IN THE SUPREME COURT OF FLORIDA

Case No. SC05-873

On review of
District Court of Appeal Case No. 1D03-3325

THE WICCAN RELIGIOUS COOPERATIVE OF FLORIDA, INC.,

Petitioner,

v.

JIM ZINGALE and THE FLORIDA DEPARTMENT OF REVENUE

Respondents.

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STATEMENT OF THE CASE AND FACTS

Petitioner, the Wiccan Religious Cooperative of Florida, Inc., ("Wiccan") seeks review of a decision of the First District holding that Wiccan lacked standing to challenge the constitutionality of a tax statute.

A. Background

Wiccan, a Florida not-for-profit corporation exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code, applied for and was granted a Florida consumer's certificate of exemption[1] on May 6, 1993, which expired five years later, on May 6, 1998. R. VI/1062. On December 18, 1999, more than a year after the certificate expired, Wiccan filed an application for a new consumer's certificate. R. VI/1075-76. After receiving the application, the Department of Revenue ("Department") notified Wiccan on at least two occasions that it needed to submit additional documentation to complete its application. R. VI/1077. Wiccan did not respond to the requests and did not provide the necessary documentation to the Department. The Department notified Wiccan that due to its failure to respond to the information requests, the Department was unable to determine if Wiccan legally qualified for a consumer's certificate of exemption and had closed its file on the application request. R. VII/1154. Wiccan did not respond to the

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[1] A consumer's certificate of exemption permits the holder to purchase items

Department's notice or pursue applicable administrative remedies. R. VI/1077.

Wiccan filed this action in circuit court on October 31, 2000. R. I/1. On August 11, 2001, nine months after filing this action, Wiccan purchased the Satanic Bible, the Koran and the "Gift and Award Bible" from Barnes & Noble. R. II/311. Wiccan was erroneously charged 45 cents in sales tax on its purchase of the Satanic Bible but was not charged sales tax on its purchase of the other books. R. II/311.

B. Course of Proceedings

After its initial and amended complaints were dismissed, Wiccan filed a second amended complaint on June 15, 2001, which (1) raised various constitutional challenges to section 212.06(9), Florida Statutes[2], a sales tax exemption provision, (2) challenged the constitutionality of section 741.07, Florida's marriage statute, (3) challenged the constitutionality of section 212.08(7)(m) and (p), and (4) alleged that it was improperly and unlawfully denied a

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without paying Florida sales and use tax.

[2] Section 212.06(9) states:

> The 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. (2005).

renewal of its certificate of exemption from Florida sales and use tax. R. II/199-263. Wiccan stated in its complaint that it "wishes to sell religious publications and paraphernalia to its members, and other interested parties without collecting sales and use tax." R. II/204, ¶12.

The trial court granted the Department's motion for summary judgment. Although the court rejected the Department's assertion that Wiccan lacked standing, it held that the challenged statutes were constitutional, and Wiccan failed to exhaust its administrative remedies regarding the renewal of its certificate of exemption. R. VII/1246-50.

Wiccan appealed the trial court's ruling to the First District, arguing only that the court erred in finding that section 212.06(9) did not violate the Establishment and Free Press Clauses of the United States Constitution. The Department argued in response that Wiccan was without standing to bring such a challenge. In its reply, Wiccan argued it had standing as a taxpayer, had suffered actual harm, and had associational standing. The First District held Wiccan lacked standing and reversed and remanded for the case to be dismissed on that basis. *Wiccan Religious Cooperative of Florida, Inc. v. Zingale*, 898 So. 2d 134, 136 (Fla. 1st DCA 2005). The district court held that Wiccan benefits from the challenged tax exemption, and further held that Wiccan "fails to have the adverse interest

necessary for standing and is not the proper party to assert the instant constitutional challenge." *Id.* at 136. The court did not address taxpayer standing and declined to address the constitutionality of section 212.06(9).

In its jurisdictional brief, Wiccan asserted as a basis for this Court's jurisdiction that the First District's decision is in express and direct conflict with decisions of other district courts and this Court on issues of taxpayer standing, and further argued that the First District's decision expressly construes a provision of the constitution. This Court accepted jurisdiction in a four-to-three decision.

SUMMARY OF ARGUMENT

Wiccan has failed to present a valid basis for this Court's exercise of jurisdiction in this case. The First District's decision does not expressly and directly conflict with any decision of another District Court of Appeal or this Court. Wiccan alleges the decision conflicts with cases addressing taxpayer standing, however, the First District's decision in this case does not even mention taxpayer standing. Likewise, the First District's decision does not expressly construe a provision of the state or federal constitution. The decision merely applies well-established case law on standing.

At the time this action was filed, Wiccan lacked standing to bring this declaratory judgment action. Wiccan demonstrated no bona fide present need for

the declaration it seeks in this case. In fact, the declaratory judgment sought by Wiccan is directly contrary to its own stated interests in this case.

Wiccan can not assert taxpayer standing in this case. The only evidence in the record that Wiccan paid tax and the only allegation by Wiccan that it ever paid tax was a reference to tax paid in error in August 2001, more than nine months after this action was filed. Standing is determined as of the time an action is filed.

Associational standing is likewise inapplicable. Associational standing in Florida has only been applied in the context of chapter 120 administrative actions and condominium association actions specifically provided for by statute. Outside of these contexts no Florida court has recognized an association's right to bring an action on behalf of its members.

It is a well-established principle that the constitutionality of statutes should not be addressed when cases may be disposed of on other grounds. Because this case may be disposed of on the grounds that (1) Wiccan has presented no valid basis for this Court's jurisdiction or (2) Wiccan lacked standing to bring this action, the Court should not address the constitutionality of section 212.06(9).

STANDARD OF REVIEW

Whether a party has standing to bring an action is a question of law to be reviewed *de novo*. *See Execu-Tech Bus. Sys. v. New Oji Paper Co.*, 752 So. 2d

582 (Fla. 2000); *Alachua County v. Scharps*, 855 So. 2d 195, 198 (Fla. 1st DCA 2003).

Whether a statute is facially unconstitutional is a question of law, subject to *de novo* review. *City of Miami v. McGrath*, 824 So. 2d 143, 146 (Fla. 2002). A statute comes before the court clothed with a presumption of constitutionality. *Dep't of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.*, 434 So. 2d 879, 881 (Fla. 1983). All doubts as to constitutionality are to be resolved in favor of the statute. *See State v. Yocum*, 186 So. 448, 451 (Fla. 1939); *see also Capital City Country Club v. Tucker*, 613 So. 2d 448, 452 (Fla. 1993) (courts must interpret statutes in such a manner as to uphold their constitutionality if it is reasonably possible to do so.); *Knight and Wall Co. v. Bryant*, 178 So. 2d 5 (Fla. 1965) (an act will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt.).

ARGUMENT

I. WICCAN HAS PRESENTED NO VALID BASIS FOR THIS COURT'S EXERCISE OF JURISDICTION

Wiccan asserted as a basis for jurisdiction that the First District's decision conflicts with three decisions from other district courts and this Court. In addition, Wiccan alleged the First District's decision construes a

constitutional provision. For the reasons discussed below, neither basis for jurisdiction exists and this case should be dismissed for lack of jurisdiction.

A. The First District's decision does not conflict with decisions of other District Courts of Appeal or this Court

Wiccan asserts that the First District's decision conflicts with *Department of Administration v. Horne*, 269 So. 2d 659 (Fla. 1972), *Paul v. Blake*, 376 So. 2d 256 (Fla. 3d DCA 1979), and *Department of Education v. Lewis*, 416 So. 2d 455 (Fla. 1982). However, each of the cases cited by Wiccan concerns a taxpayer challenge to an appropriations or tax statute, whereas in this case the district court rejected Wiccan's attempts to characterize itself as a taxpayer. Although Wiccan alleges in its briefs to this Court that it was a taxpayer bringing a challenge to a tax statute, no such facts appear within the four corners of the district court's opinion. In fact, the record contains no evidence that Wiccan paid tax prior to filing this action. Rather than rule on the issue of taxpayer standing, the court applied well-established case law on standing and held that Wiccan "fails to have the adverse interest necessary for standing and is not the proper party to assert the instant constitutional challenge." *Wiccan*, 898 So. 2d at 136.

In *Horne*, taxpayers brought a declaratory judgment action seeking to declare portions of a general appropriations act unconstitutional. 269 So. 2d at 660. The

Court held that the taxpayers' allegations that portions of the appropriations act were unconstitutional presented a valid exception to the general standing requirement and no showing of special injury was required. Accordingly, the Court held that the taxpayers' allegations satisfied "the requirement for 'standing' to attack an appropriations act." *Id*. at 662.

In *Blake*, the Court considered whether a county taxpayer has standing to bring a declaratory decree and injunctive action against public officials of the county when the action seeks to enjoin the grant of certain tax exemptions as unconstitutional. The court held that "the taxpayer has standing to bring such an action without making a showing that the grant of such exemptions inflicted a special injury upon him which is distinct from that sustained by every other taxpayer in the county." *Blake*, 376 So. 2d at 258. Relying on this Court's holding in *Horne*, the court stated:

> One exception to the special injury standing requirement in taxpayer suits has been established. A taxpayer may institute such a suit without a showing of special injury if he attacks the exercise of the state or county's taxing or spending authority on the ground that it exceeds specific limitations imposed on the state or county's taxing or spending power by the United States Constitution or the Florida Constitution.

Id.

In *Lewis*, the Court considered whether the Florida Department of Education,

State Board of Education, and the Commissioner of Education, in his official capacity, had standing to bring a complaint seeking a declaratory judgment that portions of an appropriations bill were unconstitutional. The Court held that although the appellants did not have standing in their official capacity, certain appellants did have standing as ordinary citizens and taxpayers to bring a constitutional challenge to the appropriations bill at issue. *Lewis*, 416 So. 2d at 459.

Each of the cases discussed above concern constitutional challenges by taxpayers to the state or county's taxing or spending authority. Wiccan is not a taxpayer bringing such a challenge and the district court did not characterize Wiccan as a taxpayer in its decision. The majority's decision makes no mention of taxpayer standing and announced no principle of law contrary to the above cited cases. Notably, Wiccan did not pay tax until nine months after this action was filed.[3] Thus, Wiccan could not assert taxpayer standing in this case.

Because the First District majority did not address taxpayer standing and instead applied general standing requirements, the First District's decision is not in express and direct conflict with *Horne*, *Lewis*, or *Blake*.

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[3] Wiccan's sole allegation was that it paid 45 cents of sales tax on August 11, 2001. R. II/311. This action was filed on October 31, 2000. R. I/1.

B. Constitutional construction

The First District's decision does not expressly construe a provision of the state or federal constitution. The decision merely applies relevant case law on standing. For purposes of this Court's jurisdiction, this Court has held that an opinion or judgment does not construe a provision of the constitution unless it undertakes "to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision." *Ogle v. Pepin*, 273 So. 2d 391, 392 (Fla. 1973) (quoting *Armstrong v. City of Tampa*, 106 So. 2d 407, 409 (Fla. 1958)). Mere application of existing case law does not provide a basis for this Court's jurisdiction.

Because the First District's decision does not conflict with a decision of other district courts or this Court and does not expressly construe a constitutional provision, this case should be dismissed for lack of jurisdiction. *See Pedroza v. State*, 906 So. 2d 1059, 1059 (Fla. 2005); *Sutton v. State*, 30 Fla. L. Weekly S495, S495 (Fla. 2005).

II. WICCAN LACKED STANDING TO CHALLENGE THE CONSTITUTIONALITY OF SECTION 212.06(9)

Wiccan lacked standing to file a declaratory judgment action challenging the constitutionality of section 212.06(9). Wiccan was not a taxpayer as of the date this action was filed, and had no bona fide need for the declaratory judgment requested in this case. In addition, Wiccan may not challenge the statute on the basis of associational standing.

A. Wiccan lacked standing to maintain a declaratory judgment action

This Court has held that:

> before any proceeding for declaratory relief should be entertained it should be clearly made to appear that there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interest are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity.

May v. Holley, 59 So. 2d 636, 639 (Fla. 1952). "These elements are necessary in order to maintain the status of the proceeding as being judicial in nature and therefore within the constitutional powers of the courts." *Id.*

The courts have no power to entertain a declaratory judgment action which involves no present controversy as to the violation of a statute, and where the judgment sought will not constitute a binding adjudication of the rights of the parties. *See Askew v. Ocala*, 348 So. 2d 308, 310 (Fla. 1977). Absent a bona fide need for a declaration based on present, ascertainable facts, the circuit court lacks jurisdiction to render declaratory relief. *Martinez v. Scanlon*, 582 So. 2d 1167, 1170 (Fla. 1991) (citing *Ervin v. Taylor*, 66 So. 2d 816 (Fla. 1953))*; see also Dep't of Revenue v. Markham*, 396 So. 2d 1120, 1121 (Fla. 1981) ("Disagreement with a constitutional or statutory duty, or the means by which it is to be carried out, does not create a justiciable controversy or provide an occasion to give an advisory judicial opinion."). Further, "a party seeking an adjudication as to the constitutionality of a statute must show that he or she has been charged with violating the statute, is threatened for prosecution for violation of the statute, or that the adjudication requested will otherwise affect his or her rights." *State v. Flowers*, 643 So. 2d 644, 645 (Fla. 1st DCA 1994) (citing *Martinez,* 582 So. 2d at 1171).

Wiccan sought a declaration in this case that section 212.06(9), as well as other statutes, facially violates the Establishment Clause and Free Press Clause of the United States Constitution. Wiccan argues it needs such a declaration because it is unsure whether its own publications are exempt from sales tax under the

statutory provision. However, the relief Wiccan seeks – a declaration that section 212.06(9) is facially unconstitutional, *see* R. II/209, ¶43, is adverse to Wiccan's stated interests.[4] Wiccan alleged in its Second Amended Complaint that it "wishes to sell religious publications and paraphernalia to its members, and other interested parties *without collecting sales and use tax*." R. II/204, ¶12 (emphasis added). As the First District stated, "Wiccan, as a religious organization, benefits from the sales tax exemption. Accordingly, Wiccan fails to have the adverse interest necessary for standing and is not the proper party to assert the instant constitutional challenge." *Wiccan,* 898 So.2d at 136. Because the declaration requested by Wiccan is directly adverse to its own self-proclaimed interest in this case, Wiccan does not have a bona fide, actual, present practical need for such a declaration.

In addition, Wiccan has failed to show it has any "immunity, power, privilege or right" which is dependent upon the declaration requested. *May,* 59 So. 2d at 639. "While one may seek a declaration of his or her rights without an allegation of actual injury, an aggrieved party must nonetheless make some showing of a real

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[4] Had Wiccan sought a declaratory judgment as to the applicability of the exemption to its publications, such a request may have been the proper subject of a declaratory judgment action. In fact, the Department has advised Wiccan that its publications qualify for tax exempt status pursuant to section 212.06(9). Thus, no controversy on this issue exists. *See Santa Rosa County v. Administration Comm'n, Div. of Admin. Hearings*, 661 So. 2d 1190, 1192 (Fla. 1995) (declaratory relief not available after settlement of the parties' dispute).

threat of immediate injury, rather than a general, speculative fear of harm that may possibly occur at some time in the indefinite future." *State v. Fla. Consumer Action Network*, 830 So. 2d 148, 152 (Fla. 1st DCA 2002); *see also State ex rel. Clarkson v. Philips,* 70 So. 367, 369 (Fla. 1915) ("The constitutionality of a provision of a statute cannot be tested by a party whose rights or duties are not affected by it, unless the provision is of such a nature that it renders invalid a provision of the statute that does affect the party's rights or duties."); *Sancho v. Smith*, 830 So. 2d 856, 864 (Fla. 1st DCA 2002) ("A party who is not adversely affected by a statute generally has no standing to argue that the statute is invalid."). The declaration requested by Wiccan would not affect any immunity, power, privilege or right.

Wiccan lacks both a bona fide need for the declaratory judgment requested and the adverse interest necessary to maintain this action. Accordingly, the declaratory judgment action should be dismissed. *See Santa Rosa County v. Administration Comm'n, Div. of Admin. Hearings*, 661 So. 2d 1190, 1193 (Fla. 1995) (absent a bona fide need for a declaration based on present, ascertainable facts, the circuit court lacks jurisdiction to render declaratory relief); *Fla. Consumer Action Network*, 830 So. 2d at 153 (because all allegations in the complaint regarding each plaintiff's need for a declaratory decree were grounded on

speculation and hypothesis, declaratory relief was improper).

B. Taxpayer standing does not apply in this case

An exception to the general declaratory judgment standing requirements exists when the plaintiff is a taxpayer raising a constitutional challenge to a taxing and spending statute. However, being a "taxpayer" is clearly an essential requirement to asserting "taxpayer" standing. *See Rosenhouse v. 1950 Spring Term Grand Jury*, 56 So. 2d 445, 448 (Fla. 1952) (appellant as a taxpayer has the right to institute such action because of his interest in the expenditure of public moneys); *see also Women's Emergency Network v. Bush*, 323 F.3d 937, 944 (11th Cir. 2003) (demonstrating that actual payment of tax is essential to taxpayer standing). Wiccan did not allege in its complaint that it was a taxpayer and there is no evidence in the record that Wiccan was a taxpayer at the time this action was filed. Accordingly, the taxpayer standing exception is irrelevant.

Standing is a threshold jurisdictional issue which must be determined as of the date the suit was filed. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571 (U.S. 1992). The sole basis in the record upon which Wiccan now claims to be a Florida taxpayer is a receipt dated August 11, 2001, more than nine months after this action was filed.[5] R. II/311, Init. Br. at 9-10. Thus, there is no evidence in the record that

[5] In any event, the items purchased were exempt from tax under the statute

Wiccan was a taxpayer at the time this action was filed. A "plaintiff's lack of standing at the inception of the case is not a defect that may be cured by the acquisition of standing after the case is filed." *Progressive Express Ins. Co. v. McGrath Community Chiropractic,* 913 So. 2d 1281 (Fla. 2d DCA 2005); *see also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 69 (1987) (Scalia, J., concurring) ("Subject matter jurisdiction depends on the state of things at the time of the action brought). Because Wiccan was not a taxpayer at the time this action was filed, Wiccan may not assert and rely upon taxpayer standing. The First District properly declined to apply taxpayer standing in this case.

C. Associational standing does not apply in this case.

Contrary to Wiccan's assertions, the doctrine of associational standing is of limited application in Florida. This Court has recognized associational standing in the context of administrative rule challenges filed pursuant to section 120.56, Florida Statutes. *See generally Florida Home Builders Ass'n v. Dep't of Labor and Employment Security*, 412 So. 2d 351 (Fla. 1982). However, this Court made clear in *Palm Point Property Owners' Association v. Pisarski,* 626 So. 2d 195 (Fla.

Wiccan is challenging and no tax should have been paid. Wiccan could have pursued a refund from the book seller pursuant to 215.26, Florida Statutes. Furthermore, 501(c)(3) corporations are entitled to receive a Florida consumer's certificate of exemption from sales tax. Wiccan would not have paid the forty-five cents in tax, in error or otherwise, if it had not abandoned its application for a

1993), "our recognition of associational standing in the chapter 120 context was not a blanket adoption of the doctrine." *Id.* at 197. In the administrative context, "[g]ranting trade and professional associations standing to represent their members was necessary in order to further the legislative purpose of expanding the public's ability to contest the validity of agency rules." *Id.*

In addition to the administrative context, condominium associations have been granted limited statutory power to bring actions on behalf of their members. *See* § 718.111(2), Fla. Stat. Prior to the adoption of this statute, "class actions brought by an association were dismissed on the ground that the association lacked standing since it was not a real party in interest." *Hendler v. Rogers House Condominium, Inc.*, 234 So. 2d 128 (Fla. 4th DCA 1970); *see also Rubenstein v. Burleigh House, Inc.*, 305 So. 2d 311 (Fla. 3d DCA 1974). No Florida court has applied associational standing under circumstances similar to those presented here.

The associational standing argument presented by Wiccan is similar to that presented in *Florida Bar Owners, Inc. v. Department of Business Regulation, Division of Beverage*, 440 So. 2d 15 (Fla. 1st DCA 1983), in which the First District denied association standing to Florida Bar Owners, a nonprofit corporation consisting of small bar owners, that filed a declaratory judgment action seeking to

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consumer's certificate of exemption.

have declared unconstitutional a Florida statute which limited the number of liquor licenses that may be issued in any one county. *Id.* at 16. The First District held that because there was no evidence that Florida Bar Owners as an entity had ever "applied for or been denied a liquor license," Florida Bar Owners was not entitled to seek declaratory relief. *Id*. Accordingly, the First District affirmed the trial court's dismissal and declined to address the constitutional question presented. *Id.*

Wiccan is likewise not entitled to seek the declaratory relief requested because there is no evidence in this case that Wiccan as an entity paid tax prior to the time suit was filed or was otherwise adversely affected by section 212.06(9).

III. THE CONSTITUTIONAL CHALLENGE IN THIS CASE SHOULD NOT BE ADDRESSED.

A. This case can be disposed of on other grounds.

It is a well settled rule that "courts should not pass upon the constitutionality of statutes if the case in which the question arises may be effectively disposed of on other grounds. *Singletary v. State*, 322 So. 2d 551, 552 (Fla. 1975); *see also Metropolitan Dade County Transit Authority v. State Dep't of Highway Safety & Motor Vehicles*, 283 So. 2d 99, 101 (Fla. 1973) (constitutional questions may not be addressed whenever the case can be disposed of on a non-constitutional ground). Because this case may be disposed of on the grounds discussed above,

this Court should decline to address the constitutional issues presented in this case.

B. Arguments concerning article I, section 3 of the Florida Constitution may not be raised for the first time on appeal.

Wiccan asserts in its initial brief that section 212.06(9) violates article I, section 3 of the Florida Constitution. This argument was not raised in the trial court and was not considered by the First District. It may not now be raised for the first time before this Court. *See Fla. Dep't of Fin. Servs. v. Freeman*, 2006 Fla. LEXIS 35 (Fla. January 26, 2006) (citing *Turner v. State,* 888 So. 2d 73, 74 (Fla. 5th DCA 2004)); *Sanford v. Rubin*, 237 So. 2d 134 (Fla. 1970); *Gautier v. Biscayne Shores Imp. Corp.*, 68 So. 2d 386, 390 (Fla. 1953).

C. Chapter 212, Florida Statutes, provides a number of broad sales and use tax exemptions.

The statutory provision at issue in this case, section 212.06(9), is but one of a number of broad sales tax exemptions which exempt from tax an array of items, including groceries, § 212.08(1), certain medical items, § 212.08(2), farm equipment, § 212.08(3), certain educational materials, § 212.08(5)(m) and § 212.08(6)(r), and certain magazine and newspaper subscriptions, § 212.08(6)(w), among others. Section 212.06(9) exempts from taxation "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. (2005). Although the United States Supreme Court in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), invalidated a similar Texas statutory provision on Establishment Clause grounds, Florida's sales tax statute taken as a whole exempts a much broader array of items than the Texas statute at issue in *Texas Monthly* and may be distinguished on that basis.

Even if this case were not distinguishable from *Texas Monthly*, it should be noted that the plurality decision in *Texas Monthly* is inconsistent with past Supreme Court precedent, as Justice Scalia recognized in his dissent, and merits revisiting. Nevertheless, because the First District's decision does not conflict with decisions of other district courts or this Court and because Wiccan lacks standing to challenge the statute at issue, the constitutionality of this provision need not be addressed.

CONCLUSION

The Department respectfully requests that this Court dismiss this case for lack of jurisdiction or in the alternative affirm the First District's decision in this case.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by **U.S. Mail,** postage prepaid, to Heather Morcroft, Counsel for Petitioner, 5278 Fayann St., Orlando, FL 32812, this ____ day of February 2006:

____
JAMES A. MCKEE
Deputy Solicitor General

CERTIFICATE OF COMPLIANCE

Pursuant to Fla. R. App. P. 9.210(a)(2), I certify that this computer-generated brief is prepared in Times New Roman 14-point font and complies with the font requirement of Rule 9.210, Florida Rules of Appellate Procedure.

____
JAMES A. MCKEE
Deputy Solicitor General