O/a 3-9-90

IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,201

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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

ANSWER BRIEF OF APPELLEE, FLORIDA BAPTIST WITNESS, INC.

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TABLE OF CONTENTS

ISSUES FOR REVIEW

TABLE OF CITATIONS

CASES

FLORIDA STATUTES

LAWS OF FLORIDA

FLORIDA ADMINISTRATIVE CODE

PRELIMINARY STATEMENT

Appellant, Florida Department of Revenue, shall be referred to throughout this brief as "the Department."

Appellees, Magazine Publishers of America, Inc., The Hearst Corporation, Time, Inc., Golf Digest/Tennis, Inc., and Meredith Corporation shall be referred to collectively as "the Magazines."

Appellees, Florida Catholic Conference, Inc., The Voice Publishing Company, Inc., The Daughters of St. Paul, and the Florida Baptist Witness, Inc., shall be referred to collectively as "the Religious Publishers."

References to the record shall be designated as follows: (App. _____).

SUMMARY OF ARGUMENT

POINT I

This Court should not consider the constitutionality or application of the religious publication exclusion under § 212.06(9), Fla. Stat., because this issue is not properly before this Court.

In the Magazines' Motion for Summary Judgment which led to the granting of the Final Judgment, no reference or challenge was made to the religious publication exclusion. The Plaintiff challenged only the constitutionality of the magazine tax under the "Free Press Clause" and "Equal Protection Clause" as a result of the different treatment given magazines and newspapers under the Florida Sales and Use Tax statute. Further, no other party, including the Department of Revenue, raised an "Establishment Clause" issue in their answers and affirmative defenses to the Magazines' Complaint for Declaratory Judgment and Other Relief. Thus, the issues framed by the pleadings before the court included no appropriate challenge to the religious publication exclusion.

The trial court ruled that the religious publication exclusion was not properly placed in issue by the pleadings. The trial court entered a separate order granting the Religious

Publishers' Motion to Strike which removed this issue from the case below.

This ruling by the trial court comes before this Court with a presumption of correctness, and the Department has the burden of showing error. The Department has raised no arguments in its initial brief which even question the trial court's discretion in removing the religious publication exclusion from consideration in this case. The courts are not to consider the question of the constitutionality of a statutory provision which has not been raised by the pleadings. Thus, the court should refrain from considering the constitutionality or application of the religious publication exclusion.

POINT II

If the court determines for any reason that it must consider the religious publication exclusion, the Florida Baptist Witness submits that this exclusion is constitutionally permissible. Although some of the cases cited by the Department may stand for the principle that the religious publication exclusion is not constitutionally required under the "Free Exercise Clause" of the First Amendment, no authority has been cited which would provide that a state legislature is constitutionally prohibited from granting a religious publication exclusion, if it chooses to do so.

The religious publication exclusion has been a part of the Florida Sales and Use Tax since its beginning in 1949. Thus, the Florida Legislature has chosen to provide this exclusion, and no authority has been presented by the Department for finding this exclusion to be constitutionally impermissible.

Further, no party, including the Department, appropriately raised the "Establishment Clause" issue in the pleadings below. Thus, the issue of whether the religious publication exclusion may violate the "Establishment Clause" of the First Amendment is simply not before this Court.

POINT III

If this Court rules that the tax on magazines is unlawful and further determines that the religious publication exclusion is impermissible, the appropriate remedy would be to strike the tax on magazines and uphold the balance of the statute, including the religious publication exclusion. Under cases of the United States Supreme Court, this would be the preferred remedy for the magazines who are aggrieved by the alleged underinclusiveness of the sales tax statute. It will also allow the court to apply a remedy that will preserve the greater part of the statutory scheme and legislative intent of the Florida Sales and Use Tax statute and limit the court's involvement in the legislative realm.

The Florida Legislature has provided that religious publications shall not be taxed. The remedy for any differential treatment between magazines and newspapers can be provided without altering the longstanding legislative goal of excluding religious publications from the sales tax.

ARGUMENT

POINT I. WHETHER THE EXISTENCE OF A NEWSPAPER EXEMPTION WAS AN IMPROPER BASIS FOR FINDING AN EXCISE TAX ON MAGAZINES CONSTITUTIONALLY INVALID

The Department of Revenue argues under Point I of its Initial Brief that the exemption for "newspapers" under the Florida Sales and Use Tax statute is not an unconstitutional classification under the Free Press Clause of the First Amendment or the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. It further argues that the tax exemption for "newspapers" serves as no basis for finding the sales and use tax on "magazines" to be invalid.

Clearly, the Department makes no reference in its argument under Point I to the exclusion for "religious publications" under § 212.06(9), Fla. Stat. (1987). The Department's arguments deal exclusively with the differential treatment between "magazines" and "newspapers" under the Florida Sales and Use Tax statute. Further, the Final Judgment which is the subject of this appeal makes no reference to the religious publication exclusion under § 212.06(9), Fla. Stat. (1987). This was the result of the trial court having earlier granted the Religious Publishers' Motion to Strike and ruling that the issue of the constitutionality and application of § 212.06(9), Fla. Stat. (1987), was not properly placed in issue by the pleadings (App. 145-148).

Although the Department of Revenue does not challenge the trial court's Order Granting Motion to Strike in its Initial Brief, it attempts to draw the interests of the Religious Publishers into this case by its arguments under Point II of its Initial Brief. Therefore, the Florida Baptist Witness will focus its arguments on Point II of this appeal.

POINT II. CREATING A NEW MAGAZINE EXEMPTION WAS NOT ERROR

A. THE COURT SHOULD NOT CONSIDER ANY ISSUES CONCERNING THE RELIGIOUS PUBLICATIONS EXCLUSION UNDER § 212.06(9), FLA. STAT., (1987) BECAUSE THIS ISSUE IS NOT PROPERLY BEFORE THE COURT

The Department contends under Point II that if the trial court's decision was correct concerning the difference in treatment given magazines and newspapers under Chapter 212, Fla. Stat. (1987), the trial court still erred in granting the Magazines a tax exemption under Chapter 212, Fla. Stat. (1987). The Department argues that the appropriate remedy should have been to sever both the "newspaper" exemption and the "religious publication" exclusion so that newspapers, magazines, and religious publications would all be taxed in a similar manner.

The Florida Baptist Witness submits that this Court should not determine any issues concerning the "religious publication" exclusion under § 212.06(9), Fla. Stat. (1987), because this issue is not properly before this Court.

Fundamental appellate principles provide that the trial court's Order Granting Motion to Strike and removing the issue of the constitutionality or application of § 212.06(9), Fla. Stat. (1987), comes before the appellate court with a presumption of correctness. Herzog vs. Herzog, 346 So.2d 56 (Fla. 1977). The appellant has the burden of showing that the trial court erred in granting the motion to strike. Anderson vs. Miller,

359 So.2d 472 (Fla. 3d DCA 1978); Southern National Bank vs. Young, 142 So.2d 788 (Fla. 1st DCA 1962). Further, the granting of the Motion to Strike by the trial court obviously involved the lower court's discretionary function of ruling on evidentiary matters and should not be disturbed unless there has been a clear abuse of discretion. Kersey vs. State, 73 Fla. 832, 74 So. 983 (Fla. 1917).

The record shows that the Department of Revenue did not articulate legal arguments before the trial court contesting the order granting Motion to Strike (App. 475-504). It is also apparent that the Department has set forth no arguments in its Initial Brief that even question the exercise of the trial court's discretion in granting the Religious Publishers' Motion to Strike. Thus, this Court can only assume and find that the trial court properly exercised its discretion in granting the Religious Publishers' Motion to Strike since there has been no affirmative showing to the contrary. Anderson vs. Miller, supra.

Additionally, the Department of Revenue refers to the Order Granting Motion to Strike with approval on page 29 of its Initial Brief by arguing that this Order struck "from the record below any evidence which might tend to have demonstrated infringement" to the Religious Publishers. The Department attempts to rely on this part of the Order Granting Motion to Strike without

mentioning the earlier part of the Order which provided as follows:

> Intervenor parties', Florida Catholic Conference, Inc., Daughters of St. Paul, Inc., the Voice Publishing Company, Inc., and Florida Baptist Witness, Inc., Motion to Strike having come on for hearing, and after hearing argument for all parties, the court having 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, such motion is granted. (App. 145-148)

The Department of Revenue cannot have it both ways. It has raised no challenge to the validity of the trial court's Order Granting Motion to Strike by the Religious Publishers and has therefore abandoned any appropriate appellate review of the constitutionality or application of § 212.06(9), Fla. Stat. (1987). Duckham vs. State, 478 So.2d 347 (Fla. 1985).

Even if the Department had challenged the trial court's order granting Motion to Strike, the record discloses sufficient grounds in support of the trial court's order striking the issue of the constitutionality and application of the religious publication exclusion from this case. In the Magazines' Motion for Summary Judgment which led to the granting of the Final Judgment, the Magazines challenged only the constitutionality of the magazine tax under the Free Press Clause and Equal Protection Clause as a result of the different treatment given magazines and newspapers under the Florida Sales Tax statute. (App. 33-36) No challenge or reference was made in the Magazines' Motion for

Summary Judgment to the tax exclusion for religious publications under § 212.06(9), Fla. Stat. (1987) (App. 33-36). Thus, it was not only unnecessary, but improper for the trial court to look to the exclusion for religious publications in answering the issues raised by the summary judgment pleadings.

The obvious purpose of summary judgment is to determine if there is sufficient evidence to justify a trial on the issues made by the pleadings. Connolly vs. Sebeco, Inc., 89 So.2d 482 (Fla. 1956). The Magazines raised no issues in their summary judgment pleadings concerning the Establishment or Free Exercise Clauses of the United States Constitution. Nor did the Department of Revenue raise in its answer to the Complaint for Declaratory Judgment and Other Relief any affirmative defense concerning the Establishment Clause of the United States Constitution. (App. 7-16) Thus, the Florida Baptist Witness submits that it would have been unnecessary and improper for the trial court to have gone beyond the scope of the pleadings to consider the constitutionality and application of the religious publication exclusion under § 212.06(9), Fla. Stat. (1987).

This Court addressed the issue of a court's limited power in addressing constitutional questions in the case of State of Florida and Game and Freshwater Fish Commission vs. Turner, 224 So.2d 290 (Fla. 1969). The court stated as follows:

> This Court has, on a number of occasions, held that it is not only unnecessary, but improper for a court to pass upon the constitutionality of an act, the constitutionality of which is not challenged; that courts are not to consider a question of constitutionality which has not been raised by the pleadings, or which has not been raised by a person having the requisite interest. 224 So.2d 290, 291.

Similarly, in the case of Mott vs. Cochran, 117 So.2d 408 (Fla. 1960), the court ruled as follows:

> It is not a part of the judicial responsibility to undertake to invalidate them (statutes) unless the parties to the cause raise the question and assault the statute because of organic weaknesses. 117 So.2d 408, 409.

Likewise, in the case of Henderson vs. Antonacci, 62 So.2d 5 (Fla. 1952), the Florida Supreme Court applied these fundamental rules limiting a court's inherent power. In that case, a declaratory judgment action was brought by a group of used automobile dealers questioning the constitutionality of the state's Sunday closing laws. The question raised by the pleadings was whether the Sunday closing laws, as amended by the Laws of Florida, Acts of 1951, were constitutional. The trial court determined that the statute was unconstitutional, but went a step further and determined that the Sunday closing laws as

they existed before their amendment in 1951 were unconstitutional as well. On appeal, the Florida Supreme Court held that because the plaintiffs had prayed for relief only on the ground that the laws as amended in 1951 were unconstitutional, the trial judge exceeded his authority in holding the laws as they existed before such amendment unconstitutional. The court stated as follows:

> It is a well-established principal that the courts will not declare an act of the legislature unconstitutional unless its constitutionality is challenged directly by one who demonstrates that he is, or assuredly will be, affected adversely by it...courts should not voluntarily pass upon constitutional questions which are not raised by the pleadings. 62 So.2d 5 at 8.

The Magazines were entitled to pursue the theory of their own case in their Motion for Summary Judgment. Their theory was that the current sales tax exemption for newspapers, but not for magazines, is not constitutionally permissible under the "Free Press Clause" of the First Amendment and the "Equal Protection Clause" of the Fourteenth Amendment. Therefore, the Florida Baptist Witness maintains that the trial court had no jurisdictional power to examine the religious publication exclusion under § 212.06(9), Fla. Stat. (1987), and that the record shows sufficient grounds in support of the trial court's Order granting the Religious Publishers' Motion to Strike.

Finally, it is not an appellate function to decide extraneous matters on the mere suggestion that they may be collaterally related to the case under review. Lightsee vs. First National Bank, 132 So.2d 776 (Fla. 2d DCA 1961). The Department's attempts to draw the religious publication exclusion into this case in an effort to support its arguments under Point II of the appeal concerning the appropriate remedy to be applied in this case are without any basis under the record.

B. THE RELIGIOUS PUBLICATION EXCLUSION IS PERMITTED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Florida Baptist Witness offers the following arguments against the merits of the Department's position under Point II of its Initial Brief without in any way waiving its earlier objections to consideration of the constitutionality or applicability of the religious publications exclusion.

Regardless of the court's holding concerning the taxing of magazines versus newspapers under the Florida Sales and Use Tax statute, the exclusion for religious publications is permissible. In the recent case of Jimmy Swaggart Ministries vs. Board of Equalization of California, ___U.S.__, 110 S.Ct. 688, __L.Ed.2d__ (1990), (App. 684-697), the United States Supreme Court upheld California's imposition of a general sales and use tax on sales of religious materials by Jimmy Swaggart Ministries and ruled that the imposition of this tax did not violate the religion

clauses of the First Amendment. However, neither the California State Constitution nor the California State Sales and Use Tax Law exempted or excluded religious organizations from the sales and use tax. The court stated in its opinion that the Free Exercise Clause of the United States Constitution does not "require" the state to grant appellant an exemption from its generally applicable sales and use tax. It is important to note, however, that the Jimmy Swaggart decision in no way prohibits the individual state legislatures from granting an exclusion for religious publications and organizations under a state sales and use tax law, if they choose to do so.

The exclusion for religious publications under § 212.06(9), Fla. Stat. (1987), has been an historical part of the Florida Sales and Use Tax statute. This exclusion in substantially the same wording was a part of the Florida Revenue Act of 1949. Laws of Florida, 1949, c. 26319, Section 6. Bibles were included within this religious publications exclusion in 1951. Laws of Florida, 1951, c. 26871, Section 8. Thus, unlike the State of California, Florida has chosen to grant this exclusion, and no appropriate grounds have been raised in the record for considering or striking this long-standing provision.

Additionally, the Department cites to the cases of Texas Monthly, Inc., vs. Bullock, __ U.S. ___, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989), and United States vs. Lee, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982), in support of its argument that the religious publication exclusion is not constitutionally required by the First Amendment of the United States Constitution. Each of these cases can be distinguished from the case at bar.

In the Texas Monthly decision, a divided court ruled in a limited opinion that a Texas sales tax exemption granted to religious literature, but denied to other literature, violated the Establishment of Religion Clause of the First Amendment. The Plaintiff, a publisher of a general interest magazine, challenged the religious exemption provision in part under the Establishment Clause of the First Amendment.

It is important to note that the Department has raised no Establishment Clause issue in its Answer and Affirmative Defenses to the Complaint. (App. 7-16) Therefore, under the record and the principles cited above concerning the inability of a court to consider constitutional issues not properly raised, the issue of whether the Florida religious publication exclusion violates the "Establishment Clause" of the U.S. Constitution is simply not before this Court and Texas Monthly is inapplicable.

Further, even if the religious publication exclusion had been properly challenged under the "Establishment Clause," it is consistent with the rationale of Texas Monthly vs. Bullock, supra. The provisions of the Texas statute which granted an exemption to religious publications were much more narrowly drawn than Florida's religious exclusion under § 212.06(9), Fla. Stat. (1987). The Texas statute did not simply distinguish religious speech from commercial speech. It also distinguished between theistic and atheistic values. It exempted Christian literature, but taxed atheistic and secular humanistic literature. Justice Blackmun and Justice O'Connor reasoned in their concurring opinion that if the Texas statute exempted from taxation the sale of atheistic literature distributed by an atheistic organization, the Texas statute might survive Establishment Clause scrutiny, as well as Free Exercise and Press Clause scrutiny. 103 L.Ed.2d 1, at 22.

The rules of the Florida Department of Revenue define "religious publications" as "publications...sold or distributed by a church or religious institution, holding an exempt certificate..." Fla. Admin. Code Rule 12A-1.008(12)(b). These rules and the plain wording of § 212.06(9), Fla. Stat. (1987), show that this Court, unlike the court in the Texas Monthly case, is not "constrained to construe this ...statute as exempting religious literature alone." 103 L.Ed.2d 1, 22. The statute and

rules allow this Court to broadly construe the definition of religious publications without regard to the context of the religious organization's beliefs, whether they be theistic or non-theistic. This construction of the religious publication exemption would cause it to be consistent with the broader exemption which the Texas Monthly plurality indicated would pass constitutional scrutiny under the Establishment Clause. See Washington Ethical Society vs. District of Columbia, 249 F.2d 127 (D.C. Cir. 1957); Fellowship of Humanity vs. County of Alameda, 315 P.2d 394 (First District 1957).

Further, the court in Texas Monthly seemed especially concerned with the Texas sales tax exemption which required that "public officials determine whether some message or activity is consistent with 'the teachings of the faith.'" 103 L.Ed. 1 at 17. The Texas tax officials argued that they did not in fact heed the statutory command to grant exemptions only for publications that promulgated the teaching of a particular faith. Rather, they argued that Religious Publishers or distributors were allowed to determine whether their publications qualified for the exemption. The court rejected this argument because that practice was at odds with the plain statutory language and had not been embodied in the state tax regulations, and was open for future administrators to change.

The Florida religious publication exclusion and corresponding administrative rules, however, do not require the officials of the Florida Department of Revenue to determine whether a publication is consistent with the teachings of a religious faith.

Texas Monthly does not hold that a state can tax the exercise of religion. The State of Texas was not attempting to do so, and no religious organization was a party in that case.

The question of whether a tax exclusion for religious organizations is constitutionally permissible was simply not presented in that case.

Further, United States vs. Lee, supra, involved a situation in which no exemption or exclusion was provided to the taxpayer, Edwin D. Lee, who objected to the Social Security tax on religious grounds. Mr. Lee could not avoid the tax under the express language of the statute, and his only potential remedy lay in the court finding a constitutionally required exemption. Thus, the question before the court was not whether a tax exemption or exclusion given by a state or federal government was permissible, but simply whether a constitutional right to be free from the tax existed under the First Amendment. Again, Florida has chosen to grant the religious publication exclusion throughout the long history of the Florida Revenue Act, and the

record offers no grounds for finding this exclusion to be constitutionally impermissible under the First Amendment.

The record in the Lee decision, supra, indicated that the Social Security system represents by far the largest domestic governmental program providing a variety of benefits with costs shared by employers and employees. The court also referred to a senate report on Social Security which stated that "[W]idespread individual voluntary coverage under Social Security...would undermine the soundness of the Social Security program." On the basis of these and other findings, the court concluded that participation in the Social Security system must remain mandatory for the system to survive. Therefore, the court found that the government's interest in assuring mandatory participation was very great.

There is nothing in the record below to even faintly suggest, nor has the Department asserted, that the continuation of the religious publication exclusion would wreak havoc on the Florida sales tax system, as argued by the government in the Lee decision concerning the Social Security system.

Finally, the court in Texas Monthly, supra, and in Jimmy Swaggart Ministries, supra, recognized the importance of the record before them in reaching their decisions. The court indicated that the record showed no basis for a finding that the mere act of paying the tax, by itself, violated the sincere

religious beliefs of the appellants or that the payment of the tax would inhibit religious activity. Additionally, both of these decisions recognized that a more onerous tax rate, even if generally applicable, might effectively choke off an adherent's religious practices and might violate the Free Exercise Clause.

Therefore, the Florida Baptist Witness submits that if this Court for some reason determines that the trial court erred in removing the exclusion for religious publications from consideration in this case, this matter should be remanded so that an appropriate record can be developed on this issue.

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 rules that the tax on magazines is unlawful and further determines that the religious publication exclusion is impermissible, it is the position of the Florida Baptist Witness that the appropriate remedy would be to strike the tax on magazines and uphold the balance of the statute, including the religious publication exclusion.

The United States Supreme Court has stated that where a statute is defective because of underinclusion, there are two remedial alternatives: a court may either 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. Heckler vs. Mathews, 465 U.S. 728, 738, 79 L.Ed.2d 646, 104 S.Ct. 1387; Califano vs. Wescott, 443 U.S. 76, 89, 61 L.Ed.2d 382, 99 S.Ct. 2655; Welsh vs. United States, 398 U.S. 333, 361, 26 L.Ed.2d 308, 90 S.Ct. 1792. Further, the United States Supreme Court has indicated that extension, rather than nullification, is the proper course in providing a remedy for a statute which is defective because of underinclusion. Califano vs. Wescott, supra, 443 U.S. 76 at 89. Additionally,

the United States Supreme Court stated that the courts should consider the effect of the remedy on the statutory scheme and not use its remedial powers to circumvent the intent of the legislature. Califano vs. Wescott, supra, 443 U.S. at 94; Welsh vs. United States, supra, 398 U.S. at 333.

Florida principles provide that although a portion of the statute is unconstitutional, the remainder of the statute will be upheld if that which is left is complete in itself, sensible, capable of being executed, and wholly independent of that which is rejected. Kass vs. Lewin, 104 So.2d 572, 577 (Fla. 1958). The test is whether the court can say the legislature would not have enacted the law under scrutiny except for the provision which is held unconstitutional. State ex. rel. Limpus vs. Newell, 85 So.2d 124, 128 (Fla. 1956).

In looking to the legislative intent under the Florida Sales and Use Tax statute, the Legislature provided some guidelines concerning the issue of severability by enacting § 212.21, Fla. Stat. (1987), which provides as follows:

> (1) If any section, subsection, sentence, clause, phrase or word of this chapter is for any reason held or declared to be unconstitutional, invalid, inoperative, ineffective, inapplicable, or void, such invalidity or unconstitutionality shall not be construed to affect the portions of this chapter not so held to be unconstitutional, void, invalid, or ineffective, or affect the application of this chapter to other circumstances not so held to be invalid, it being hereby declared to be the express legislative intent that any such unconstitutional, illegal, invalid, ineffective,

> inapplicable, or void portion or portions of this chapter did not induce its passage, and that without the inclusion of any such unconstitutional, illegal, invalid, ineffective, or void portions of this chapter, the Legislature would have enacted the valid and constitutional portions thereof.

Subsections 2, 3, 4, and 5 of Section 212.21, Fla. Stat. (1987), provide additional express legislative intent concerning severability.

Further, in looking to the statutory scheme under the Florida Sales and Use Tax statute, it is clear that religious publications have been treated differently than newspapers. Unlike the exemption granted newspapers under the statute, the Religious Publishers are not subject to the Florida Sales and Use Tax as a result of an exclusion under § 212.06(9), Fla. Stat. (1987).

Based upon the legislative intent and statutory scheme of Chapter 212, Fla. Stat. (1987), and the state and federal law concerning severability of unconstitutional provisions, the Florida Baptist Witness contends that the appropriate remedy in this case is to strike the tax on magazines and uphold the remainder of the statute, including the exclusion for religious publications. This course will uphold the preferred remedy of extending tax benefits to the magazines who are aggrieved by the alleged underinclusions under the sales tax statute. It will also allow the court to apply a remedy that will preserve the

greater part of the statutory scheme and legislative intent of Chapter 212, Fla. Stat., and limit the court's involvement in the legislative realm.

The Florida Legislature has provided that religious publications shall not be taxed. This policy is embedded in the history of the Florida Revenue Act of 1949. The remedy for the differential treatment between magazines and newspapers can be made without impairing the long-standing legislative goal of excluding religious publications from the sales tax.

CONCLUSION

Appellee, Florida Baptist Witness, Inc., respectfully requests this Court to uphold the trial court's decision as it relates to Religious Publishers. If for any reason the court must consider the constitutionality of the religious publications exclusion, the Florida Baptist Witness requests that the exclusion be upheld as constitutionally permissible under the First Amendment of the United States Constitution. In the alternative, the Florida Baptist Witness would request that this issue be remanded for the development of a complete record on this issue. Finally, if the court reaches the merits of the religious publication exclusion and finds it to be underinclusive in scope, the Florida Baptist Witness requests this Court to apply the remedy of enlarging the exclusion to apply to the sale of magazines.

Respectfully submitted this 16th day of February, 1990.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by United States Mail this 16th day of February, 1990, to the following:

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