

**IN THE SUPREME COURT OF FLORIDA**

Case No. SC05-873

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

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**THE WICCAN RELIGIOUS COOPERATIVE OF FLORIDA, INC.,**

Petitioner,

v.

**JIM ZINGALE and THE FLORIDA DEPARTMENT OF REVENUE,**

Respondents.

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**AMICUS CURIAE BRIEF OF THE FLORIDA CATHOLIC, INC.,  
AND FLORIDA BAPTIST WITNESS, INC., IN SUPPORT OF  
RESPONDENTS**

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## **STATEMENT OF IDENTITY AND INTERESTS**

The Florida Catholic is a bi-weekly publication produced by The Florida Catholic, Inc. (“The Florida Catholic”), to bring news and commentary from a Catholic perspective to its subscribers across the state of Florida. The newspaper provides a variety of information to help its subscribers understand the Catholic Church, the Dioceses in Florida, and current events throughout the United States and the world. The Florida Catholic is owned jointly by the Dioceses of Orlando, St. Petersburg, Pensacola-Tallahassee, Venice, Palm Beach, and the Archdiocese of Miami.

Since 1884, Florida Baptist Witness has been the official newspaper of the Florida Baptist State Convention (FBSC), comprised of 2,700 churches and missions, with one million members. Owned by Florida Baptist Witness, Inc. (“Florida Baptist Witness”), and published 46 times per year, Florida Baptist Witness seeks to promote FBSC causes, the Baptist cause in general, and the promotion of the kingdom of God on Earth; and, in order to attain these ends, to maintain and safeguard the inalienable rights and privileges of a free press, consistent with the traditional Baptist emphasis upon freedom, under Christ, of both the human spirit and Baptist churches.

The interests in this case of both The Florida Catholic and Florida Baptist Witness (collectively “Amici Curiae”) is the constitutionality of Section 212.06(9),

Fla. Stat. (2005). Amici Curiae have a direct interest in upholding the constitutionality of this statute because they do not charge sales tax to their subscribers based in part on the statutory exemption for religious publications contained in Section 212.06(9). Amici Curiae advocate the protection of the First Amendment rights of religious organizations and publications, and the proper development of the Court's jurisprudence in that regard.

### **SUMMARY OF ARGUMENT**

In an appeal rife with procedural flaws, the Petitioner asks this Court to take *de novo* review of constitutional issues not addressed by the District Court of Appeal. Amici Curiae respectfully suggest that this case should be dismissed due to lack of jurisdiction or due to the Petitioner's lack of standing. The Amici Curiae support in their entirety the procedural arguments raised by the Respondents.

If the Court should decide to reach the constitutional issue, the substantive issues raised by the Petitioner are similarly unavailing. This is not a new or novel constitutional issue warranting the Supreme Court's intervention. Indeed, "[t]here is no genuine nexus between tax exemptions and the establishment of religion." *Walz v. Tax Commission*, 397 U.S. 664, 675 (1970). The law is well-settled, and the Petitioner can rely only on a skewed reading of a plurality opinion in a case involving a non-analogous statutory scheme to foment an argument challenging



Section 212.06(9), Fla. Stat. (2005). In so doing, the Petitioner ignores a litany of cases supporting the statutory scheme adopted by the Florida Legislature.

Legislatures have the prerogative and discretion to adopt regulations or laws even if they result in some benefit for religions, provided that the benefit is consistent with a legitimate statutory scheme or purpose. *See Locke v. Davey*, 540 U.S. 712 (2004). A tax exemption created in the legislature's prerogative passes constitutional muster if it advances a state interest, does not promote one religion over another, and has a *de minimus* impact on non-beneficiaries. Section 212.06(9) easily meets this standard.

Congress and state legislatures have, throughout the history of this Country, passed laws benefiting religions in some respect. These laws have allowed for parochial school children to receive public busing, free text books, and other accommodations. In the area of tax exemptions, both before and after the adoption of the Bill of Rights, state legislatures, and ultimately the courts, have found it prudent to avoid entanglement of religion with the state taxation process by providing exemptions for religious properties, publications, and other religious-based activities. These tax exemptions, like Section 212.06(9), are usually contained among a litany of exemptions for activities the legislature, in its wisdom, deems beneficial to the state and local communities.

Section 212.06(9) also has a *de minimus* impact on the State's taxation scheme. The financial impact of the exemption is less than one percent of the ten billion dollars in exemptions in the statute, exemptions extended to, among 236 other categories, non-profit civic theatre tickets, environmental equipment, hospital physical fitness facilities, human organs, and the sale of state flags. Moreover, the legislature has chosen to exempt other non-religious publications that it similarly believes serve a state interest, such as certain newspapers, newsletter subscriptions, community newspapers, school books, and similar publications distributed or used by elementary and high schools, and publications for the Retired Educators Association. Under these circumstances, the exemption for religious publications does not place an undue burden on non-beneficiaries of the tax exemption. Section 212.06(9) certainly passes muster as a proper exercise of legislative discretion and is constitutional. Accordingly, the decision below should be affirmed.

### **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. Sharps*, 855 So. 2d 195, 198 (Fla. 1<sup>st</sup> 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,

*Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc.*, 434 So. 2d 879, 881 (Fla. 1983), and 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. THE COURT SHOULD NOT CONSIDER THE SUBSTANTIVE CONSTITUTIONAL ISSUES RAISED BY PETITIONER BECAUSE FACTUAL AND LEGAL ISSUES WERE NOT FULLY DEVELOPED AND ADDRESSED IN THE LOWER COURTS.<sup>1</sup>**

The constitutional issue raised by Petitioner was not fully developed or addressed by the District Court of Appeal because it found Petitioner lacked

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<sup>1</sup> The Respondents' Brief adequately and persuasively addresses this Court's lack of jurisdiction and Petitioner's lack of standing. Amici Curiae adopt the position advanced by the Respondents. *See* Brief of Respondents at 6-18; *see also Pedroza v. State*, 906 So. 2d 1059 (Fla. 2005); *Sutton v. State*, 30 Fla. L. Weekly S495 (Fla. 2005); and *May v. Holley*, 59 So. 2d 636, 639 (Fla. 1952) (Petitioner's failure to show an "immunity, power, privilege, or right" to be remedied by the requested declaration defeats standing). The arguments that follow are submitted because the Court might (but should not) seek to address the constitutional issues Petitioner attempts to raise in this appeal.

standing to raise the issue.<sup>2</sup> The Court should similarly dispose of Petitioner's claims on standing issues without having to reach the constitutional issues raised by Petitioner. If, however, this Court reverses the District Court of Appeal's holding as to standing, the constitutional issue should be remanded to the District Court of Appeal for consideration. *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) (when the case can be disposed of on a non-constitutional ground, constitutional questions may not be addressed). Sound jurisprudence principles and the orderly administration of justice warrant a remand in these circumstances. There is simply no reason, nor basis, for this Court to wade into this substantial constitutional issue without the benefit of a full record and full consideration below. Accordingly, if the Court were inclined to find that Petitioner has standing to challenge the statute's constitutionality, the case should be remanded with instructions to the District Court of Appeal to consider the trial court's decision holding Section 212.06(9) constitutional.

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<sup>2</sup> This brief addresses only Petitioner's claim that Section 212.06(9) violates the federal Constitution. Petitioner's newly-asserted claim that the statute violates the Florida Constitution was not raised below and may not be raised on appeal. *See Florida Dep't. of Fin. Servs. v. Freeman*, 2006 Fla. LEXIS 35 (Fla. Jan. 26, 2006) (citing *Turner v. State*, 888 So. 2d 73, 74 (Fla. 5<sup>th</sup> DCA 2004)); *Sanford v. Rubin*, 237 So. 2d 134 (Fla. 1970); *Gautier v. Biscayne Shores Imp. Corp.*, 68 So. 2d 386, 390 (Fla. 1953).

**II. SECTION 212.06(9) IS CONSTITUTIONAL BECAUSE THE FLORIDA LEGISLATURE HAS BROAD DISCRETION IN DETERMINING ITS TAX BASE, AND EXEMPTIONS FOR RELIGIOUS ENTITIES IN AN OVERALL TAX POLICY SCHEME BENEFITING A VARIETY OF NON-PROFIT, RELIGIOUS, CHARITABLE, AND COMMUNITY SERVICE ENTITIES DOES NOT “ESTABLISH” RELIGION.**

Constitutional jurisprudence strongly supports the State of Florida’s decision to exempt certain publications, religious speech, and religious items from taxation given its permissible legislative power to define a tax base possibly benefiting or burdening a variety of end users engaged in a range of activities, including religious, deemed beneficial to the state and local communities. Such exemptions have a strong historical foundation, both on a federal and state basis, including a long history in Florida, further establishing their constitutionality. Indeed, the large number of exemptions existing at the time the First Amendment of the United States Constitution was adopted, and those enacted shortly thereafter, persuasively establish that these exemptions do not run afoul of the Constitution.

**A. The history of tax exemptions for religious entities, both nationally and in Florida, demonstrates legislative restraint from entanglement with religion through taxation, not the establishment of a national or state religion.**

“There is no genuine nexus between tax exemption and the establishment of religion.” *Walz v. Tax Commission*, 397 U.S. 664, 675 (1970). The federal and Florida legislatures have historically exercised their legislative discretion to establish tax bases excluding the taxation of religious entities and religious speech.

Even so, not all religious activities or entities have been wholly excluded from taxation. Regardless of religion's exclusion or inclusion in a tax base, the legislature does not violate the prohibition on "establishment" of religion every time it uses its discretion to create a general tax scheme.

**1. At the time of adoption of the Bill of Rights, and thereafter, state and federal legislatures chose to exempt religious entities and their real property from the tax base.**

As Justice Holmes once said, "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.). This is particularly true in this constitutional analysis. At the time the Bill of Rights was passed, the states had pre-existing tax exemptions for places of worship that not only continued, but increased. *Walz*, 397 U.S. at 676-678. Although the federal legislature from its origin exempted religious entities and their real property from the national tax base, the effect has never been the establishment of religion. The 7<sup>th</sup> and 12<sup>th</sup> Congress enacted tax statutes exempting churches and the importation of religious articles. *Id.* at 677. By 1870, this practice had not diminished. Congress that year exempted all churches and church property (real and personal) in the District of Columbia from any and all "taxes or assessments, national, municipal, or county." *Id.* One-hundred years later, at the time of the *Walz* opinion, all 50 states provided tax exemptions for places of worship. *Id.* at 676.

In *Walz*, the Supreme Court considered a challenge to a New York statute granting a property tax exemption to religious organizations for properties used solely for religious worship. The Supreme Court found the exemption did not violate the Establishment Clause. *Id.* at 667. Recognizing federal and state legislatures' historical abstention from taxing religious entities, the Court observed, "[f]ew concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference." *Id.* at 676.

The *Walz* Court reasoned that legislatures may accommodate religious autonomy or separation from government interference without violation of the Constitution:

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 reasonable and balanced attempt to guard against those dangers. The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself.

*Id.* at 673. This Court should not undermine that heritage by finding Section 212.06(9) unconstitutional.

**2. The State of Florida historically abstained from including religious institutions and activities in its tax base.**

The State of Florida has refrained from taxing religious entities and activities from its inception. The Constitution of Florida, adopted in 1885, excluded property used for religious purposes from taxation and continues to do so today. Art. IX, Section 1, Fla. Const. (1885); Art. VII, Section 3(a), Fla. Const. (2004).<sup>3</sup> Florida historically had categories of taxation such as intangible personal property, excise tax on documents, license taxes, and tax assessments. In most of these categories, Florida chose to abstain from taxing religious entities.<sup>4</sup> The inclusion of religious activities along with educational or charitable activities demonstrates Florida's recognition of the community benefit derived from these beneficent activities.

Similarly, Florida exempted most of the items contained within Section 212.06(9) since the establishment of its sales and use tax. Section 212.06(9) finds

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<sup>3</sup> Current Art. VII, Section 3(a) and original Art. IV, Section 1 of the Constitution of Florida similarly exclude from taxation property used for educational, literary, scientific, and charitable purposes.

<sup>4</sup> Section 199.02(4) Fla. Stat. (1941) (exempting intangible personal property belonging to any religious, charitable, benevolent or educational association); Section 201.06 Fla. Stat. (1941) (reducing the Excise Tax on Documents involving voting proxies for religious, educational, charitable, fraternal, or literary societies etc.); Section 205.18 Fla. Stat. (1941) (excluding license requirements for "practicing the religious tenets of any church").



its origins in the “Florida Revenue Act of 1949.” Section 212.01 (1949).<sup>5</sup> The Florida Revenue Act of 1949 incorporated the “Tax on Sales, Use and Certain Transactions,” and includes most of the exemptions in today’s statutory scheme.<sup>6</sup> See Section 212.06(9), Fla. Stat. (1949) (exempting “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 statute was amended in 1951 resulting in the exact exemption challenged in this proceeding. Ch. 26871, Section 8, Laws of Fla. (1951). This long history of abstaining from involving religion in Florida’s tax scheme illustrates the Florida Legislature’s belief that there is a lack of a nexus between tax exemptions for religion and the establishment of religion. It also passes constitutional muster.

**B. Legislatures have the discretion to decide who or what is regulated and within this discretion to relieve the burdens on religion through abstaining from taxing religious entities and their speech.**

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<sup>5</sup> A defect in the title of Ch. 26319, Laws of Fla. (1949), relating to the legislation being beyond the scope of the title was cured by incorporating the 1949 Act, which included the Florida Revenue Act, into Ch. 26871, Laws of Fla. (1951).

<sup>6</sup> The 1941 Florida Statutes and the 1947 Cumulative Supplement to Volume 1, Florida Statutes of 1941, do not include a general sales tax. Presumably, the 1949 “Tax on Sales, Use and Certain Transactions” contained the first general sales tax within the State of Florida.

Legislatures do not automatically show hostility to or establishment of religion every time they use their discretion to create a general tax scheme. That Florida may deal differently with religious publications and the publications of K-12 schools than with certain commercial publications hardly constitutes establishing religion. The concept of legislative discretion or a legislative prerogative was most recently recognized by the United States Supreme Court in *Locke v. Davey*, 540 U.S. 712, 721 (2004), when Chief Justice Rehnquist, writing for the majority, approved a legislature's discretion to include or exclude religion in broader public programs without making the programs "inherently constitutionally suspect."

The Supreme Court has historically recognized this legislative prerogative. In 1886, the Court reviewed a Congressional real estate tax scheme for Washington, D.C., exempting buildings devoted to art, to institutions of public charity, libraries, cemeteries, and "church buildings, and grounds actually occupied by such buildings." *Gibbons v. District of Columbia*, 116 U.S. 404, 406 (1886). The Court upheld both the Congressional grant of the tax exemption to church-owned property housing the church and the taxation of church-owned property adjacent to the church building. *Id.* By recognizing a legislature's ability to implement a tax scheme that may or may not exclude or include religious property, the Court in *Gibbons* set the precedent that continues today in decisions such as

*Walz* and *Locke*. “In the exercise of this [taxing] power, Congress, like any State legislature unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property.” *Id.* at 408. At least through the progeny of *Walz* and *Locke*, a tax exemption that includes religious uses and entities is within constitutional bounds.

C. **Florida has exempted from its Sales and Use Tax so many “sales,” requiring the taxing of religious sales would be discriminatory and in contradiction to the Supreme Court’s rationale in *Walz* and *Locke*.**

The sales tax exemption at issue in this case is just one of many exemptions Florida’s legislature chose to include in its overall tax scheme. The Florida Department of Revenue estimates that the Florida Sales and Use Tax, of which Section 212.06(9) is but a small part, will bring in approximately \$20 billion in the 2005-2006 fiscal year. 2005 Florida Tax Handbook Including Fiscal Impact of Potential Changes (“the Handbook”) at 107.<sup>7</sup> The total exclusions, exemptions, deductions and credits from the Florida Sales and Use Tax are estimated to be nearly \$10 billion. *Id.* at 116. The exemptions allowed by Section 212.06(9) for the 2005-2006 fiscal year, are estimated to be almost \$10 million. *Id.* at 114. Thus,

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<sup>7</sup> The Handbook is produced by the staffs of the Senate Committee on Government Efficiency Appropriations, the House Committee on Finance and Tax, the Office of Economic and Demographic Research, and the Office of Tax Research of the Department of Revenue. Handbook at p. xi.

the “cost” of Section 212.06(9)’s statutory exemption constitutes less than one percent (1%) of the “cost” created by 236 other exemptions, many of which contain multiple “sub-exemptions.” Section 212.06(9) is, in essence, the proverbial “drop in the exemption bucket” including, but certainly not limited to, such varied State interests as hospital physical fitness facility charges, fish breeding, tickets for certain non-profit theatre, opera or ballet events, solid waste management equipment, human organs, and sales of U.S. and State flags.<sup>8</sup> *Id.* at 113-115. Given the similarly beneficent activities of religious organizations, it is not artificial or contrived for the State of Florida to include religious publications among this considerable list of exempt sales.

This broad scheme of exemptions enacted by the State of Florida reflects the legislature’s distribution of the tax burden among many interests. “Our decisions consistently have recognized that traditionally ‘legislatures have especially broad latitude in creating classifications and distinctions in tax statutes.’” *Mueller v. Allen*, 463 U.S. 388, 396 (1983) (tax deduction held not to violate the Establishment Clause because it “is only one among many deductions – such as those for medical expenses . . . and charitable contributions . . . available under the Minnesota tax laws”) (quoting *Regan v. Taxation With Representation of Wash.*,

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<sup>8</sup> See Sections 212.02(1), 212.02(28)(29), 212.04(2)(a)6, 212.051(2), 212.08(2)(e), 212.08(7)(f), Fla. Stat. (2005).

461 U.S. 540, 547 (1983)); *Kotterman v. Killian*, 193 Ariz. 273, 280 (1999) (stating tax credit is “one of an extensive assortment of tax-saving mechanisms available as part of a ‘genuine system of tax laws,’” and reasoning “[d]eductions and credits are legitimate tools by which government can ameliorate the tax burden while implementing social and economic goals”) (quoting *Mueller*, 463 U.S. at 396 n.6).

Section 212.06(9) fits soundly within this recognized legislative prerogative to establish a tax system that may include religion among other interests excluded from taxation. To accept Petitioner’s argument that Florida can legislate an extensive system of sales tax exemptions for a variety of local interests – but must tax sales involving religion – would be in contradiction to the historical constitutional soundness of tax exemptions, and the rationale in *Walz* and *Locke* recognizing a legislature’s broad discretion to exempt *vel non* all types of activities, including religion. Petitioner’s argument is therefore unavailing.

**D. Section 212.06(9) is constitutional because the legislature’s prerogative does not over-burden non-beneficiaries and it has exempted both religious and non-religious publications.**

Florida by no means imposed substantial burdens on non-beneficiaries of the tax exemptions by singling out religion for exemption from the Florida Sales and

Use Tax.<sup>9</sup> Currently, the tax exemption at issue in this case is overshadowed by billions of dollars of exemptions the legislature decided were in the State's best interest – only some of which are religious. Florida, in its overall tax scheme, also chose to exempt from its Sales and Use Tax other non-religious publications that it believed served a State interest: (1) certain newspaper, magazine, and newsletter subscriptions, shoppers, and community newspapers; (2) school books, yearbooks, magazines, newspapers, directories, bulletins, and similar publications distributed or used by schools for grades K-12; and (3) publications made by the Florida Retired Educators Association and its local chapters. Section 212.08(7), Fla. Stat. (2005) (subparts (w), (r) and (g)).<sup>10</sup>

The various exemptions provided by Florida both similar to and different from those in Section 212.06(9) reflect the Florida Legislature's "especially broad latitude in creating classifications and distinctions in tax statutes." *Mueller*, 463

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<sup>9</sup> The exempted 6% tax on the sales included within Section 212.06(9) hardly poses a substantial burden on those who have to pay 6% on other sales in Florida. Of the estimated \$20 billion collected from Florida citizens to support the State through its Sales and Use Tax, abstaining from taxing the exempted sales at issue accounts for only an estimated \$9.9 million in sales tax revenue and is part of an estimated \$10 billion worth of exempted sales. *See Handbook* at 107-116.

<sup>10</sup> Although Section 212.08(7)(w), Fla. Stat., was found unconstitutional, on grounds not related to the Establishment Clause, the source of the offense to the Constitution was removed by amendments to the statute's application included in the Florida Administrative Code in 2001. *Compare Department of Rev. v. Magazine Pub. of America*, 604 So. 2d 459 (Fla. 1992), with Fla. Admin. Code R. 12A-1.008 (2005).

U.S. at 396. The fact some exemptions benefit religion and some do not demonstrates neither establishment of or hostility to religion. *See Gibbons*, 116 U.S. at 498; *see also Locke*, 540 U.S. at 725. Therefore, the Florida Sales and Use Tax exemption scheme, including Section 212.06(9), is constitutional.<sup>11</sup>

**E. The Petitioner overstates the limited holding by the plurality opinions in *Texas Monthly, Inc. v. Bullock*.**

The plurality opinions in *Texas Monthly* found the Texas exemption for writings that “promulgate the teachings of religious faiths” offensive to the Establishment Clause. *Texas Monthly*, 489 U.S. 1, 14 (1989). The plurality opinion written by Justice Brennan, however, was limited: “we in no way suggest that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless

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<sup>11</sup> Florida did not attempt to establish religion when it originally excluded religion from much of its initial tax scheme. Indeed, state legislatures can and have made legislative decisions that may ultimately benefit religion more directly (and withstanding constitutional scrutiny) reflecting these legislatures’ ability to legislate tax credit, deduction, and exemption systems even if religious end users get some benefit. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding tuition aid for low income students in certain school districts, benefiting parochial schools); *Mueller*, 463 U.S. at 390 (upholding tax deduction for tuition, textbooks, and transportation, benefiting parochial schools); *Board of Education v. Allen*, 392 U.S. 236 (1968) (upholding law requiring public schools to lend textbooks free of charge to private schools, benefiting parochial schools); *Everson v. Board of Education*, 330 U.S. 1 (1947) (upholding statute reimbursing parents for transportation fares to schools, benefiting parochial schools); *Kotterman*, 193 Ariz. at 273 (upholding tax credit to citizens who donate to school tuition organizations, benefiting parochial schools).

they are mandated by the Free Exercise Clause.” *Id.* at 18 n.8. Justice Brennan distinguished cases where “the benefits derived by religious organizations flowed to a large number of nonreligious groups as well” or where the exemption “impose[d] substantial burdens on non-beneficiaries while allowing others to act according to their religious beliefs.” *Id.* at 11, 18 n.8.

The statute at issue in this case falls outside the limitations incorporated into the *Texas Monthly* plurality. The State of Florida grants exemptions from its Sales and Use Tax to a multitude of groups, industries, and citizens generally and to numerous other publications specifically. *See* Section 212.08(7). Accordingly, it is not a benefit conferred exclusively upon religious organizations. *Compare Texas Monthly*, 489 U.S. at 28 (noting Texas confined the tax exemption exclusively to religious publications) (Blackmun, J., concurring). The concurring opinion of Justice Blackmun, joined by Justice O’Connor, which becomes the guiding opinion under the case law *Gregg v. Georgia*, 428 U.S. 153, 169 (1976), reasoned that a State providing a tax-exemption statute for the “sale not only of religious literature distributed by a religious organization but also of philosophical literature distributed by nonreligious organizations” would not run afoul of the Establishment Clause. *Id.* at 27. The State of Florida’s decision to exempt, among other things, newspapers published by K-12 educational institutions together with



religious publications, certainly fits the constitutionally valid statutory scheme envisioned by Justice Blackmun.

The exemption for “religious publications” in this case also can be distinguished from the Texas statute because the Florida exemption applies to publications produced by religious institutions whereas the Texas exemption applies to “periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teachings of the faith and books that consist wholly of writings sacred to a religious faith.” *Texas Monthly*, 489 U.S. at 5. The holding in *Texas Monthly*, thus, does not limit this Court from applying the long-standing recognition of Florida’s discretion to exempt or not exempt a range of activities, including religious, from taxation.

## **CONCLUSION**

This Court should dismiss Petitioner's appeal for lack of jurisdiction or affirm the District Court of Appeal's finding that Petitioner lacked standing. Alternatively, the case should be remanded for further consideration of the constitutionality of Section 212.06(9). If the Court chooses to consider the constitutional issues, it should hold that Section 212.06(9) is constitutional.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing has been furnished  
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**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.

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