O/a 3-9-90

IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,201

DEPARTMENT OF REVENUE,

Appellant,

vs.

MAGAZINE PUBLISHERS OF AMERICA, INC., et al.,

Appellees.

On Discretionary Review From the District Court of Appeal of Florida, First District

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APPELLEES', FLORIDA CATHOLIC CONFERENCE, INC., THE VOICE PUBLISHING CO., INC., AND DAUGHTERS OF ST. PAUL, INC., ANSWER BRIEF

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I.

STATEMENT OF THE CASE AND FACTS

Appellees, Florida Catholic Conference, Inc., The Voice Publishing Co., Inc. and Daughters of St. Paul, Inc. accept the Statement of the Case and Facts presented by Appellant, Department of Revenue, so far as it goes. However, this Statement of the Case and Facts is incomplete as it relates to the issues relevant to these parties. Appellees, therefore, wish to add the following to the Statement of the Case and Facts presented by the Department of Revenue.

> The taxes imposed by [the Florida Sales Tax] do not apply to the use, sale, or distribution of religious publications, bibles, hymn books, prayer books, vestments, altar paraphernalia, sacramental chalices, and like church service and ceremonial raiments and equipment.

§ 212.06(9), Fla. Stat. (1989).[1] This section of the Florida Sales Tax is hereafter referred to as "the Religious Publication Exclusion." The plaintiffs originally alleged that the effect of the Religious Publication Exclusion was to discriminatorily tax their magazines. They argued that their magazines could be distinguished from exempt religious publications solely on the basis of content and that by selectively and discriminatorily taxing the sale of their magazines and not taxing the sale of other publications, Florida's sales tax favors the content of religious publications over the content of plaintiffs' magazines. (App. 1-6). The main thrust of plaintiffs' complaint, however, was aimed at a sales tax exemption for the sale of newspapers.

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[1]Citations are to the 1989 edition of Florida Statues. There were no changes to the affected portion of the statute between the 1987 and 1989 editions.

After the court indicated that it may consider the validity of the Religious Publication Exclusion, various religious publishers, including Appellees named above, moved to, and were granted leave to, intervene. (App. 7-13, 22). At this same time, plaintiffs, with consent of all parties, filed a Motion for Leave to Amend Complaint. (App. 14-15.) The effect of the amendment was to remove all reference to the Religious Publication Exclusion, with the only issue being whether the sale of newspapers may be exempted from sales tax if the sale of magazines is not. (App. 16-20). The motion to amend was denied. (App. 21).

Appellees, Florida Catholic Conference, Inc., The Voice Publishing Co., Inc., The Daughters of St. Paul, Inc. and Florida Baptist Witness, Inc. then filed a Motion to Strike, seeking to strike all evidence presented on the issue of the constitutionality of the Religious Publication Exclusion. (App. 27-28). These parties argued that the trial court had abused its discretion in failing to grant the plaintiffs' Motion for Leave to Amend Complaint. Since that discretion had been abused, the case should be heard as if the pleadings had been amended and the issue removed from the case. (App. 31-34). At the final hearing the plaintiffs withdrew their Motion for Leave to Amend Complaint. (App. 85).

At final hearing, the judge ruled as follows:

> I am going to grant the motion to strike. I don't think on the pleadings that you are properly before the Court, out of an abundance of caution.. . . And I guess we'll just grant the motion to strike, and that takes religious publications all the way out. You all are free to stay or free to go about your business, whatever you want to do. (App. 112-113).

An order was entered in which the court granted the Motion to Strike because it "concluded that the issue of the constitutionality and application of Section 212.06(9), Florida Statutes is not properly placed in issue by the pleadings in this action." (App. 82-83). The Summary Judgment from which appeal was taken does not refer to the Religious Publication Exclusion.

II.

SUMMARY OF THE ARGUMENT

The original complaint filed in this action raised the issue whether Florida could tax the sale of magazines while exempting newspapers from tax. It also questioned whether excluding the sale of religious publications from the tax unfairly discriminated against magazines. Prior to final hearing, the plaintiffs sought leave to amend their complaint to remove the religious publication issue from the case. All parties consented to the amendment but the trial court denied the motion for leave to amend. Subsequently, the various religious publishers argued that the motion (subsequently withdrawn) should have been granted. Reasoning that it should have, the religious publishers moved to strike all evidence taken on the question of religious publications since such evidence was no longer relevant to any issue before the court. This motion was granted, the court ruling that the issue of religious publications was no longer before it.

Inasmuch as the religious publication issue was not considered by the trial court, it should not be considered now. This Court is generally loathe to consider matters not passed on below. At times, exceptions to this general rule are made but only in very specific circumstances. No necessity for considering the issue has

been shown. Furthermore, no fundamental error can be shown because all parties, by agreeing to the amendment, admitted that the issue of religious publications is only peripheral to this case. This Court should not consider the constitutionality of the Religious Publication Exclusion.

If the Court determines that it should pass on the constitutionality of the Religious Publication Exclusion, it must determine whether the exclusion serves a valid secular purpose, whether it directly advances or infringes on religion and whether, in operation, it will have the effect of excessively entangling government and religion. The exclusion satisfies all three prongs of this traditional test and is clearly constitutional.

The statute serves two valid secular purposes, either of which standing alone would be sufficient. First, it is simply one part of an overall scheme designed to foster the development of a pluralistic society. Florida's sales tax contains numerous exemptions and exclusions, of which the religious publication exclusion is only one, all designed to foster this overall secular purpose. Numerous nonprofit organizations are favored with exemptions or exclusions, all of which serve the purpose of enhancing pluralism. Second, the exclusion serves the purpose of accommodating religion by the creation of a sector for free exercise thereby disentangling religion and government. The exclusion prevents government from reviewing the content of religious publications by excluding from the operation of the tax all publications of religious organizations. The statute, therefore, serves a valid secular purpose.

The Religious Publication Exclusion does not constitute an improper establishment of religion. First, it merely accommodates religious freedom, it does not favor or establish religion. Traditionally, statutes which merely lift an otherwise applicable burden or regulation are not perceived as establishing religion. Second, the exclusion is of long standing, having been present in Florida's original sales tax enactment. This factor is frequently looked to when the Court is determining whether a statute establishes religion. Similar tax exemptions for religious activities have been present in federal taxing statutes almost from the beginning of the Republic. The statute is not one respecting the establishment of religion.

Operation of the statute does not entangle government and religion. In general, statutes exempting religion from some burden do not entangle religion and government unless their operation requires the state to delve into the religious beliefs in order to administer the statute. The Religious Publication Exclusion, as interpreted by the Department of Revenue in its rules, excludes from the tax publications of otherwise tax exempt religious groups. The Department of Revenue need not inquire into the content of the publications, the beliefs of the organization, or any other factor to establish the scope of the exclusion. Operation of the exclusion does not excessively entangle government and religion.

If the Court does determine that the Religious Publication Exclusion impermissibly favors religious publications over secular magazines, the Court may either extend the exclusion to magazines or strike the exclusion. Generally, when the courts are faced with an underinclusive benefit, they prefer to expand the scope of the benefit rather than nullifying it. An exclusion from the operation of tax,

unlike an exemption, is not readily severable from the tax itself since it goes to the scope of the original imposition of the tax. This exclusion also includes many other religious articles besides publications. Striking the exclusion will result in radically changing Florida's sales tax base. It will involve in the operation of the tax a whole new class of taxpayer which has traditionally had no contact with Florida's sales tax system. It will do much more violence to the statute than simply excluding the sale of magazines from the operation of the tax. If the Court determines that the Religious Publication Exclusion is impermissibly narrow, it should expand the exclusion to magazines.

III.

ARGUMENT

A. THIS ISSUE OF THE CONSTITUTIONALITY OF SECTION 212.06(9), FLORIDA STATUTES IS NOT BEFORE THIS COURT BECAUSE IT WAS NOT CONSIDERED OR RULED ON BY THE TRIAL COURT.

The State of Florida exempts the sale of newspapers from the sales tax while taxing the sale of magazines. The issue in this case is whether the State of Florida thereby unconstitutionally favors newspapers over magazines. This issue was fully briefed and argued below and the trial court ruled on this issue. Incidentally, the sales tax does not reach the sale of religious publications and other religious articles because these items are excluded from the tax base. No party has properly placed the constitutionality of the Religious Publication Exclusion in issue. The question was not considered by the court below. This Court cannot consider the constitutionality of the Religious Publication Exclusion.

Appellant Department of Revenue is the only party which quarrels with the decision of the trial court. No party cross appealed. The Department of Revenue itself offers no argument that the Religious Publication Exclusion impinges on any provision of the constitution. Rather, in arguing the issue of remedy, the Department says that underinclusiveness of the exemption for the sale of newspapers should be cured by extending the tax to newspapers, and, incidentally, religious publications. The Florida Attorney General, acting on behalf of the Florida Department of Revenue, is before this Court asking it to invalidate a Florida statute which no party is arguing is unconstitutional.

The original complaint filed in this case obliquely raised the issue whether the Religious Publication Exclusion offended the Free Press Clause of the First Amendment because it favored religious publications based on their content. (App 1-6). At about the time the various religious publishers sought to intervene, plaintiff filed a Motion for Leave to Amend Complaint. (App. 14-15). The requested amendment deleted all reference to the Religious Publication Exclusion, leaving the trial court to consider the question whether the State can distinguish between newspapers and magazines for tax purposes. (App. 16-21). All parties consented to the motion, assuming that the religious Publication Exclusion would not be addressed by the Court, indicating that none of them believed the issue to be fundamental to this case. (App. 15). The trial court, however, denied the motion. (App. 21).

The various religious publishers argued below that denial of the motion constituted an abuse of the trial court's discretion, that the motion should have

been granted and that the case should be tried as if this issue had been withdrawn from the case. (App. 31-34). In furtherance of this argument, these parties filed a Motion to Strike all evidence relevant to the consideration of the religious publication issue on the grounds that it was no longer relevant to any issue properly before the court. (App. 27-28). The court determined that the motion to amend should have been granted, that this issue of religious publications was no longer before it and all evidence relevant to the issue was stricken. (App. 82-83).

In determining that the issue of the constitutionality of the Religious Publication Exclusion was not properly raised in the pleadings, the court treated the case as if the pleadings had been amended to conform to the Amended Complaint. At final hearing, the judge ruled as follows:

> I am going to grant the motion to strike. I don't think on the pleadings that you are properly before the Court, out of an abundance of caution . . .. And I guess we'll just grant the motion to strike, and that takes religious publications all the way out. You all are free to stay or free to go about your business, whatever you want to do. (App. 112-113).

The court's final judgment makes no reference to the religious publication issue.

An amended pleading constitutes an abandonment of the original pleading which it supersedes. Thereafter the original pleading no longer serves any purpose in the record. Dee v. Southern Brewing Co., 1 So.2d 562 (Fla. 1941). The "issues in a cause are made solely by the pleadings." Hart Properties, Inc. v. Slack, 159 So.2d 236, 239 (Fla. 1963). "[T]he issues of fact in any case are initially framed by the pleadings and not by motions, depositions or affidavits . . . Motions, of course,

are not pleadings." Harris v. Lewis State Bank, 436 So.2d 338, 340 n.1 (Fla. 1st D.C.A. 1983).

If an issue is not raised by the pleadings as they stand at some stage of the proceedings, they "may be changed only by (a) stipulation of the parties, (b) consent or acquiescence of the parties, (c) motion and order, or (d) by amendment express or implied to conform to the evidence." Griffin v. Griffin, 463 So.2d 569, 573 (Fla. 1st D.C.A. 1985). Along these lines, the Rules of Civil Procedure provide that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Fla. R. Civ. P. 1.190(b). Although the court ruled that the issue was not present on the pleadings, the parties may nevertheless, by consent, have tried the issue of religious publications and the pleadings would be deemed to have been amended to permit consideration of the issue.

However, the operative language of the Rule and the case law is that the issue must have been tried "by the express or implied consent of the parties." In this case, the religious publishers moved to strike all evidence relating to the religious publication issue and filed a conditional voluntary withdrawal of all of their evidence. The motion was granted. It is clear that the issue was *not tried* by consent of the parties. Thus, not having been raised by the pleadings nor tried by consent of the parties, the Religious Publication Exclusion was not considered by the trial court.

> It is a rule of long standing that on appeal this Court will confine itself to a review of those questions, and only those questions, which were before the trial court. Matters not presented to the trial court by the

> pleadings and evidence will not be considered by this court on appeal.

Mariani v. Schleman, 94 So.2d 829, 831 (Fla. 1957). This is true on an appeal from summary judgment as well as any other final judgment on the merits. Dober v. Worrell, 401 So.2d 1322 (Fla. 1981). This Court has specifically declined to rule on the constitutionality of a statute because "the trial court did not pass" on the issue and "dismissed all parties before him relevant to that issue." Smith v. Brantley, 400 So.2d 443, 445 (Fla. 1981). This Court has even refused to consider a due process objection to a statute when the issue was raised for the first time on appeal. Century Village, Inc. v. Wellington, E,F,K,L,H,J,M & G, Condominium Association, 361 So.2d 128 (Fla. 1978).

Is it accurate to say that an issue was not raised in the trial court when, in fact, it was originally addressed in the complaint but subsequently withdrawn? In North v. Ringling, 7 So. 2d 476 (Fla. 1940), a divorce case, the question was whether an appeal from a decree of divorce could be prosecuted by a Personal Representative. The court noted the rule that an appeal from a final decree of divorce may not be prosecuted after the death of a party unless property issues are at stake. The issue of property rights was not raised in the complaint. The question was introduced in the answer but later withdrawn.

> [W]hen the issues were made, the evidence taken and the final decree entered, the subject of property rights was not before the court, was not considered, and no adjudication was made on that point.

Id. at 480. The court granted the motion to dismiss the appeal. See also Dee v. Southern Brewing Co., 1 So.2d 562. Similarly, the religious publication issue was withdrawn from this case.

There are certain circumstances in which this Court will consider the constitutionality of a statute for the first time on appeal. First, in case of absolute necessity dealing with the operation of government, the Court may consider the constitutionality of a statute by original mandamus. Dickinson v. Stone, 251 So.2d 268 (Fla. 1971) (consideration of constitutionality of General Appropriations Act.) No such case is presented here. Second, this Court may consider "fundamental error" on appeal even if not raised below. Palm Beach County v. Green, 179 So.2d 356 (Fla. 1965). However, this doctrine is not carte blanche for the Supreme Court to consider any issue involving the constitutionality of any statute.

Cases enunciating the "fundamental error" doctrine "do not hold that every constitutional issue amounts to fundamental error cognizable initially on appeal. Constitutional issues, other than those constituting fundamental error, are waived unless they are timely raised." Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970). What then is fundamental error and does the Religious Publication Exclusion question involve such error?

> "Fundamental error," which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action. The Appellate Court should exercise its discretion under the doctrine of fundamental error very guardedly.

Id.

In this case, the Religious Publication Exclusion issue is not fundamental but merely incidental. The plaintiff, by filing the Motion for Leave to Amend Complaint, essentially conceded that the Religious Publication Exclusion is peripheral to this case. Counsel for all parties agreed, stipulating to the motion. Counsel for plaintiff, after withdrawing its motion, nevertheless indicated that he considered the issue unnecessary to this case. (App. 102). Counsel for the Florida Press Association indicated that "the issue as to the newspapers and magazines can only be decided between them, and on those grounds alone." (App. 103). Thus, it cannot be said that this issue goes to the foundation of the case. It is not a proper case for the application of the "fundamental error" doctrine.

Furthermore, the constitutional issue of disparate treatment of newspapers and magazines may clearly be reached by this Court without any consideration of the Religious Publication Exclusion. Treatment of the Religious Publication Exclusion is no more essential to the case than consideration of the sales tax exemption for the sale of American and Florida, but no other, flags. See § 212.08(7)(f), Fla. Stat. (1989). Certainly no one suggests that, under the fundamental error doctrine this Court may randomly page through the Florida Statutes examining sales tax exemptions for their constitutionality.

Finally, there is some language in decisions of this Court to indicate "[o]nce this Court has jurisdiction . . . it may, at its discretion, consider any issue affecting the case." Cantor v. Davis, 489 So.2d 18, 20 (Fla. 1986). See also Savoie v. State, 422 So.2d 308 (Fla. 1982). However, it should be noted that Cantor v. Davis relies for its authority on Trushin v. State. That case does not stand for the proposition

that this Court has unlimited discretion to consider issues not raised below. Trushin v. State, 425 So.2d 1126 (Fla. 1982) is simply a "fundamental error" case. The Court in that case considered the constitutionality of a criminal statute under which the defendant had been convicted although the issue had not been raised in the trial court.

> Only the constitutionality of the statute under which Trushin was convicted was the kind of alleged error which must be considered for the first time on appeal because the arguments surrounding the statute's validity raised a fundamental error.

Id. at 1130. (Emphasis in original.) The court was even more explicit in Sanford v. Rubin holding that, "[t]here being no fundamental error, the District Court of Appeal in their case sub judice, improperly considered the constitutionality" of the statute in question. Sanford v. Rubin, 237 So.2d at 138. Thus, in order to exercise its "discretion" to consider an issue not raised below, this Court should first determine that "fundamental error" is present. As indicated above no fundamental error is present to justify this Court's consideration of the Religious Publication Exclusion issue.

After proper motion by the parties, the trial court treated the pleadings as amended to delete all references to the constitutionality of the Religious Publication Exclusion. Therefore, it refused to consider the question and struck all evidence probative of issues involved in such a consideration. This Court is presented with a record on which the question has not been raised, no evidence has been taken and no ruling has been made by the trial court. The Attorney General, without arguing the constitutionality of the statute has asked this Court to strike it down as

part of the remedy for the alleged unconstitutionality of another statutory provision. No compelling reason has been offered why this Court should consider this issue for the first time on appeal. No fundamental error has been demonstrated. This Court should not consider the constitutionality of Section 212.06(9) of the Florida Statutes.

B. SECTION 212.06(9) OF THE FLORIDA STATUTES IS IN FULL COMPLIANCE WITH THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The religious publishers continue to advance their argument that this Court should not consider the constitutionality of Section 212.06(9), Florida Statutes. Assuming this Court determines that it should consider the question of the Religious Publication Exclusion, it must determine whether the exclusion is constitutionally defective. If so, the Court must then fashion an appropriate remedy. In Section B. of this Argument, the religious publishers argue that the exclusion is constitutionally permissible. In addition, in Section C. the religious publishers will consider the question of remedy. These portions of the brief should not be taken to imply that the religious publishers abandon the position advanced in Section A. of this Argument.

The Religion Clauses of the First Amendment to the United States Constitution have been described as a Scylla and Charybdis through which the Florida Legislature (after application of the Fourteenth Amendment to the Constitution) has navigated in fashioning legislation which has an impact on the exercise of religion. Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981) (REHNQUIST, J.

Dissenting Opinion). The Legislature may neither favor religion, thereby "establishing" it; nor may it hinder the "free exercise" thereof. The U.S. Supreme Court has on more than one occasion confessed its inability to clearly delineate the buoys marking the channel through these treacherous waters.

To this point in the case, no party has thoroughly briefed, or vigorously argued, the unconstitutionality of the Religious Publication Exclusion. This assumes particular significance in light of the fact that any statute comes before this Court clothed with a presumption of constitutionality. Gardner v. Johnson, 451 So.2d 477 (Fla. 1984); Gulfstream Park Racing Association, Inc. v. Department of Business Regulation, 441 So.2d 627 (Fla. 1983). Rather, the Attorney General argues that, if the Religious Publication Exclusion is unconstitutional, neither the Free Exercise nor the Establishment clause prevents this Court from invalidating the exclusion and applying the tax to the sale of religious publications and other religious articles. The Attorney General does not actually argue that the exclusion is unconstitutional but simply cites cases which appear to bring its constitutionality into question. In this section of the brief, we assume that the argument is that the Religious Publication Exclusion constitutes an unconstitutional "establishment" of religion and will demonstrate that it does not.

The State of Florida imposes a tax on the privilege of engaging in the business of selling tangible personal property at retail in this state. § 212.05, Fla. Stat. (1989). But "[t]he taxes imposed by this chapter do not apply to the use, sale, or distribution of religious publications, bibles, hymn books, prayer books, vestments, altar paraphernalia, sacramental chalices, and like church service and

ceremonial raiments and equipment." § 212.06(9), Fla. Stat (1989). The rules of the Department of Revenue (except in some specifics not relevant here) merely repeat the statute with respect to bibles, hymn books, prayer books, vestments, altar paraphernalia, etc. Fla. Admin. Code Rule 12A-1.001(2) and Fla. Admin Code Rule 12A-1.008(12)(a). The Department of Revenue has, however, defined religious publications as "publications, except [bibles, hymn books, prayer books] that are used, sold, or distributed by a church, or religious institution, holding an exemption certificate based on its exemption under 212.08(7)(o), F.S." Fla. Admin. Code Rule 12A-1.008(12)(b).

The U.S. Supreme Court has announced that a statute must have three characteristics in order not to run afoul of the Religion Clauses of the First Amendment. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster 'an excessive government entanglement with religion.'" Lemon v. Kurtzman, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971). There is some question whether this test should be applied when testing a statute which has the effect of relieving religion from a burden or granting it a benefit. However, the Court has adhered to this test in such cases. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327, 335, 107 S.Ct. 2862, 2867-2868, 97 L.Ed.2d 273 (1987).

In assessing the constitutionality of the Religious Publication Exclusion, we first begin with an inquiry into the State's secular purpose in adopting the exclusion.

There are two such purposes underlying this statute, either of which constitutes a valid purpose. First, the State has an interest in promoting the existence and communication of a plurality of interests and ideas in society. Second, the State has a secular interest in disentangling itself from religious questions or, to state it another way, in accommodating religion by creating a clearly-defined sector in which its exercise will not be subject to governmental supervision.

The State has a strong interest in encouraging the development of a pluralistic society reflecting a variety of social concerns. Frequently, this interest is furthered through a system of tax deductions or exemptions. An indicator that this purpose underlies the statute is a system of widely applicable deductions or exemptions. The leading case dealing with tax exemptions in the religious context is Walz v. Tax Comm'n of New York City, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970). New York, like every other state, exempts religious property from ad valorem taxation. The Court upheld the exemption for houses of religious worship "within a broad class of property owned by non-profit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical and patriotic groups." Id. at 673, 90 S.Ct. at 1413.

In Mueller v. Allen, 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983), the U.S. Supreme Court considered the constitutionality of Minnesota state income tax deductions for educational expenses against the challenge that this aided religious schools and, thereby, established religion. The Court, in upholding the constitutionality of the deductions noted, among other things, the great number of income tax deductions available to Minnesota taxpayers. Id. at 396, 103 S.Ct. at

3067. The Court determined that this was "particularly significant" because "'legislatures have especially broad latitude in creating classifications and distinctions in tax statutes.'" Id.

Florida has demonstrated its interest in a pluralistic society through the adoption of any number of Florida sales tax exemptions created for non-economic social purposes and available to a wide variety of "non-profit, quasi-public corporations." For example, sales of "artificial commemorative flowers by bona fide nationally chartered veterans' organizations," of "the flag of the United States and the official state flag of Florida," of "guide dogs for the blind, commonly referred to as 'seeing-eye dogs,' and of food or other items for such guide dogs," of "prepared meals by a nonprofit volunteer organization to handicapped, elderly, or indigent persons when such meals are delivered as a charitable function by the organization to such persons at their places of residence," of school books and school lunches, are all exempt from sales tax. §§ 212.08(7)(a),(f),(h),(k),(q), Fla. Stat. (1989).[2] Purchases of office supplies, equipment, and publications made by the Florida Retired Educators Association and its local chapters, and all sales to nonprofit corporations whose primary purpose is to raise money for military museums, to nonprofit religious, nonprofit charitable, nonprofit scientific, or nonprofit educational institutions when used in carrying on their customary nonprofit activities, and to the state headquarters of bona fide veterans'

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[2]Florida has a host of other sales tax exemptions created for various economic or commercial purposes, the presence of which was not deemed helpful in Texas Monthly, Inc. v. Bullock, __ U.S. __, 109 S.Ct. 890, 899 n.4, 103 L.Ed.2d 1 (1989). These commercial and economic exemptions should be contrasted with the social policy exemptions referred to above.

organizations and the state headquarters of their auxiliaries when used in carrying on their customary activities are exempt from sales tax. §§ 212.08(7)(g),(l),(o)1.b.c., Fla. Stat. (1989). Exempt from sales tax are: (i) nonprofit organizations the primary purpose of which is providing activities that contribute to the development of good character or good sportsmanship or to the educational or cultural development, of minors, (ii) churches, and (iii) nonprofit organizations designated as State Theater Program Facilities. §§ 212.08(7)(n),(o)1.a.,(r), Fla. Stat. (1989). It should be noted that a number of these exemptions involve speech, symbolic or otherwise, and the dissemination of views. See, e.g., Regan v. Taxation With Representation of Washington, 461 U.S. 540, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983) (involving subsidy to veterans organizations not available to other nonprofit organizations) and Texas v. Johnson, __ U.S. __, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (flag burning expressive conduct). It is clear that the Religious Publication Exclusion is cut from the same cloth as these exemptions and is consistent with Florida's broad secular interest in a pluralistic society.

The State also has an interest in disentangling itself from religious questions, an interest which can be furthered by exempting religious organizations from taxation or regulatory schemes applicable to others.

> Governments have not always been tolerant of religious activity, and hostility toward religion has taken many shapes and forms--economic, political, and sometimes harshly oppressive. Grants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes; exemption constitutes a balanced attempt to guard against those dangers.

Walz v. Tax Comm'n, 397 U.S. at 673, 90 S.Ct. at 1413. See also Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 793, 93 S.Ct. 2955, 2975, 37 L.Ed.2d 948 (1973). This secular purpose is best illustrated in Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 107 S.Ct. 2862. In that case, Congress originally exempted from the operation of certain Civil Rights legislation hiring by religious organizations for positions related to religious functions. Congress subsequently broadened this exemption to apply to all hiring by religious organizations. A building engineer at a gymnasium who had been fired because he no longer met the religious qualifications imposed by the church-owned gymnasium filed suit alleging that the exemption was an unconstitutional establishment of religion insofar as it related to hiring for nonreligious functions. The Court held that a valid secular purpose was involved in broadening the exemption because it relieved the religious organization from having to predict "on pain of substantial liability . . . which of its activities a secular court will consider religious." Id. at 336, 107 S.Ct. at 2868. In essence, the accommodation of religion through the creation of an area free of governmental supervision has been found to be a valid secular purpose. See also Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952).

The Religious Publication Exclusion furthers the secular purpose of disentangling the State of Florida from religious questions and accommodating religion by creating an area in which religion may operate freely, that of publication. Florida's statute does not require religion to determine which of its publications will be deemed by the State of Florida to be secular and which are

religious. Rather, the sale of any publication by a religious organization will be exempt from taxation. Just as in Amos, the State has created a broad exemption for both religious and nonreligious activities to eliminate an arena of potential conflict between the State and religion. This is a valid secular purpose served by the Religious Publication Exclusion.

The second area of inquiry is whether the statute directly advances or infringes on religion. After all, it is only religious publications and other articles which are given the benefit of the exclusion. For two reasons this exclusion from tax does not constitute an establishment of religion. First, the effect of the statute is simply to remove a burden from religion, not to favor it. Second, the exclusion is of long standing, a factor which is given great weight in determining establishment questions.

The U.S. Supreme Court

> has never indicated that statutes that give special consideration to religious groups are per se invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause . . . Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities.

Corporation of Presiding Bishop v. Amos, 483 U.S. at 338, 107 S.Ct. at 2869. See also Mueller v. Allen, 463 U.S. at 393, 103 S.Ct. at 3066. The U.S. Supreme Court in an early case determined that mere accommodation did not constitute establishment. There the issue of establishment of religion arose in the context of public schools releasing children to attend religious instruction. It was argued that

the children were released in such an organized program only to attend religious instruction. Children not released because they sought no religious instruction could have been made to feel discriminated against. The Court rejected these arguments finding no establishment because "the public schools do no more than accommodate their schedules to a program of outside religious instruction." Zorach v. Clauson, 343 U.S. at 315, 72 S.Ct. at 684. Furthermore, the Court has ruled that, in the context of a statutory scheme encompassing a broad variety of exemptions and exclusions, the legislative purpose of an exemption "is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility." Walz v. Tax Comm'n, 397 U.S. at 672, 90 S.Ct. at 1413. Florida has not established religion in the Religious Publication Exclusion. It merely gives religion room in which to operate.

In determining whether a statute establishes religion, one factor the courts look to is its history. Marsh v. Chambers, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d. 1019 (1983). A long-standing judgment of the Florida Legislature is considered less likely to violate the establishment clause. "[A]n unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside." Walz v. Tax Comm'n, 397 U.S. at 678, 90 S.Ct. at 1416. The Florida Sales Tax was adopted in the Extraordinary Session of 1949. Section 6 of Chapter 26319, which imposed the tax, provided that "[t]he Taxes under this statute shall not apply to the use, sale or distribution of religious publications, hymn books, prayer books, vestments, altar paraphernalia, sacramental chalices, and like Church service and ceremonial

raiments and equipment, to or by Churches for use in their customary religious activities." The exemption was subsequently amended in 1951 by deleting the phrase "to or by Churches for use in their customary religious activities." Section 8, Chapter 26871, Laws of Fla. (1951). The exclusion has remained in effect since that time. The Religious Publication Exclusion has been a part of the statute since its inception. Insofar as sales tax provisions are concerned, no exemption or exclusion has a longer history. A provision having such a history should not be lightly cast aside.[8]

The final step in the inquiry is to determine whether the effect of the exclusion will be the "excessive government entanglement with religion." Walz v. Tax Comm'n, 397 U.S. at 674, 90 S.Ct. at 1414. Generally a tax exemption "creates only a minimal and remote involvement between Church and state and far less than taxation of churches." Id. at 676, 90 S.Ct. at 1415. It seems virtually self-evident that a statute which excludes religious publications from tax does not excessively entangle government and religion. This is especially true of the Religious Publication Exclusion. Given the rules of the Department of Revenue, the only contact between the State and one claiming the exclusion will be a determination whether the claimant holds a tax exemption certificate as a church. Fla. Admin Code Rule 12A-1.008(12)(b). Application of the Religious Publication Exclusion "does not require the state to inquire into the religious content of the items sold or

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[8]Similar exemptions have been part of federal law since very early times. "As early as 1813 the 12th Congress refunded import duties paid by religious societies on the importation of religious articles" such as plates for printing Bibles, church vestments, furniture, paintings, Bible plates and church bells. Walz v. Tax Comm'n, 397 U.S. at 677, 90 S.Ct. at 1415-16.

the religious motivation for selling or purchasing the items, because the materials are" excluded from tax "regardless of content or motive." Jimmy Swaggart Ministries, Inc. v. Board of Equalization of California, __ U.S. __, 110 S.Ct. 688, 699, __ L.Ed.2d __ (1990). There is no inquiry into the doctrine of the organization, the content of the publication or any other issue. There is, simply, no entanglement.

Florida's Religious Publication Exclusion satisfies the three-pronged test enunciated in Lemon v. Kurtzman. It advances two valid secular purposes. First, it is one element in an overall program to encourage the development of a pluralistic society. Second, it disentangles religion from government by accommodating religion, creating an area of exercise free from governmental supervision. The statute is not one respecting an establishment of religion. Its purpose is to accommodate, not establish, religion and, furthermore, the weight of historical precedent is behind it. Finally, the operation of the statute is not such as to entangle government and religion. Rather, because it lifts a burden from religion, it reduces the contact between religion and government.

The Florida Attorney General has not argued directly that the Religious Publication Exclusion fails the test enunciated in Lemon v. Kurtzman. Rather, he cites several cases in which a party claimed that the Free Exercise Clause of the First Amendment required an exemption or exclusion when none was present in the statute. Finally, he cites one case in which a very narrow statutory exemption was found to violate the test without any explanation of how the case is applicable to Florida's exclusion.

The thrust of the Attorney General's argument seems to be that the Religious Publication Exclusion is not mandated by the Free Exercise Clause of the First Amendment. Therefore, it should be stricken. U.S. v. Lee, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982), Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 105 S.Ct. 1953, 85 L.Ed.2d 278 (1985) and Jimmy Swaggart Ministries v. Board of Equalization of California, __ U.S. __, 110 S.Ct. 688, are all cited for the proposition that taxes of general applicability may be imposed on religious organizations. In each of those cases, a party argued that a statute which contained no express statutory exemption could not be applied to them because the absence of an exemption violated the Free Exercise Clause of the Constitution. That is not the issue in this case. The issue in this case is whether an express statutory exclusion is permissible.[4]

It simply is not the law that the state is permitted to grant an exemption to religious activities only when the failure to grant such an exemption would be unconstitutional. "The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." Walz v. Tax Comm'n, 397 U.S. at 673, 90 S.Ct. at 1413-14. This principle can best be demonstrated by contrasting Tony & Susan Alamo Foundation, with Corporation of Presiding Bishop v. Amos. In Tony & Susan Alamo Foundation, 471 U.S. 290, 105 S.Ct. 1953, the Court considered the reach of the Fair Labor Standards Act. The statute specifically exempted employees of religious

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[4]Similarly Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d (1981), cited by the Miami Herald involves a plaintiff seeking to create an exemption from a regulation of general applicability.

organizations who were engaged in religious activities from the requirements of the wage and hour laws. It did not exempt employees of religious organizations who were engaged in nonreligious, commercial activities. The Foundation claimed that the Free Exercise Clause mandated an exemption for its employees engaged in nonreligious, commercial activities. The Court soundly rejected this argument, holding that labor laws of general applicability could be applied to employees of religious organizations engaged in nonreligious activities. In Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 107 S.Ct. 2862, the statute expressly exempted all employees of religious organizations, whether engaged in nonreligious or religious activities, from the operation of certain employment provisions of the Civil Rights laws. An employee claimed that this amounted to an establishment of religion. The Court also rejected this argument, holding that, although such an exemption may not be required by the Free Exercise Clause, neither did it violate the Establishment Clause. Thus, exemption for religious activities are permissible even where they are not required.

The cases cited by the Attorney General, including Jimmy Swaggart Ministries, simply hold that certain exemptions are not required by the Free Exercise Clause.[5] Even if one concedes that the Free Exercise Clause does not

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[5]It should be noted that the Court in Jimmy Swaggart Ministries did not foreclose the possibility that a tax could impermissibly burden the Free Exercise of religion. Exemption from such a tax would be mandated by the Free Exercise Clause. Jimmy Swaggart Ministries, Inc. v. Board of Equalization of California, 110 S.Ct. at 696. In Murdoch v. Commonwealth of Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943) and Follett v. Town of McCormick, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944) the Court struck taxes which significantly burdened religious activities. Thus, there is always a factual inquiry to be made when a tax is levied on a religious activity.

require Florida's Religious Publication Exclusion, none of these cases say that an exemption actually granted by statute must be required by the Free Exercise Clause in order to pass constitutional muster. Indeed, they say just the opposite. Therefore, none of these cases constitute an argument for the invalidity of Florida's Religious Publication Exclusion.

The Attorney General's final assault on the statute consists of a citation to the U.S. Supreme Court's decision in Texas Monthly, Inc. v. Bullock, ___ U.S. ___, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989). Texas Monthly struck down a statute that exempted from sales tax "periodicals that are published by a religious faith and that consist wholly of writings promulgating the teaching of the faith." Id. at 894. In order to qualify for the exemption in Texas a two prong test was imposed by the statute. First, was the publisher a religious faith? Second, did the material consist wholly of writings promulgating the teaching of the faith? Both of these questions, in the plurality's mind, raise issues concerning both establishment of religion and entanglement with it. The inquiry required by the two questions together brought the issues to critical mass and required invalidation of Texas' statute. Florida's statute, by contrast, does not require the State revenue authorities to consider or resolve these two questions. Florida's very different statutory exclusion is not called into question by the Texas Monthly decision.

The question whether the contents of a publication "consist wholly of writings promulgating the teaching of the faith," clearly involves the tax authorities in determining the doctrines of a given religious faith. Under Texas' statute taxing

authorities were required to distinguish doctrinal from non-doctrinal teachings and to do so for every possible religious faith.

> The prospect of inconsistent treatment and government embroilment in controversies over religious doctrine seems especially baleful where, as in the case of Texas' sales tax exemption, a statute requires that public officials determine whether some message or activity is consistent with 'the teaching of the faith.'

Id. at 902. Texas argued in Texas Monthly that its taxing officials interpreted the statute not to require an examination into whether the publication contained religious doctrine. Id. at n.9. As a matter of administrative policy these officials allowed religious publishers to make this determination. The plurality opinion discounted this argument as being contrary to the face of the Texas statute and not embodied in the current regulations, and pointed out that this policy was subject to change by future administrators. By contrast, the plain language of the Florida statute does not require any determination whether a publication contains the doctrine of a religious faith. Furthermore, the rules of the Florida Department of Revenue define "religious publications" as "publications . . . sold, or distributed by a church, or religious institution, holding an exemption certificate . . .." Fla. Admin. Code Rule 12A-1.008(12)(b). This is precisely the type of rule which was not present in Texas and the presence of which may have saved the Texas statute.

Florida's broad exclusion, as opposed to Texas' narrow exemption, serves the purpose of accommodating religion approved in Corporation of Presiding Bishop v. Amos. That case involved the constitutionality of exempting all activities of churches (including those not strictly related to the church's religious mission) from the reach of federal civil rights legislation dealing with employment. Here the case

involves the constitutionality of exonerating from sales tax the sale of all publications by religious organizations, not just publications promulgating the faith. The Court in Amos held that such a wide-reaching exemption was permitted because

> it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions . . . it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious.

Corporation of Presiding Bishop v. Amos, 483 U.S. at 335-36, 107 S.Ct. at 2868.

Florida's statutory exclusion takes a similar approach to that used by Congress and approved in Amos and one very different from that declared unconstitutional in Texas Monthly. Because the exemption in Texas only applied to writings containing the doctrine or faith of a church, Texas explicitly involved itself in determining what was or was not doctrinal. It forced religions to run the unacceptable risk which the exemption in Amos was designed to alleviate. Florida's exclusion, like the congressional exemption, alleviates the risk that governmental authorities may second-guess religious authorities because it excludes all religious publications, not just those containing the faith's sacred writings. Thus, Florida's exclusion not only is not reached by the Court's holding in Texas Monthly but falls foursquare within the Legislature's prerogative of accommodating the free exercise of religion.

Furthermore, it should be noted that the three dissenters and the three concurring justices in Texas Monthly all announced rationales under which Florida's

Religious Publication is constitutional. The dissenters would have permitted Texas' exemption, narrow as it was. This case would be easy for the dissenters because Florida's exclusion is so much broader. Justices Blackmun and O'Connor found Texas' exemption objectionable because it constituted a "statutory preference for the dissemination of religious ideas." Texas Monthly, Inc. v. Bulloch, 109 S.Ct. at 907, (BLACKMUN, J. opinion concurring in judgment). Florida's statute does not favor the dissemination of religious ideas. It excludes from the operation of the tax all religious publications, whether or not they contain the sacred doctrine or other ideas of a religion. Justice White found Texas' statute unconstitutional because it distinguished among publications solely on the basis of their content. Id. at 905 (WHITE, J. opinion concerning in judgment). The constitutionality of Florida's Religious Publication Exclusion is not called into question by the holding in Texas Monthly.

Various cases holding that certain exemptions from governmental regulation are not required by the Free Exercise Clause of the First Amendment are not relevant here. Texas Monthly addressed a very narrow exemption which directly involved state officials in determining what did and did not constitute the sacred doctrine of a religion. The Florida statute is a broad, prophylactic exclusion adopted for a valid secular purpose. It does not result in the establishment of religion and has the salutary effect of disentangling the State from religious issues by accommodating religion with the creation of a sector in which it may operate without government's supervision. The Florida Religious Publication Exclusion is constitutional.

C. IF THE RELIGIOUS PUBLICATION EXCLUSION STANDING WITHOUT A SIMILAR EXCLUSION FOR SECULAR PUBLICATIONS IS CONSTITUTIONALLY IMPERMISSIBLE, THE APPROPRIATE REMEDY IS EXTENSION OF THE EXCLUSION TO THE SECULAR PRESS.

If this Court determines that the Religious Publication Exclusion is constitutionally impermissible, it must elect between two available remedies in redressing the defect. It may either extend the exclusion to other publications or invalidate the exclusion altogether. Before we proceed to a discussion of the law governing this Court in its choice of remedy, we believe it important to point out that the religious publication exclusion is a different species of statutory animal from the newspaper exemption. Section 212.06, Florida Statutes, prescribes the moment at which the sales or use tax is levied. Subparagraph 9 of that section states that the taxes imposed by chapter 212 "do not apply to the use, sale or distribution of religious publications, bibles, hymn books, prayer books, vestments, altar paraphernalia, sacramental chalices, and like church service and ceremonial raiments and equipment." By contrast Section 212.08 states that the sale at retail, the rental, the use, the consumption, the distribution, and the storage to be used or consumed in this state of certain items "are hereby specifically exempt" from the sales and use tax. Newspapers are named in subparagraph 7(w) of this section as one of the exempt items. This difference may require different remedies even if the Court determines that both the religious publication exclusion and the newspaper exemption are unconstitutional.

"Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may declare it a nullity and order that its benefits not

extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." Califano v. Westcott, 443 U.S. 76, 89, 99 S.Ct. 2655, 2663, 61 L.Ed.2d 382 (1979) quoting Welsh v. U.S., 398 U.S. 333, 361, 90 S.Ct. 1792, 1807-08, 26 L.Ed.2d 308 (1970) (Harlan, J. concurring). See also Heckler v. Matthews, 465 U.S. 728, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984). Califano v. Westcott involved a statute which extended Aid to Families with Dependent Children to families in which the father was unemployed. The Court ruled that this scheme denied families in which the mother was unemployed the equal protection of the law. The Court noted that, while it could either strike the benefits for families of unemployed fathers or extend the benefits to families of unemployed mothers, the trend in such cases has been to extend the benefits to the excluded class, rather than remove the benefit from the favored class. Similar results were obtained in Greenberg v. Bolger, 497 F.Supp. 756 (E.D.N.Y. 1980) (extending the benefits of lower postal rates, granted by statute to existing political parties, to new political parties) and Rhode Island Chapter of National Women's Political Caucus, Inc. v. Rhode Island Lottery Commission, 609 F.Supp 1403 (D.C.R.I. 1985) (extending privilege of conducting lotteries, granted by statute to major political parties, to minor political parties). The U.S. Supreme Court has not merely noted that there are two possible remedies without indicating a preference for one or the other. Instead the Court has determined that "ordinarily" extension of the sought-after benefit to all, rather than nullification of the benefit of the few, is the preferred remedy. Heckler v.

Matthews, 465 U.S. at 739, 104 S.Ct. at 1395, n.5.[6] Imposing a tax on the sale or use of magazines but not on the sale or use of religious publications is akin to taxing the privileges or property of publishers of magazines at a higher rate than that of religious publishers. In such cases, this federal law clearly implies that the tax on nonreligious publishers should be lifted.

There is no body of Florida jurisprudence on the subject. When the constitutionality of a portion of a statute is called into question, the first issue addressed by the Florida (and federal) courts is severability. It is firmly established that if a statute contains valid and invalid provisions, the valid ones may be enforced provided they are severable and would have been enacted apart from the invalid provisions of the statute. Wright v. State, 351 So.2d 708, 711 (Fla. 1977). A court will uphold the remainder of a statute if the portion which is left is complete in itself, sensible, capable of being executed, and wholly independent of that which is rejected. See Daytona Beach v. Harvey, 48 So.2d 924 (Fla. 1950); Harris v. Bryan, 89 So.2d 601 (Fla. 1956). This is the proper result whether or not the statute contains a severability clause, that is, a clause stating that if any portion of the statute is found invalid the remaining portions should be given full effect. State v. Williams, 343 So.2d 35 (Fla. 1977). However, it is necessary that the

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[6]This preference has been especially strong in ad valorem tax cases involving disparate treatment of similarly situated taxpayers. Cumberland Coal Co. v. Board of Revision of Tax Assessments in Greene County, Pa., 284 U.S. 23, 52 S.Ct. 48, 76 L.Ed. 146 (1931). This result has been applied to the ad valorem taxation of both real and personal property. Iowas-Des Moines National Bank v. Bennett, 284 U.S. 239, 52 S.Ct. 133, 76 L.Ed. 265 (1931). The courts have expressly held that courts in such situations cannot require the plaintiff to attempt to compel the tax assessor to properly assess or collect a higher tax from another. Hillsborough Township v. Cromwell, 326 U.S. 620, 66 S.Ct. 445, 90 L.Ed. 358 (1946).

Legislature had intended that any remaining portion be given effect. A severability clause serves the purpose of communicating the Legislature's intent. See Heckler v. Matthews, 465 U.S. 728, 104 S.Ct. 1387; Barndollar v. Sunset Realty Corp., 379 So.2d 1278 (Fla. 1979); Lewis K. Liggitt Company v. Lee, 109 Fla. 477, 149 So. 8 (1933). Furthermore, the question whether the Legislature would have enacted the law without the provision held unconstitutional is a mixed question of fact and law. City Council of the City of North Miami Beach v. Trebor Constr. Corp., 254 So.2d 51, 54 (Fla. 3rd DCA 1971), cert.denied, 260 So.2d 514 (Fla. 1972).[7]

Chapter 212 contains an extensive declaration of legislative intent with regards to severability. See Section 212.21, Florida Statutes. But the only real guidance given by this Section is that the Court should not strike the entire chapter imposing the sales tax. But does Section 212.21 suggest or require that either the tax or the exclusion be stricken? The statute purports to express the Legislature's intent that, if either a taxing provision or an exemption is invalidated, the balance of the tax will stand as severable. But in this case what is invalid? Is it the tax on magazines or the exclusion from tax of religious publications? In either case it is a portion of a taxing statute, not an exemption, which we are construing. We submit to the Court that Section 212.21 can be given effect by ruling that the tax

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[7]As noted above, the exclusion for religious publications found in Section 212.06(9) is not a mere exemption. Thus, the analysis found in certain Florida cases such as Small v. Sun Oil Company, 222 So.2d 196 (Fla. 1969) is not controlling and, indeed, not particularly helpful. Exemptions are merely legislative favors, and, therefore to some extent, inherently severable without violating the integrity of the taxing statute itself. An exclusion indicates the intent of the Legislature, not to grant a favor, but to determine the reach of the taxing measure. See also Dickinson v. City of Tallahassee, 325 So.2d 1 (Fla. 1975) (distinguishing immunity from exemption).

on magazines is unlawful, striking that tax and allowing the balance of the statute, including the exclusion for religious publications, to stand.[8]

In determining the Legislature's intent the Court must be mindful that the sale of religious publications was excluded from the tax base, not merely exempted from reach of the tax. "[T]he obligation of a citizen to pay taxes being purely of statutory creation, taxes can be lawfully levied, assessed, and collected only in the express method pointed out by statute. [cite omitted]. An act, therefore may not be construed to impose a tax unless its terms definitely so provide." State ex rel. Seaboard Air Line R. Co. v. Gay, 35 So.2d 403, 409 (Fla. 1948). The Florida Sales Tax cannot be construed to impose a tax on the sale of religious publications. Therefore, the question is whether the Court should construe a verbose, and abstruse severability clause in the taxing statute to impose the tax on a class of transactions clearly excluded by the Legislature. Where "the language of a taxing or tax enforcement statute, [is] doubtful, the rule in this jurisdiction is that such doubt should be resolved in favor of the rights of the citizen and against the State." Lovett v. Lee, 193 So. 538, 542 (Fla. 1940), Accord Maas Brothers, Inc. v. Dickinson, 195 So.2d 193 (Fla. 1967); State ex rel. Housing Authority of Plant City v. Kirk, 231 So.2d 522 (Fla. 1970). For whatever reason, the Legislature did not create an exemption for religious publications as it did for newspapers. It, therefore, clearly indicated its intent to refrain from applying a tax to religious

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[8]King Kole, Inc. v. Bryant, 178 So.2d 2 (Fla. 1965), is not applicable to the religious publication exclusion. First, the treatment of the issue whether to sustain an exemption or strike a tax was dicta because it found the taxing scheme constitutional. Second, the case dealt with an express exemption not an exclusion from tax.

publications perhaps because it did not wish to burden religion with a concern that secular courts would be drawn into disputes to determine what are and are not essential religious functions. The legislative intent should be given effect by the Court.

If this Court determines that religion cannot be accommodated by the Religious Publication Exclusion, the remedy fashioned by this Court must be that which most comports with the Legislature's intention as expressed in the statute. The Court cannot simply strike an exemption. None is at issue. Rather, the Court must order the collection and payment of tax where no such tax is imposed by law. Would the Legislature, by reason of the nature of religious publications, have required a different system of collecting and reporting the tax? Would it have considered a different system of audit and review designed to prevent entanglement in the church's affairs? These and many other questions must be addressed by this Court in legislative fashion if the tax is to be imposed on religious publications.

Finally, it should be noted that striking the tax on magazines will grant the only relief to which the plaintiffs may be entitled under any theory insofar as the Religious Publication Exclusion is implicated in this action. The Religious Publication Exclusion goes much beyond religious newspapers and magazines. It extends to "religious publications, bibles, hymn books, prayer books, vestments, altar paraphernalia, sacramental chalices, and like church service and ceremonial raiments and equipment." Striking the exclusion will have the effect of imposing the tax on a whole host of activities not remotely similarly situated to those carried on by magazine publishers. In fact, it is doubtful that the Court, on the record

presented could strike the entire exclusion. This would go much beyond the relief requested or the relief which the plaintiffs have standing to request.

The most the Court could do is to deny the exclusion to religious publications similarly situated to magazines. Who will define such publications? How will this judicially-fashioned rule be administered? Any such ruling would do much more violence to the statutory scheme than simply striking the tax on magazines. It is incumbent on any court, if it finds the statute defective, "not to extend its invalidation of a statute further than necessary to dispose of the case before it." Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 105 S.Ct. 2794, 2801, 86 L.Ed. 2d 394 (1985); See also Presbyterian Homes v. Wood, 297 So.2d 556 (Fla. 1974). The most economical method of repairing any defect in the statute is simply to exclude magazines from the operation of the tax.

The Legislature indicated a clear intent to exclude religious publications from the Florida Sales Tax. The severability clause offers little guidance as to the intent of the Legislature. Where the reach of a tax, as opposed to the application of an exemption, is in issue, the Court must construe the taxing statute narrowly. Such an interpretation prevents extension of a tax by statutory interpretation. Application of the tax to a religious organization, a group unique in our culture, requires the application of legislative, not judicial power. The tax should not be applied to religious publications by striking the exclusion.

IV.

CONCLUSION

Appellees, Florida Catholic Conference, Inc., The Voice Publishing Co., Inc., and Daughters of St. Paul, Inc. seek affirmance of the trial court's decision insofar as it relates to religious publishers. If the Court determines that it will address the constitutionality of the Religious Publication Exclusion without permitting the trial court to rule on the issue, these appellees seek a ruling that the exclusion is in accord with the First Amendment of the Constitution or a remand for creation of a record on which the issue may be decided. Finally, if the Court determines that the Religious Publication Exclusion is impermissibly narrow in its scope, these appellees seek an order broadening the exclusion to apply to the sale of magazines.

Dated this 16th day of February, 1990.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the individuals on the listed below by United States Mail, this 16th day of February, 1990.

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