertising and printing), the county is a market participant and, therefore, the State has the right to determine with whom the county may contract with to perform the printing and publication of its public notices. Given the cases from the Arizona and United States Supreme Courts cited above, we conclude that A.R.S. § 39-204(C)(2) does not violate the Equal Protection provisions of the United States or Arizona Constitutions or the federal Commerce Clause provision.

We also consider whether A.R.S. § 39-204(C)(2) violates Ariz. Const. art. IV, pt. 2, § 19(13). This provision provides in relevant part:

No local or special laws shall be enacted in any of the following cases . . . :

. . . .

13. Granting to any corporation, association, or individual any special or exclusive privileges, immunities, or franchises.

The Arizona Supreme Court, in *Prescott Courier Inc. v. Moore*, 35 Ariz. 26, 274 P. 163 (1929) previously has considered whether a statute similar to A.R.S. § 39-204(C)(2) constituted local or special legislation. The statute, § 4657, R.C. 1913 (Civil),

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2. One of the precedents cited by the Court as comporting with the market participant/market regulator distinction is *Askew*. See *Reeves*, 447 U.S. at 436 n.9.

limited the printing of legal advertisements to newspapers "established and published within the State of Arizona." The court concluded that there was a "reasonable ground for this particular limitation" thus rejecting the appellant's contention that a bid request requirement patterned after the statute violated § 19(13). Prescott Courier, at 33, 274 P. at 165.

In Hersey v. Nelson, 131 P. 30 (Mont. 1913), the Montana Supreme Court faced a similar challenge to a statute which provided:

All newspapers which may receive any contract for printing under this act which may not be able to execute any part of such contract shall be required to sublet such contract or portion of contract to some newspaper or printing establishment within the state, which may be competent to execute such work.

Hersey, 131 P. at 31. The court upheld the statute stating:

When we consider that [the statute] is state wide in its operation, it cannot be classed as a local statute; and, since it applies to all county printing contracts, it is not special.

Hersey, 131 P. at 34. The statutes upheld in Prescott Courier and Hersey, in our view, are similar to A.R.S. § 39-204(C)(2). All three statutes limit who may perform public printing jobs and the limitations in all three statutes are based on location of the printer. We, therefore, conclude that A.R.S. § 39-204(C)(2) is not violative of Arizona's Constitution for being local or special legislation.<sup>3/</sup>

Sincerely,



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Attorney General

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3. We also note that A.R.S. § 39-204(C)(2) does not favor any specific corporation, association or individual nor does it absolutely exclude any entity from printing a county's legal notices. Any entity which desires to print such notices can establish a printing facility in the county.