IN THE SUPREME COURT OF FLORIDA

The Wiccan Religious
Cooperative of Florida, Inc.,

Appellant,

CASE NO.: SC05-873
LOWER TRIBUNAL NO.: 1D03-3325

v.

Jim Zingale and the Florida
Department of Revenue,

Appellees.
_____/

INITIAL BRIEF OF APPELLANT

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STANDARD OF REVIEW

The questions at issue in this case are matters of law and are reviewable *de novo.*

STATEMENT OF THE CASE

The Petitioner is a non-profit Wiccan church, incorporated in the state of Florida, with federal 501(c)(3) status. The church originally sued based on the Department of Revenue's refusal to reissue the group a consumer sales tax exemption certificate pursuant to *§212.08(7)(o)(2)(a*) (1999) and the facial unconstitutionality of the sales tax exemption under *Fla. Stat. §212.06(9)*(1999). The issue ultimately before the appellate court became the constitutionality of the Florida sales tax exemption for religious publications and items of worship, pursuant both to *Fla. Stat. §212.06(9)* (1999) and to *Article 1, Section 3* of the Florida Constitution, which parallels the First Amendment to the United States Constitution. In the Florida constitutional provision, specific limitations are placed on the taxing and spending power of the state: "[n]o revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect or religious denomination or in aid of any sectarian institution."

The relevant history of this case is as follows: On May 6, 1993, the Florida Department of Revenue issued tax exemption certificate Number 58-12-130568-55C to the Wiccan Religious Cooperative of Florida, Inc. as a religious organization. R V.5, p. 785.[1] The certificate expired on May 6, 1998. R V.5, p. 785. On December 20, 1999, WRCF applied for a renewal of the tax exemption certificate as a religious institution under *Fla. Stat. §212.08(7)(o)(2)(a*) (1999). This application, which required the submission of proof of an established physical place of worship, was submitted directly to the then Executive Director, Larry Fuchs, along with documentation, and a letter from WRCF's counsel setting forth concerns about the substance of the statute and requesting legal opinions and advice. R V.5, p. 785.

In this letter, WRCF freely admitted that it had no established physical place of worship, and did not submit any documentation claiming that it did. On January 5, 2000, Tracy Allen, Assistant General Counsel for the

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[1] R. V. 5, pp. 780-803 reflect the body of WRCF's Motion for Summary Judgment as filed in the trial court. V. 5 804-927 and V. 6 928-997 consist of the exhibits referred to in the motion and attached. Some of counsel's files were damaged, destroyed or lost during Hurricane Charley, and she no longer has a legible and properly organized copy of all the Exhibits. Therefore, in this brief she will refer to the page which contains the information, and the reference to that page should be read to include Exhibits that are identified in the Motion, although it includes the exact record and volume page of the Exhibit itself only where that specific cite was available. Counsel apologizes for this inconvenience.

Department, responded. R V.5, p. 786. Attorney Allen confirmed in this letter to WRCF's counsel that the DOR did require the applicant to have its own established physical place of worship, and that the Division of Administrative Hearings had upheld this requirement on several occasions. *See Appendix A* He suggested that if WRCF believed that it might qualify pursuant to another exemption, the church might want to supplement the application by mailing additional information to the Department. Finally, he briefly explained the Notice of Intent to Deny procedure, which indicated that if there was no follow up or no other basis for exemption, the Notice of Intent to Deny would be issued. R V.5, p. 786.

On January 14, 2000, the Department sent WRCF a request to "[p]rovide a notarized statement explaining that your organization is a governing or administrative office that functions to assist or regulate member organizations over which your organization has control." The request stated, in bold, that "Your failure to submit the requested information will delay the processing of your application and ultimately result in its denial." R V.5, p. 786. WRCF is not, and never has been "a governing or administrative office that functions to assist or regulate member organizations over which [the] organization has control." All the church's members are individuals or families. R V.5, p. 786. As the WRCF

could not in all honesty provide the requested information, and the Department had indicated that failure to respond would result in a denial of the application, WRCF did not respond to the January 14, 2000 letter.[2]

On January 25, 2000, Kevin O'Donnell, Assistant General Counsel for the Department, responded to additional questions regarding the sale of personal property by religious institutions WRCF sent with its renewal application on December 20, 1999. He responded regarding the sale of personal property, including religious publications and items of worship, by churches as defined in applicable Florida Administrative Code provisions, and confirmed that such sales are exempt if the church qualifies as a religious institution pursuant to *Fla. Stat. 212.08(7)(o)(2)(a)*(1999). He declined to issue any opinion regarding what constituted a religious publication or item of worship. R V.5, p. 788-789. In fact, the Department specifically said, regarding the authority to determine the constitutionality of a statute, "[t]hat responsibility rests with the Judicial Branch of our Government. The Department of Revenue presumes the constitutionality of all laws it administers until a court of competent jurisdiction rules otherwise." R V.5, p. 788-789.

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[2] Furthermore, the law supported the Department's position in the letter, and justified WRCF's reliance on that letter. R V.5, p. 793-794.

On February 14, 2000, the Department sent another request for information identical to the request sent on January 14, 2000. R V.5, p. 787 Just as in the January 14, 2000 letter, the request stated, in bold, that "Your failure to submit the requested information will delay the processing of your application and ultimately result in its denial." WRCF did not respond to the February 14, 2000 letter. On March 20, 2000, the Department sent WRCF a letter stating that the case had been closed because of failure to respond, and that the WRCF would need to reapply. R V.5, p. 787. The Department never issued a Notice of Intent to deny. R V.5, p. 787.

On June 6, 2001 the law was amended to include in *Fla. Stat. 212.08(7)(p)*(2001), effective January 1, 2001, a provision that permitted, but did not require, any 501(c)(3) organization to apply for and obtain a consumer sales tax exemption for leases or purchases used in carrying on their customary nonprofit activities. 2000 Fl. ALS 228, *at* pp. 7 & 17-18, attached hereto as Appendix B. While the amendment did also make some minimal changes in *Fla. Stat. 212.08(7)(o)(2)(a)* (1999), it did not change the requirement that in order to qualify for a sales tax exemption as a religious institution, the organization must have an established physical place of worship.

On October 30, 2000, WRCF filed suit in the Circuit Court for the Second Judicial Circuit of Florida. R. – V. 1, pp. 1-10. On March 6, 2001, WRCF filed an amended complaint, R – V. 1, pp. 84-98 and on June 18, 2001, a second amended complaint R – V. 2, pp. 199-263. The Department filed its Answer on July 9, 2001. R. – V. 2, pp. 264-277. The parties each filed motions for summary judgment. R. – V. 5, pp. 780-927; V. 6, pp. 928-997; V. 6, pp. 1011-1027.

On July 15, 2003 the trial court granted the Department's motion for summary judgment and denied WRCF's motion. R. – V. 7, 1246-1250. In its order, the trial court held that 1) WRCF had failed to exhaust its administrative remedies regarding its application for a consumer sales tax exemption certificate; 2) had standing to raise the constitutional issue; 3) held that *Fla. Stat. § 212.06(9)*(1999) and *Fla. Stat. § 212.08(7)(o)(2)(a)* (1999) were facially constitutional; and 4) dismissed WRCF's case. R. – V. 7, 1248-49. On July 30, 2003, WRCF timely filed its Notice of Appeal. R. – V. 7, pp. 1251-1262.

The trial court held, without discussion, that the church did have standing to raise the issue. R – V. 7, p. 1249. It found that the *Fla. Stat. 212.06(9)*(1999) was constitutional under the Establishment Clause because it was broad and religion neutral. R – V. 7, p. 1249. The Court found that

both statutes were constitutional under the Equal Protection Clause because they did not discriminate amongst religions. R – V. 7, p. 1249. The trial court made no finding regarding the constitutionality or lack thereof of *Fla. Stat. §212.06(9)* (1999) under the Free Press Clause.

The church appealed the constitutional issue, and there was no cross appeal on standing. Both parties briefed and argued the issue of standing on appeal. The church argued that although it had suffered harm, it was a taxpayer, questioning the constitutionality of the statute based directly on the limitations of the taxing and spending power of the state[3], under both state and federal constitutional law, and that therefore the church was not required to show special injury.[4] *Department of Admin. v. Horne*, 269 So. 2d 659 (Fla. 1972); *Paul v. Blake*, 376 So. 2d 256 (Fla. 3d DCA 1979); *Flast v. Cohen, Secretary of Health, Education, and Welfare*, 392 U.S. 83; 88 S. Ct. 1942; 20 L. Ed. 2d 947 (U.S. S. Ct. 1968). The Department argued that special injury was required, and that since the statutory exemption benefits religious organizations, the church could show no adverse interest, and had no standing.

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[3] Article I, §3 of the Florida Constitution, specifically cited in the church's appellate brief and expressly made a part of the argument.

[4] WRCF did argue special injury, and Judge Benton wrote "The Cooperative proved that it suffered actual injury…" *WRCF v. Zingale*, 898 So. 2d 134, 140 (Fla. 2nd DCA 2005).

A three judge panel issued an opinion on March 8, 2005, all judges concurring that the trial court's decision should be reversed and remanded. However, a two judge majority held the basis for reversal and remand was the trial court's decision that the church had standing, and these judges did not reach the constitutional question. In his opinion concurring in part and dissenting in part, Judge Benton found that, under any theory, the church did have standing, that the statute was unconstitutional, and that the trial court's decision should be reversed on the constitutional issues. The church timely filed a motion for rehearing and certification, which was denied without opinion on April 14, 2005. The church then timely filed its Notice of Intent to Invoke Discretionary Jurisdiction on May 16, 2005. This Court accepted jurisdiction on November 17, 2005.

Statement of the Facts

WRCF is a Florida not-for-profit corporation, R. V. 2, p. 203, recognized by the Internal Revenue Service as a tax-exempt religious organization, under § 501(c)(3) of the Internal Revenue Code. R. V. 2, p.203. The Department of Revenue is the Florida agency charged with administering the tax laws for the state of Florida. R. V. 5, p.1015. *Article 7, §1* of the Florida Constitution authorizes the taxing and spending power of the state, and provides that "[n]o tax shall be levied except in pursuance of law. *Art. 1, §3* of the Florida Constitution, which parallels the First

Amendment to the United States Constitution, places additional *specific* limitations upon that taxing and spending power, stating "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury *directly or indirectly* in aid of any church, sect or religious denomination or in aid of any sectarian institution." (emphasis added)

In August of 2001, WRCF, through it's then Vice President and President Elect, purchased three books from Barnes and Noble, and ordered another. Pursuant to Title 10, Section 2 of the Bylaws, a copy of which was filed with the complaints in this action, Directors must meet all the requirements of membership, and the Vice President was a member. The books he purchased were a Christian children's Bible, the Koran, and The Satanic Bible.[5] He also ordered The Witches Bible Compleat. R – V. 5, pp. 784-785. The bookstore charged, and WRCF paid, a sales tax on the Satanic Bible, and was advised it would be charged sales tax on the Witches Bible

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[5] Wicca is not a Satanic religion. Wiccans do not even believe in Satan. *U.S. v. Phillips*, 38 MJ 641 (1993); *U.S. v. Phillips*, 42 MJ 341 (1995). *See also* Appellant's Motion to Strike Reference Unsupported by the Record, filed in the DCA in February, 2004. The DCA granted this motion. This book was chosen for purchase because, like Wicca, courts have recognized Satanism as a religion. *Flanagan v. State*, 109 Nev. 50 (Nev. 1993); *Ramirez v. Coughlin*, 919 F. Supp. 617 (U.S.D.C., N.D.N.Y. 1996); *U.S. v. Meyers*, 906 F. Supp. 1494 (U.S.D.C. Wyo. 1995); *Howard v. U.S.*, 864 F. Supp. 1019 (U.S.D.C. Colo. 1994); *Commonwealth v. Chuck*, 227 Pa. Super. 612 (1974); *MacMahon v. State*, 1998 Tex. App. LEXIS 5029 (1998).

Compleat. No sales tax was collected on the Christian Bible or the Koran. R. V. 4, pp. 805-810. The differing sales tax collection practices were premised on *Fla. Stat. § 212.06(9)*(2001), which, then and now, grants a sales and use tax exemption to religious publications and items of religious worship.

WRCF's Bylaws clearly state: "We are a nonprofit religious, charitable, scientific, literary, artistic and educational corporation, organized to practice the full spectrum of legal activities practiced by any church, including, but not limited to, worship services, clergy functions, counseling, mediation, and spiritual leadership." R. V.5, p. 892 The Bylaws further state that "[t]o accomplish the goals outlined in the Preamble, W.R.C.F. advocates and practices, as an integral part of our faith, many sciences, arts, and disciplines, both mainstream and alternative, within a nondogmatic, pluralistic context, in order to change ourselves and the world around us." R V. 5, p. 853 The Bylaws go on to specify that these practices include scholarly research, the study of comparative religions, liturgical arts, and other activities and practices that encompass a wide variety of religious literature and items of worship. R V.5, p. 853

At no time, despite at least one documented request in the record R V. 6, p. 948-950, has the Department ever pointed to **any** factual or legal

authority defining religious publications and/or items of worship, nor has it been willing to express an opinion as to the definitions. In fact, the Department admits that it does not have the legal authority to make these determinations. R – V. 5, pp. 788-789. The Department does admit that it recognizes certain items (bells, candles, incense and robes) used in Catholic worship ceremonies as religious items, but declines to recognize those same items as items used in Wiccan worship ceremonies, stating that it is "without sufficient knowledge to admit or deny as to Wiccan usage" but setting forth no statement that it had made a reasonable inquiry and that the information known or readily available to the Department was insufficient to enable that party to admit or deny the request as required by Fla. R. Civ. P. 1.370(a) (1972) as amended.[6] R V. 6, p. 962 The Department admits that it is making a content-based determination when it admits that "specific kinds, but not all, candles, bells, incense and robes are used by the Catholic church." R V. 6, p. 962. The Department fails to indicate the basis for these types of distinctions.

Nowhere in the record has the Department articulated a secular purpose for *Fla. Stat. §212.06(9).* The Department has not pointed to any

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[6] The rule has not significantly changed since 1954, and an inadequate reason for admitting or denying is the equivalent of an admission. *Amendments to the Florida Rules of Civil Procedure*, 858 So. 2d 1013, 1025 (Fla. 2003)

legislative or policy statement, or legal opinion, articulating a secular purpose. Nor has the Department argued that the exemption does not advance religion. The Department's entire constitutional argument rests on the proposition that *Fla. Stat. §212.06(9)* does not on its face discriminate amongst religions which was not the ruling made by the trial court. WRCF did not appeal the Equal Protection ruling, so the Department's sole focus on that ruling is misplaced.

The trial court actually found that *Fla. Stat. §212.06(9)* did not violate the Establishment Clause because it was "broad and religion neutral." R V. 7, p. 1249 In a completely separate paragraph of the Order, the trial court found that there was no equal protection violation in the application of either *Fla. Stat. §212.06(9)* or *Fla. Stat. 212.08(7)(o)(2)(a)*(1999) because there was no evidence presented that the Department discriminated amongst religions. R V. 7, p. 1249[7] The court made no finding as to the application of the Free Press Clause to *Fla. Stat. §212.06(9)*.

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[7] In its motion for summary judgment, WRCF argued that the equal protection claim was based, not on any allegations that the statute facially discriminated amongst religions, but rather that no other types of 501(c)(3) organizations are required by the statute to maintain a regular physical location for carrying out their purposes. R. – V. 5, 798-801 Thus, not only does this requirement discriminate between religious and non-religious charitable institutions, it can also be considered a burden on the free exercise of religion, by requiring religious groups that want special exemptions to lease or purchase property for a permanent location.

SUMMARY OF THE ARGUMENTS

3. WRCF has standing because it has suffered harm

The District Court held that WRCF benefited from the sales tax exemption at issue and therefore had no standing. However, WRCF has proved that it does not benefit from the exemption for two reasons. **1(a).** First, religious liberty is threatened when the state abuses its power and exceeds its constitutional limitations to pass laws that promote religion and/or require excessive state entanglement with religion. A threat to religious liberty is a threat to all religious organizations, and people of all faiths, and harms WRCF. This is true both under the Establishment Clause and under the Free Press Clause. **1(b).** Second, WRCF presented uncontested evidence that it asked the Department to define the parameters of the statutory exemption, and the Department refused. WRCF then purchased several types of religious literature from a national bookseller, and was charged sales tax on some, but not all of those publications. WRCF refrained from, and continues to refrain from, selling items pursuant to the exemption for fear of civil penalties and criminal prosecution. *Fla. Stat. 212.15, 775.082 and 775.083* (2005). Finally, such an exemption forces WRCF to subsidize ideas and beliefs which it finds inimical, and directly opposed to its own beliefs.

1(a) WRCF does not benefit from the exemption, as the exemption threatens religious liberty. A threat to religious liberty harms all religions while government neutrality towards religion benefits everyone.

Religious liberty is threatened when the state abuses its power and exceeds its constitutional limitations to pass laws that promote religion and/or require excessive state entanglement with religion. A threat to religious liberty is a threat to all religious organizations, and people of all faiths and harms WRCF. In *Flast v. Cohen*, 392 U.S. 83 (1968), adopted by *Department of Administration v. Horne*, 269 So. 2d 659 (Fla. 1972), and relied upon by the District Court in making its determination regarding standing, the United States Supreme Court said:

> The concern of Madison and supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general. *Flast* at 103-104

1(b). WRCF purchased several religious publications and was charged sales tax on some, but not all, of the books, thus demonstrating specific harm

In August of 2001, WRCF purchased three books, a Christian children's Bible, the Koran, and The Satanic Bible. WRCF also ordered The Witches Bible Compleat. The bookstore charged, and WRCF paid, a sales tax on the Satanic Bible, and was advised it would be charged sales tax on the Witches Bible Compleat. No sales tax was charged on the Christian

Bible or the Koran. R. V. 4, pp. 805-810. The differing sales tax collection practices were premised on *Fla. Stat. § 212.06(9).* WRCF has suffered direct and indirect economic and non-economic harm. It had to pay sales tax on religious publications that were nominally exempt under the statute because the statute does not, and cannot constitutionally define the parameters of the exemption. It has refrained, and continues to refrain, from selling items nominally covered by the exemption for fear of crippling civil penalties and criminal prosecution. *Fla. Stat. 212.15, 775.082 and 775.083* (2005). WRCF is also harmed, because it is forced to subsidize ideas and practices it finds inimical. Such a statutory scheme pits religions against one another, rather than promoting unity and diversity.

2. WRCF has citizen-taxpayer standing that does not require specific injury

Where there is an attack upon constitutional grounds based directly upon the Legislature's taxing and spending power, there is standing to sue without the requirement of special injury. *Flast v. Cohen,* 392 U.S. 83 (1968), *Department of Administration v. Horne,* 269 So. 2d 659 (Fla. 1972). *Flast* applied this principle to Establishment Clause cases, finding Mrs. Flast had standing to challenge the constitutionality of a federal act because the Establishment Clause imposes a specific limitation upon the federal taxing and spending power. *Horne* approved this rationale as it applies to the

taxing and spending power of the state. In *Paul v. Blake*, 376 So. 2d 256 (Fla. 3d DCA 1979), the third district court of appeal relied on *Horne* in holding that a taxpayer had standing to challenge a tax exemption absent special injury when the suit attacked the exercise of the state's taxing or spending authority on the ground that it exceeds specific limitations imposed on the taxing and spending power by the United States Constitution or the Florida Constitution. Here, WRCF alleges that the exemption specifically violates *Art. 1, §3* places limitations upon that taxing and spending power, stating "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury **directly or indirectly** in aid of any church, sect or religious denomination or in aid of any sectarian institution." (emphasis added) This is exactly the type of prohibition found in *Flast.*

3. WRCF has associational standing to assert harm on behalf of its members

WRCF has associational standing to challenge the facial constitutionality of *Fla. Stat. §212.06* on behalf of its members because it meets the standards set forth in both state and federal law. A voluntary association can have standing to bring suit on behalf of it's members. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Warth v. Seldin*, 422 U.S. 490, 511 (1975) WRCF, a voluntary religious

organization, challenges the facial constitutionality of a sales tax exemption for items expressing religious speech. Religious speech, and liberty regarding that speech, are clearly germane to the purposes of the organization. Members have standing to sue in their own right. WRCF meets all the criteria for associational standing.

4. This court should review the constitutional challenge to *Fla. Stat. §212.06(9)* and find that the application of *Texas Monthly* and its progeny compel a determination that the statute is unconstitutional and must be enjoined

As this case is before the court on *de novo* review, this court may choose to consider and rule on the constitutional question as well as the issue of standing. *Fla. Stat. §212.06(9)* exempts from sales and use tax religious publications and religious items used in expressive speech, *i.e.* religious worship. WRCF argues that the exemption lacks sufficient breadth to pass scrutiny under the Establishment Clause, and violates the Free Press Clause because it is a content-based regulation, and urges this court to review this issue, declare the statute unconstitutional under both these provisions.

The district court was once before confronted with the facial constitutionality of *Fla. Stat. §212.06(9)* in *Sharper Image Corporation v. Department of Revenue*, 704 So. 2d 657 (Fla. 1st D.C.A. 1997). In that case, Sharper Image challenged a tax assessment on its sales catalogs, and claimed, *inter alia*, that *Fla. Stat. §212.06(9)* was facially unconstitutional.

The court did not find it necessary to determine that issue, as the remedy for such unconstitutionality, pursuant to *Fla. Stat. §212.21(2)* would have been to eliminate the exemption for religious literature, not to extend the exemption to cover Sharper Image sales catalogs, which was the remedy sought by Sharper Image. *Id. at 663-664.* As the tax would have been assessed regardless of the constitutionality of the challenged statutes, this Court did not find it necessary to reach that issue. In this case, the issue is squarely presented to this Court for adjudication as WRCF seeks to have this facially unconstitutional statute enjoined. WRCF argues that *Texas Monthly, Inc. v. Bullock,* 489 U.S. 1; 109 S.Ct. 890; 103 L.Ed.2d 1 (1989) and its progeny compel such a result.

ARGUMENTS

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1(a). WRCF does not benefit from the exemption, as the exemption threatens religious liberty. A threat to religious liberty harms all religions while government neutrality towards religion benefits everyone.

Religious liberty is threatened when the state abuses its power and exceeds its constitutional limitations to pass laws that promote, rather than simply accommodate, religion and/or require excessive state entanglement with religion. A threat to religious liberty is a threat to all religious organizations, and people of all faiths and harms WRCF. In *Flast v. Cohen*, 392 U.S. 83 (1968), adopted by *Department of Administration v. Horne*, 269 So. 2d 659 (Fla. 1972), and relied upon by the District Court in making its determination regarding standing, the United States Supreme Court said:

> Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general. … The concern of Madison and supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general. The Establishment Clause was designed as a specific bulwark against such potential abuses of government power, and that clause of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power. *Flast* at 103-104

While *Flast* addresses the standing issue in the context of the Establishment Clause, this case also involves a challenge to the exemption under the Free Press Clause. The Free Press clause also operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power, *Dept. of Educ. v. Lewis*, 416 So. 2d 455 at 461, and the *Flast* standing analysis is applicable in the Free Press context as well as in an Establishment Clause context. In considering the application of the Free Press clause to this case, an application that the trial court failed to make, it cannot in all seriousness be argued that WRCF, or *any* religious institution, benefits from any laws which involve the state in content-based determinations as to what is and is not religious.[8]

[8] Except, of course, the religion or religious institution whose doctrines and forms of worship are approved as religious by the state. No one so far in the five year course of this case has even attempted to advance the argument that

It is often said that when we forget history, we are doomed to repeat it. In this context, the words of the Reverend Martin Niemoller spoken in 1945 come to mind. The Reverend, a Protestant cleric, was referring to a government that incarcerated and mistreated individuals based upon, among other things, membership in specific groups and the expression of ideas repugnant to that particular government.

> First they came for the Communists, and I didn't speak up, because I wasn't a Communist. Then they came for the Jews, and I didn't speak up, because I wasn't a Jew. Then they came for the Catholics, and I didn't speak up, because I was a Protestant. Then they came for me, and by that time there was no one left to speak up for me.

Clearly, a legislative enactment of a sales tax exemption does not immediately bring to mind the incarceration of individuals based upon their expression of ideas. However, under the current statutory scheme it is a real legal possibility. The challenged statute fails to define the religious publications and items exempted from taxation by the state. The Department admits that it cannot define such items. R – V. 5, 799-801. However, if someone selling such items makes the "wrong" choice, and fails to collect sales tax on an item that the state ultimately determines does not

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the state has the power to approve religious content or forms of worship, nor could that argument be advanced, as there is no precedent whatsoever for that contention, and a long line of precedent clearly prohibiting that sort of state action.

meet the requirements of the exemption, that person is subject to civil and criminal penalties including fines, seizure of property, and incarceration for up to thirty years. *Fla. Stat. 212.15, 775.082 and 775.083* (2005).

The United States Supreme Court in *Texas Monthly v. Bullock*, 489 U.S. 1, 8-9 (1989) considered Texas' argument that the publisher had no standing because it could show no harm based on the available remedies, finding the state's contention to be misguided. *Id.* at 11, reasoned that where the benefits of a tax exemption are confined to religious organizations, they cannot appear other than as state sponsorship of religion, and would be stricken for lacking a secular purpose and effect. Here the District Court is in effect saying that WRCF cannot complain about state sponsorship of religion, even if it is unconstitutional, because it benefits from the sponsorship.

That is like saying that a shop-owner who is forced to pay crooked cops to allow him to keep his store open cannot complain about the illegal extortion because he benefits by being able to continue selling items and making money. A little graft is a small price to pay for a larger economic benefit, in that type of argument. The *Texas Monthly* court does not buy that argument. In specifically rejecting the application of *Valley Forge Christian College v. ACLU, Inc.*, 454 U.S. 464 (1982), a case relied upon by the

majority below, to the standing issue in the context of publications, the court said that since Texas Monthly had paid money that it should not have had to pay, it had standing to bring the action. *Texas Monthly* at 9. In this case, WRCF paid money it should not have had to pay under the statute when it paid sales tax on religious publications, and therefore meets the standing requirement. WRCF was harmed because the statute does not and cannot define religious literature, and the fact that it had to pay the sales tax on religious publications was the direct result of the constitutional infirmity of the statute. It does not matter whether the district court meant that it believed WRCF is not a taxpayer, and thus must show harm in order to have standing, or is a taxpayer, but does not have standing because it is a taxpayer that benefits from the provision it is challenging. The first conclusion is wholly unsupported by any evidence in the record while the second is unsupportable as a matter of law.

1(b). WRCF purchased several religious publications and was charged sales tax on some, but not all, of the books, thus demonstrating specific harm

In August of 2001, WRCF purchased three books, a Christian children's Bible, the Koran, and The Satanic Bible. WRCF also ordered The Witches Bible Compleat. The bookstore charged, and WRCF paid, a sales tax on the Satanic Bible, and was advised it would be charged sales tax on

the Witches Bible Compleat. No sales tax was on the Christian Bible or the Koran. R. V. 4, pp. 805-810. The differing sales tax collection practices were premised on *Fla. Stat. § 212.06(9).* WRCF has suffered direct and indirect economic and non-economic harm. It had to pay sales tax on religious publications that were nominally exempt under the statute because the statute does not, and cannot constitutionally define the parameters of the exemption.[9]

WRCF is also harmed, because it is forced to subsidize ideas and

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[9] At one point in discovery responses, the Department stated that it could not respond to a particular request for admission because the question asked about pagan religious materials, and the Department argued that the term "pagan" was inconsistent with the term "religious." Looking at *Random House Webster's College Dictionary, 2001*, it is apparent that the Department's is making arguments which mire it in a morass of contradictory attempts to define the content and expression of religious beliefs and practices. The first definition listed for pagan is "one or a people or community observing a polytheistic religion, as the ancient Romans and Greeks." While WRCF does not agree, and does not teach, that this is an accurate and complete definition of pagan, or is slightly different from neo-pagan, which is not defined in the dictionary, it is clear that the word "pagan" is not inconsistent with religious beliefs. The second definition makes clear that viewing "pagan" and "religious" as incompatible is an exclusive rather than an inclusive definition. The second definition is "a person who is not a Christian, Jew, or Muslim." If the Department relies on this definition to define "religious" publications, then it would recognize only Christian, Jewish and Muslim publications. This is a conceptual swamp from which the Department cannot gracefully extricate itself. The origins of the word as listed make it clear that the word pagan originally was defined someone who was rural. Finally, as an adjective, pagan is defined as "of or pertaining to pagans **or their religion**". (emphasis added)

creeds which it may find inimical. WRCF's Bylaws promote diversity and respect for all religions. WRCF should not be forced to subsidize the purchase of a text which states as the word of God that one "should not suffer a witch to live" or that pagans should be stoned to death for worshipping idols[10]. For that matter, someone who believes that it is blasphemous to worship more than one God, or an atheist who believes there is no God, should not be forced to subsidize a religious publication promoting polytheism or a religious worship service celebrating polytheism. Assuming *arguendo* that the statute does exempt all forms of religious speech, it forces members of differing religious beliefs to subsidize the expression of other religious beliefs that they may find objectionable, inimical, or simply not their beliefs. Wiccans must subsidize Christians, Jews subsidize Muslims, etc., thereby encouraging religious divisiveness.

WRCF has refrained from reselling publications and items pursuant to this statute because the state does not provide any method for determining what items are covered under the rubric "religious" and opens the church and its members to the possibility of financial ruin pursuant to civil penalties, or even criminal prosecution and possible incarceration of as much

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[10] *Dettmer v. Landon*, 799 F.2d 929 (4th Circ. 1986) *cert. den.* 483 U.S. 1007, 107 S.Ct. 3234, 97 L.Ed.2d 739 (1987), specifically recognizes that Wiccan beliefs are based on witchcraft as "an ancient pagan faith." *See also Goodman v. Carter*, 2001 U.S. Dist. Lexis 9213 (U.S.D.C. N. D. Ill. 2001)

as thirty years. Therefore WRCF has foregone income that it should have been able to generate under *Fla. Stat. 212.06(9)* (1999), regardless of whether or not it obtained a consumer sales tax exemption certificate.

The Department argues that it concedes that any materials used or sold by the organization qualify for the exemption – in other words a sort of non-binding promise to assume that everything WRCF does is religious. Even if accepted, this argument fails to remove WRCF's basis for standing as it does not remedy the harm to religious freedom, address the purchase or use of items by WRCF or its members from other sellers, or solve the underlying constitutional issue.

In *Melzer v. Board of Public Instruction of Orange County, Florida*, 548 F.2d 559 (5th Circ. 1977), the School Board argued that the statute requiring schools to "inculcate…Christian virtue" could not be challenged because the School Board was not enforcing the statute. The Court had this to say:

> It is of course true that the statute has not recently been enforced by disciplinary measures. But that does not remove the potential effect of its mandatory wording or remove the possibility of disciplinary measures for noncompliance in the future, ***particularly if we give our implicit sanction to the statute by failing to interpret it.*** *Melzer at 26, n. 25.* (emphasis added)

Similarly in this case, the exemption is a mandatory exemption –"the taxes imposed by this chapter do not apply." *Fla. Stat. 212.06(9)*

2. <u>WRCF has citizen-taxpayer standing that does not require specific injury.</u>

Where there is an attack upon constitutional grounds based directly upon the Legislature's taxing and spending power, there is standing to sue without the requirement of special injury. *Flast v. Cohen*, 392 U.S. 83 (1968), *Department of Administration v. Horne*, 269 So. 2d 659 (Fla. 1972), *Paul v. Blake*, 376 So. 2d 256 (Fla. 3d DCA 1979). While a state constitution may provide for more rights than the federal constitution, it is axiomatic that it cannot provide for fewer rights. Florida is exercising its taxing and spending power to endorse and subsidize religious speech. The state is explicitly favoring religious based content over secular content, rather than remaining neutral, by exempting items of religious speech from sales and use tax. This forces any taxpayer purchasing secular materials to support religious expression through the subsidy. The Court in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1; 109 S.Ct. 890; 103 L.Ed.2d 1 (1989) states:

> Every tax exemption constitutes a subsidy that affects nonqualifying taxpayers, forcing them to become indirect and vicarious donors. (citations omitted) Insofar as that subsidy is conferred upon a wide array of nonsectarian

> groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause. However, when government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, as Texas has done, it "provide[s] unjustifiable awards of assistance to religious organizations" and cannot but "conve[y] a message of endorsement" to slighted members of the community. It is difficult to view Texas' narrow exemption as anything but state sponsorship of religious belief, regardless of whether one adopts the perspective of beneficiaries or of uncompensated contributors. *Texas Monthly at 14,15.*

The taxing and spending power afforded to Florida cannot be *greater* than that allowable under the United States Constitution. *Article 7, §1* of the Florida Constitution specifically provides that "[n]o tax shall be levied except in pursuance of law". *Art. 1, §3* places limitations upon that taxing and spending power, stating "No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury **directly or indirectly** in aid of any church, sect or religious denomination or in aid of any sectarian institution." (emphasis added) This is not an "ill-defined controversy over constitutional issues," *WRCF* at 135[11], but rather it is exactly the type of governmental overreaching which the *Flast* court

[11] Citing *Valley Forge*, specifically disapproved for application in this context by *Texas Monthly*.

addressed by recognizing citizen-taxpayer standing in this specific and well-defined context.

The *Texas Monthly* court rejected the distinctions between beneficiaries and non-beneficiaries made by the majority in the district court decision, stating "[i]t is difficult to view Texas' narrow exemption as anything but state sponsorship of religious belief, regardless of whether one adopts the perspective of beneficiaries or of uncompensated contributors." *Texas Monthly at 14,15.* Florida's tax exemption, like the one in *Texas Monthly*, subsidizes and promotes religion, giving those entities or persons that express religious speech, either in writing or through the expressive speech of worship, the benefit of keeping tax money that would otherwise go to the state to spend on behalf of all its citizens, religious or not, worthy or not. As a matter of both law and policy, this money should be going to fund some of the unfunded mandates placed in the constitution by the majority of the people of this state, for example, minimum class size requirements, not religious literature. People will worship, and regularly do, with or without money, and churches can promote their beliefs and missions without the help of the state. Schools, on the other hand, cannot function without money, and schools serve all children, not just children from religious families.

In *Department of Admin. v. Horne*, 269 So. 2d 659 (Fla. 1972) state senators, who were also taxpayers, challenged the constitutionality of several sections of the General Appropriations Act. This court specifically found an exception to the "Rickman Rule" requiring a showing of special injury, stating:

> The instant case presents a valid exception to the so-called Rickman Rule." The Appellants have alleged the *unconstitutionality* of certain sections of an appropriations act. These sections are said to be violative of constitutional provisions which place limitations upon enacting legislation regarding state funds.

In *Horne* this court expressly relied on the rationale set forth in *Flast v. Cohen, Secretary of Health, Education, and Welfare*, 392 U.S. 83; 88 S. Ct. 1942; 20 L. Ed. 2d 947 (U.S. S. Ct. 1968). In *Flast*, the U.S. Supreme court announced the rule on standing as follows:

> A taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power. *Flast* at 105-6

This court said "[W]e choose to follow the United States Supreme Court." *Horne* at 663

In *Paul v. Blake*, 376 So. 2d 256 (Fla. 3d DCA 1979), the third district court of appeal relied on *Horne* in holding that a taxpayer had standing to

challenge a tax exemption absent special injury when the suit attacked the exercise of the state's taxing or spending authority on the ground that it exceeds specific limitations imposed on the taxing and spending power by the United States Constitution or the Florida Constitution. The court states:

> Notwithstanding the danger of increased taxpayer suits, we perceive this exception to be based on our fundamental belief that such an unconstitutional exercise of the taxing and spending power is intolerable in our system of government and that the courts should be readily available to immediately restrain such excesses of authority. *Paul* at 259

The district court opinion in this case holds that the church does not have standing to sue because, as a religious institution, it benefits from the exemption. The exemption was promulgated pursuant to the taxing and spending authority of the state, and the church alleges that it is unconstitutional under both the Establishment and Free Press clauses of the federal and state constitutions, that it is an invalid exercise of the taxing and spending authority, and violative of *Article I, § 3* of the Florida constitution. The church meets all the requirements of the exception to the general rule that requires a taxpayer bringing a lawsuit to allege special injury.

This court has demonstrated a continued commitment to the application of this exception to the rule. In *Department of Education v. Lewis*, 416 So. 2d 455 (Fla. 1982) this court found that taxpayers had standing to challenge a general appropriations bill that prohibited any state

funds from being distributed to any state supported educational institutions that recommended or advocated sexual relations between unmarried persons. In holding that the taxpayers, who were also state officials, had standing to sue, this court said:

> In making their challenge, the Appellants invoke two constitutional prohibitions: article III, section 12, Florida Constitution, governing appropriations acts; and the state and federal constitutional prohibition against state action abridging the freedoms of speech and association. Both challenges relate to the power of the legislature to tax and spend for the general welfare of the state as embodied in the appropriations bill. The proviso is challenged as an abuse of the appropriations process and as an invalid directive to the postsecondary school administrators of the state concerning the spending of state funds. Therefore, Appellants as taxpayers have standing to challenge the constitutionality of the proviso. *Lewis* at 459

The district court cited as its primary source for its decision on standing the *Flast* case[12], stating that "[a] proper party is essential to prevent the courts from deciding 'ill-defined controversies over constitutional issues.'" [*citation omitted*] *Wiccan Religious Cooperative of Fla. v. Zingale*, 898 So. 2d 134, 135 (Fla. 2d DCA 2005). The district court also relied on the standing analysis set forth in *Valley Forge v. A.C.L.U., Inc.*, 454 U.S. 464,

[12] None of the other cases cited by the district court in its opinion involve the taxing and spending power of the state. *Chamberlin v. Dade C'ty B'd of Public Inst.*, 171 So. 2d 535, although it did not expressly mention the taxing power of the state implicitly involved that power. However, the case remains distinguishable because the comments on standing were dicta, not actually before the court for decision, and the case was decided in 1965, three years before *Flast*.

473 (1982) specifically stating that "courts have declined to hear cases that 'would convert the judicial process into no more than a vehicle for the vindication of the value interests of concerned bystanders.'" *WRCF* at 135. Certainly that is not the way the *Texas Monthly* court saw it, when they rejected the application of the *Valley Forge* standard to a party that had paid money it should not have had to pay. Such a party was clearly viewed as much more than a bystander.

In its analysis of the Article III standing requirements, the district court stated:

> Wiccan's constitutional challenge is that, based on the reasoning found in Texas Monthly, the Florida sales tax exemption benefits religion. The parties have stipulated that Wicca is a religion. Therefore, under Wiccan's argument that the tax exemption benefits religion, 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 constitutional challenge. *WRCF* at 137-138.

The district court failed to address or apply the test that was actually defined by the United States Supreme Court in *Flast*:

> The nexus demanded of … taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of Congressional power under the taxing and spending clause … of the Constitution. … Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional

> infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress. … When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke [the court's] jurisdiction. *Flast* at 102-103

Actually, the concern in this case is the establishment or promotion of religion, and state entanglement in religion. Judge Benton in his dissent in the district court opinion cogently explained the inextricable relationship between the standing issue and the constitutional issue. "The decision that the Cooperative had standing was an integral part of the judgment, and a necessary predicate to the declaration of constitutionality that the Department asks us to uphold." *WRCF* at 139.

In *Flast*, the court held that the taxpayer had met the requirements of the test. The *Flast* court's analysis parallels the church's argument in this case, that the constitutional challenge is made to a legislative exercise of taxing and spending power under the constitution, and that the challenged exemption violates the First Amendment to the United States constitution. WRCF has standing in this case.

3. WRCF has associational standing to assert harm on behalf of its members

It is a long standing federal and state principal that a voluntary association has standing to bring suit on behalf of it's members when:

> (a) Its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Warth v. Seldin*, 422 U.S. 490, 511 (1975)[13]

WRCF challenges the facial constitutionality of a sales tax exemption for items expressing religious speech. WRCF is a religious organization. It, as well as its members, can be expected to purchase and use religious items and publications as part of their religious speech. Reliance on its own doctrines and beliefs, without requiring the approval of the state, to identify those publications and items to be used by the church and its members in religious and educational programs and worship services is germane to the organization's purpose as fully set forth in its Bylaws. Equally germane is

[13] *see also Familias Unidas v. Briscoe, 619* F.2d 391 (5th Cir. 1980); *Church of Scientology v. Cazares*, 638 F.2d 1272 (5th Cir. 1981); *TVA v. U.S. EPA*, 278 F.3d 1184 (11th Cir. 2002); *National Parks Conservation Association v. Norton*, 324 F.3d 1229 (11th Cir. 2003); *NAACP v. Florida Board of Regents*, 2003 Fla. LEXIS 1987 (Fla. 2003); *Division of Alcoholic Beverages and Tobacco v. McKesson*, 524 So. 2d 1000 (Fla. 1988); *Fla. Homebuilders Ass'n v. Dept. of Labor and Employment Security*, 412 So. 2d 351 (Fla. 1982).

the ability of WRCF to sell these items, to their members and to others, without the threat of crippling civil penalties, criminal prosecution, and incarceration.

Members' purchase of these things does not in any way depend on whether or not WRCF has a consumer sales tax exemption. Nor does it depend on whether or not they are members of the organization. Members may purchase such items from anyone who sells them, and under no circumstances should such items be taxed under the current statute. However, since there is no identification of these items, members have no ability to access the alleged benefits of this exemption. Furthermore, the problems the exemption creates for religious freedom negatively affects the members as well as the organization. Members have standing to sue in their own right.

Neither the claim asserted nor the relief sought requires the participation of individual members. WRCF seeks to have this single statute declared facially unconstitutional and enjoined. The constitutional infirmity is that no one has, nor can they constitutionally, define how to identify the items which the statute exempts. The gravamen of the statute is that the

content or use of the items must be "religious[14]" in order to be exempted. Common sense dictates that this is both a promotion of religion over non-

[14] By separate request pursuant to *Rule §90.20, Fla. R. of Evid.*, WRCF requested the trial court to take judicial notice of the following dictionary definitions set forth *Random House Webster's College Dictionary*, 2001.

(a) Bible. The first definition is "the collection of sacred writings of the Christian Religion, comprising the Old and New Testaments" while the second definition is "Also called Hebrew Scriptures. The collection of sacred writings of the Jewish religion, known to Christians as the Old Testament." It can also mean the sacred writings of any religion, or a reference publication esteemed for its usefulness and authority.

(b) Vestments. The meanings are as broad as "garment", "attire" or "clothing" and as narrow as "priestly robe."

(c) Sacrament and sacramental. Sacrament is defined as "a rite considered to have been established by Christ as a means of grace" and it then goes on to define sacraments of various Christian sects. Three of four definitions refer to Christian religious rites, while the final definition is "something regarded as possessing a sacred character or mysterious significance." Sacramental is defined as "of or pertaining to, or of the nature of a sacrament, especially the sacrament of the Eucharist" (which the dictionary defines as the Christian rite of Holy Communion), as something which is "powerfully binding", or as "a sacred act, ceremony, or object instituted by the Church, as prayer, a blessing or holy water."

(d) Church. "a **building** for public Christian worship" (emphasis added); "a religious service in a church"; "the whole body of Christian believers"; "a Christian denomination"; "a Christian congregation"; "organized religion as distinguished from the state",

religion ***and*** a content-based determination prohibited by the First Amendment.

4. This court should review the constitutional challenge to *Fla. Stat. §212.06(9)* and find that the application of *Texas Monthly* and its progeny compel a determination that the statute is unconstitutional and must be enjoined

As this case is before the court on *de novo* review, this court may choose to consider and rule on the constitutional question as well as the issue of standing. *Fla. Stat. §212.06(9)* exempts from sales and use tax religious publications and religious items used in expressive speech, *i.e.* religious worship. WRCF argues that the exemption lacks sufficient breadth to pass

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"the Christian Church before the Reformation" and "the profession of an ecclesiastic"

(e) Chalice. "a cup for the wine of the Eucharist", "a drinking cup or goblet"; or "a cuplike blossom".

(f) Religious. Religious means "of or pertaining to religion" while religion means " a set of beliefs concerning the cause, nature and purpose of the universe…usually involving devotional and ritual observances, and often containing a moral code for the conduct of human affairs"; "a specific fundamental set of beliefs and practices generally agreed upon by a number of persons or sects"; "the body of persons adhering to a particular set of beliefs and practices"; "the practice of religious beliefs; ritual observance of faith" and "something a person believes in and follows devotedly".

(g) "other church service equipment" Is defined as a phrase neither by the statute nor by the dictionary.

scrutiny under the Establishment Clause, and violates the Free Press Clause because it is a content-based regulation, and urges this court to review this issue, declare the statute unconstitutional under both these provisions.

The district court was once before confronted with the facial constitutionality of *Fla. Stat. §212.06(9)* in *Sharper Image Corporation v. Department of Revenue*, 704 So. 2d 657 (Fla. 1st D.C.A. 1997). In that case, Sharper Image challenged a tax assessment on its sales catalogs, and claimed, *inter alia*, that *Fla. Stat. §212.06(9)* was facially unconstitutional. The court did not find it necessary to determine that issue, as the remedy for such unconstitutionality, pursuant to *Fla. Stat. §212.21(2)* would have been to eliminate the exemption for religious literature, not to extend the exemption to cover Sharper Image sales catalogs, which was the remedy sought by Sharper Image. *Id. at 663-664.* As the tax would have been assessed regardless of the constitutionality of the challenged statutes, this Court did not find it necessary to reach that issue. In this case, the issue is squarely presented to this Court for adjudication as WRCF seeks to have this facially unconstitutional statute enjoined. WRCF argues that *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1; 109 S.Ct. 890; 103 L.Ed.2d 1 (1989) and its progeny compel such a result.

The U.S. Supreme Court in *Flast* and this court in *Horne*, created a very specific exception to the special injury rule, followed by the Third District Court of Appeals in *Paul*, allowing taxpayer standing when a taxpayer brings a suit alleging constitutional violations based directly on the taxing and spending power of the state. There are sound public policy reasons for this exception based on the "fundamental belief that such an unconstitutional exercise of the taxing and spending power is intolerable in our system of government and that the courts should be readily available to immediately restrain such excesses of authority." *Paul at 259*

The district court's decision carves out an exception to the exception, making such taxpayer standing unavailable to church taxpayers because they "benefit" from the exemption. However, the fundamental concept behind the exception is that no taxpayer benefits from the abuse of the government's power to tax and spend, and curbing abuses of that power is essential to the preservation of religious liberty, a fundamental right. The district court decision discriminates against taxpayers **because** they are religious. As Judge Benton says in his dissent "[T]his is not in keeping with our traditions. *WRCF* at 20

The Court must begin any constitutional inquiry with consideration of the binding decision in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1; 109 S.Ct.

890; 103 L.Ed.2d 1 (1989). In that case, the United States Supreme Court, in a plurality opinion, held that a sales tax exemption for religious literature is an unconstitutional establishment of religion over non-religion.[15]

The trial courts in both this case and in *Texas Monthly* found that the exemption at issue was facially constitutional because it was "religion neutral." That analysis was specifically rejected in 1989, sixteen years ago, by the U.S. Supreme Court in *Texas Monthly* which held that the exemption violated the Establishment Clause of the First Amendment to the U.S. Constitution. In a concurrence in the opinion only, Justice White opined that the exemption violated the Free Press Clause. While neither the Florida nor the Texas regulation explicitly singles out any particular type of religion,[16] the Constitution not only mandates that a regulation not discriminate amongst various religions, but also that it not advance religion over non-religion.

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[15] Justices Brennan, Marshall and Stevens opined that any religious exemption violated the Establishment Clause, while Justices Blackmun and O'Connor expressed the opinion that statutes that exempted *only* religious literature violated that same clause. Justice White concurred in the opinion only, stating that he believed the case was more properly decided as violative of the Free Press Clause.

[16] Although the language used to describe publications and items of worship are defined in the dictionary as primarily specifically Judeo-Christian forms of religious expression. R. V. 5, 998-1010. *See also* footnote 14.

Texas Monthly makes it clear that "[i]t is part of our settled jurisprudence that the Establishment Clause prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, **or on religion as such**…" *Id. at 8 (emphasis added)*. Benefits may flow to religious organizations only to the extent that the same benefits flow to a large number of nonreligious groups as well. *Id. at 9-15*. The Court stated, "It is difficult to view Texas' narrow exemption as anything but state sponsorship of religious belief, regardless of whether one adopts the perspective of beneficiaries or of uncompensated contributors." *Id. at 15*.

While the majority in *Texas Monthly* declined to decide the Free Press Clause issue, Justice White, concurring in the judgment, clearly stated that "[t]he Texas law at issue here discriminates on the basis of the content of publications…Appellant is subject to the tax, but other publications are not because of the message they carry." *Texas Monthly at 25, 26*, relying on *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

In this case, the statute exempting religious publications and items of worship from sales and use tax impermissibly establishes religion over non-religion as a state sponsored activity, has no discernable secular purpose, and impermissibly entangles the state with religion, because it requires governmental scrutiny of both the written word and expressive speech, *i.e.*,

forms of worship, to determine if the speech qualifies as "religious." This is a content-based determination that requires both extensive scholarly and historical knowledge of all faiths, known and unknown, as well as the application of personal judgment and discrimination, which is not standardized or infallible. No specific guidelines or criteria are contained in the statute to guide the State's discretion in this regard. This is precisely the sort of official scrutiny of the content of speech that is so repugnant to the First Amendment. *Finlator v. Powers*, 902 F.2d 1158 (4th Circ. N.C. 1990).

Several other courts have declared similar regulations invalid, relying on *Texas Monthly*. For example the Pennsylvania Supreme Court and the Rhode Island Supreme Court have both held sales tax exemptions on religious publications unconstitutional. In *Haller v. Commonwealth of Pennsylvania*, 693 A.2d 266 (Pa. 1997), the court held that such an exemption violated the Establishment Clause of the First Amendment. In *Ahlburn v. Clark*, 728 A.2d 449 (R.I. 1999) the court held that such an exemption violated the Free Press Clause of the First Amendment. The reasoning in these decisions should be applicable to the instant case.

The Florida Supreme Court, in *Department of Revenue v. Magazine Publishers of America, Inc.*, 604. So. 2d 459 (Fla. 1992) has directly considered the Free Press Clause argument in relation to secular

publications. In that case, Florida imposed a sales and use tax on secular magazines, but not on secular newspapers. The Florida Supreme Court, relying on *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221 (1987), found that the exemption for newspapers could not survive heightened scrutiny under the First Amendment, because it discriminated on the basis of the content of the speech. The content of the publication was a key factor in determining whether the publication was subject to taxation.[17] *Id. at 461-462.*

In this case, the statute on its face makes religious content **the** key factor in determining eligibility for the exemption.[18] In *Finlator v. Powers*, 902 F.2d 1158 (4th Circ. N.C. 1990) the court considered a tax exemption for "Holy Bibles." The court found that the exemption violated both the Establishment Clause and the Free Press Clause. Furthermore, the court found that even if the exemption were applied to any sacred scriptures of any

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[17] The statute was subsequently changed to apply the exemption to newspapers, magazines and newsletters. *Fla. Stat. 212.08(7)(w).*

[18] This argument applies equally to the exemption for religious items. Publications or literature are "pure" speech, and "church service items" or objects of or for use in worship and ritual are expressive speech. Worship and ritual are inherently symbolic. Religious literature takes on its religious nature by virtue of its express content, while religious items take on their religious nature by virtue of their symbolism and use.

religion, it would still require the sort of official scrutiny of the content of publications that was so repugnant to the First Amendment.

The statute exempts religious publications and religious items used in expressive religious speech. WRCF argues that the exemption violates the Establishment Clause and the Free Press Clause. The Department argues that it is constitutional because it does not discriminate amongst religions. The correct standard for constitutional analysis prohibits statutes that promote religious speech over secular speech.

The Department bases its entire argument on discrimination amongst religions. When distinguishing the list of applicable cases cited in WRCF's initial brief to the DCA, counsel either claims the distinction is that the statute in the other case does discriminate amongst religions, or that Florida's statute is more inclusive because it includes all religions. The *Finlator* Court found that even if the exemption were interpreted to apply to any religious publication, it would still be unconstitutional, stating:

> The Secretary argues that, despite its plain wording, she has attempted to apply the Exemption in a constitutional manner by interpreting it so that any sacred scriptures of any religion can qualify for the exemption upon proper review and consideration. However, it is precisely this type of "official scrutiny of the content of publications as the basis for imposing a tax" that is so repugnant... *Finlator at 1163*

The proper test to be applied to this case is that of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In order to pass constitutional muster, a statute must possess a secular legislative purpose, must not have as its primary effect advancing or inhibiting religion, and must not give rise to excessive government entanglement with religion. The U.S. Supreme Court, the 4th Circuit Court of Appeals in North Carolina, the Pennsylvania Supreme Court, the Rhode Island Supreme Court, and the South Carolina Supreme Court, *Thayer v. South Carolina Tax Commission,* 413 S.E. 2d 819 (S. C. 1992) have all found that sales tax exemptions for religious publications are unconstitutional under either or both the Establishment Clause and the Free Press Clause of the United States Constitution.

In all of these cases, no secular purpose could be found absent the inclusion in the exemption of secular speech. The Department has never advanced any secular purpose for this statute. Nor has The Department cited a single case in which such an exemption has been upheld. The Department's analysis is factually and legally flawed. *Fla. Stat. §212.06(9)* is facially unconstitutional, and cannot be interpreted in any way so as to save it.

CONCLUSION

WRCF has established on the record that it meets all the requirements for standing in this case under many standards. It has suffered harm, it has

citizen-taxpayer status that bestows standing even without harm, and it meets the requirements for associational standing. The district court erred as a matter of law in holding that WRCF did not have standing, and it should have decided the constitutional issue. As the case is before this court on *de novo* review, this court may consider and rule on the constitutional issue, and WRCF urges the court to do so. The United States Supreme Court ruled in 1989, sixteen years ago, that this type of exemption is unconstitutional. It has taken five years for this issue to come before this court, and it is time to resolve the issue in the state of Florida in accordance with the Supreme Court and every other state that has reviewed this issue.

In constitutional terms, this is a simple case involving constitutional construction, where the result is compelled by the United States Supreme Court. This court now has the issue of the facial unconstitutionality of a sales tax exemption solely benefiting religious speech placed squarely before it should it choose to consider the matter. If it does, application of established standards of First Amendment jurisprudence compel a finding that *Fla. Stat. §212.06(9)* is facially unconstitutional as an establishment by the state of religion over non-religion and a content-based regulation of speech protected by the First Amendment.

WHEREFORE, WRCF requests that this court **reverse** the decision of the district court as to standing, finding that WRCF does have standing. WRCF further requests that this court, in the exercise of its discretion, review the constitutionality of *Fla. Stat. 212.06(9)*, **declare** the Statute unconstitutional, and **remand** the case to the district court to enter an order consistent with this ruling.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail/facsimile to: James A. McKee, Office of the Attorney General, PL-01, The Captiol, Tallahassee, FL 32399-1050, Nicholas Bykowsky, Office of the Attorney General, The Capitol, Tax Section, Tallahassee, FL 32399-1050 and George Hamm, Florida Dept. of Revenue, P.O. Box 6668, Tallahassee, FL, 32314-6668, this _____ day of December, 2005.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with all font size and format requirements of Rule 9.210(a)(2) of the Rules of Appellate Procedure.

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