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.
_____/

REPLY BRIEF OF APPELLANT

HEATHER MORCROFT
Florida Bar No.0709859
5278 Fayann St.
Orlando, FL 32812
Phone: 407-325-0585
Fax: 407-843-9713
Attorney for Appellant

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The posture of this case as it is currently before this Court is somewhat different than the posture of this case when it first went to trial. These changes are important to the substance of the issues before the Court because they are relevant to both the standing issue and the underlying constitutional issue. The initial lawsuit, filed in state court, requested both declaratory and injunctive relief, and was decided as a matter of law on summary judgment motions.[1]

Between May 6, 1993 and May 6, 1998, WRCF held a consumer sales tax exemption certificate issued by the Department of Revenue of the State of Florida. On December 20, 1999, WRCF applied for a renewal of that application as a religious institution under a provision of then *Fla. Stat. 212.08* which required that in order to qualify as a religious institution the organization must have an established physical place of worship. The current version of this statute retains that requirement:

Fla. Stat. 212.08(7)(m) Religious Institutions

> 1. There are exempt from the tax imposed by this chapter transactions involving sales or leases directly to religious institutions when used in carrying on their customary nonprofit religious activities or sales or leases

[1] It is now clear, based on *Hibbs v. Winn*, 542 U.S. 88 (2004), that this case, or a similar case seeking relief on the same issue, could now be filed in federal court as an option. *See Budlong v. Graham*, 414 F. Supp. 2d 1222 (N.D. Ga. 2006).

> of tangible personal property by religious institutions having an established physical place for worship at which nonprofit religious services and activities are regularly conducted and carried on.
>
> 2. As used in this paragraph, the term "religious institutions" means churches, synagogues, and established physical places for worship at which nonprofit religious services and activities are regularly conducted and carried on…

The statute goes on to describe specific sub-categories of specialized entities that qualify as religious institutions, none of which apply to WRCF. The statute specifically considers "nonprofit state, nonprofit district, or other nonprofit governing or administrative offices the function of which is to assist or regulate the customary activities of religious institutions" to be religious institutions. Additional categories include, among others, religious broadcasters and organizations that put religious publications on tape for the blind and distribute them at no charge. While this particular statute was part of the original lawsuit filed in the trial court, it was not an issue on appeal. It is, however, important factual background in terms of the history of this appeal, and its presentation before this Court.

There was significant correspondence between the Department and WRCF regarding the renewal application, all of which is a part of the record in this case, and is fully referenced in Appellant's Appendix to its Initial Brief. WRCF explained to the Department at the time of its request for

renewal of the tax exemption certificate that it no longer had an established physical place of worship. The Department sent a letter confirming that an established physical place of worship was required in order to be recognized by the state as a religious institution.

In an attempt to resolve the issue, the Department sent two letters requesting that WRCF provide a notarized statement explaining that the organization was "a governing or administrative office that functions to assist or regulate member organizations over which your organization has control" – one of the definitions of "religious institution" under *Fla. Stat. 212.08(7)(o)*. The record clearly shows that WRCF was unable to send such a notarized statement, as the content of that statement would have been untrue – WRCF was not and never has been such an organization, and the Department has never argued that it was.

The Department's letters specifically stated that failure to respond would "delay the processing of [the] application and ultimately result in its denial." However, contrary to the statements in the letter, no notice of intent to deny or denial was ever issued. Instead, in March of 2000, the Department sent a letter to WRCF stating that the case had been closed because of failure to respond, and that the organization would have to reapply for a license. This procedure was in direct contravention of the law

applicable to the Department. *Fla. Stat. §120.60* requires that a notice be issued. If an applicant fails to provide information, the Department may request such information. Regardless, however, an application must be granted or denied within ninety days.

In addition to filing its renewal application seeking to be designated as a religious institution, WRCF also requested, prior to filing a lawsuit, that the Department advise it how to identify and define a religious publication or item of worship. In response, the Department sent a letter in which it stated that such items were identified as tax exempt when sold by religious institutions granted certificates of exemption under the classification requested by WRCF in its application. As to any other types of publications, the Department admitted that it could not define the meaning of religious publications, nor could it pass on the constitutionality of the statute.

At the time this correspondence was being generated, the Department was working under the following Administrative Code Regulations, which it had itself promulgated. Rule 12A-1.001, *Fla. Admin. Code* provided:

> (a) Bibles, hymn books, prayer books and religious publications similar thereto, altar paraphernalia, sacramental chalices, and like church service and ceremonial raiment and equipment are exempt. (See Rule 12A-1.008(12), F.A.C. for sale or purchase of religious publications.)
>
> (b) Christian Science reading rooms are allowed to sell

> Bibles and religious publications and literature tax exempt.
>
> (c) A book of sermons does not fall within the specific exemptions provided under Rule 12A-1.001 and the sale thereof is taxable.
>
> Rule 12A-1.008, *Fla. Admin. Code* provided that :
>
> (12)(a) The sale, use, or distribution of bibles, hymn books, and prayer books is exempt without reference to the type of person, institution, or organization that uses, sells, purchases, or publishes such property.
>
> (b) Religious publications are exempt. For purposes of this exemption, 'religious publications' are defined as publications, except those referred to in paragraph (a), that are used, sold, or distributed by a church, or religious institution, holding an exemption certificate based on its exemption under s. 212.08(7)(o), F.S.

The first provision has been amended five times since WRCF's correspondence with the Department began in 1999, four of them subsequent to the filing of this lawsuit in 2000. The second provision was amended once subsequent to the filing of the lawsuit. The specific provisions cited above and challenged by WRCF have been removed from the Administrative Code by the Department. The only definition the state has ever proffered of "religious publications" is the definition offered in the above provisions, which include a) bibles, hymn books, or prayer books and b) publications sold, used or distributed by churches or religious

organizations that hold a consumer sales tax exemption under the specific provision of the statute that requires such an institution to have an established physical place of worship.

Thus, at the time this dispute arose between WRCF and the Department of Revenue, all bibles, hymn books and prayer books were exempt, no matter what individual or organization sold them, while any other publication would only be defined by the state as religious if it was sold by a church or religious institution that had an established physical place of worship and was the holder of a state consumer sales tax exemption certificate issued by the state.[2]

The current exemption statute, *Fla. Stat. 212.06(9)* states: "The taxes imposed by this chapter do not apply to the use, sale, or distribution of religious publications, bibles, hymn books, prayer books, vestments, altar

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[2] This definition certainly looks like a convoluted attempt on the part of the Department of Revenue to predetermine who is entitled to a monetary benefit from the state on the basis of who they are and what they say, and furthermore, to require them to get a permit to express these ideas without being taxed on their use, sale or distribution. Given this history, and the Department's continued refusal to define "religious publications" this statute cannot as a practical matter be considered "broad". This distinction is more than an "as applied" argument, which is not before the Court. At this point in time, there is no one willing or able to enforce the statute, and this is so because the State knows that it cannot be the final arbiter of what is and is not religious speech, nor can it delegate the authority to interpret the statute to others. There is no way off this Mobius strip. The constitutional defect is facial and irremediable.

paraphernalia, sacramental chalices, and like church service and ceremonial raiments and equipment." Thus bibles, hymnbooks and prayer books continue to be defined as exempt, while there is now *no definition whatsoever* indicating what content would qualify a publication, or what use would qualify an item, as religious.

Shortly before the filing of the lawsuit, about the time that the first provision, Rule 12A-1.001, *Fla. Admin. Code,* was repealed, the statute itself was amended to permit any type of organization that had obtained federal 501(c) (3) tax exempt status to apply for and receive a consumer sales tax exemption certificate on that basis alone. During the course of the lawsuit, the Department argued that, as WRCF could apply for a sales tax exemption certificate under its 501(c)(3) status, there was no reason to continue the lawsuit. However, WRCF chose not to apply at that time for a sales tax exemption certificate under its 501(c)(3) status, and has never reapplied for any type of consumer sales tax exemption. Prior to the Department's Answer Brief filed in this Court, there has been no argument made that WRCF was anything other than a taxpayer.

ARGUMENTS

1. All Applicable Case Law Supports WRCF's Standing in this Case and its Request for Injunctive Relief Enjoining Application of the Statute.

There are eight cases which are precisely on point on the constitutional issue, and every one of them holds that a sales tax exemption such as the one at issue in this case is unconstitutional under the First Amendment to the United States Constitution.[3] In addition, most of these cases address the issue of standing and there are two additional cases, one of which addresses the unconstitutionality of content based tax exemptions, and the other which addresses standing issues in precisely the case before this

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[3] *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1; 109 S.Ct. 890; 103 L.Ed.2d 1 (1989); *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Finlator v. Powers*, 902 F.2d 1158 (4th Circ. N.C. 1990); *Haller v. Commonwealth of Pennsylvania*, 693 A.2d 266 (Pa. 1997); *Ahlburn v. Clark*, 728 A.2d 449 (R.I. 1999); *Thayer v. South Carolina Tax Commission*, 413 S.E. 2d 819 (S. C. 1992); *Budlong v. Graham*, 414 F. Supp. 2d 1222 (N.D. Ga. 2006); *See also Department of Revenue v. Magazine Publishers of America, Inc.*, 604. So.2d 459 (Fla. 1992)(taxing or exempting a publication based on its content violates the Free Press clause of the First Amendment); *Sharper Image Corporation v. Department of Revenue*, 704 So.2d 657 (Fla. 1st D.C.A. 1997)(where taxpayer appellant's constitutional claim was based on a content-based approach to taxation of publications, that taxpayer has standing).

Court.[4] Whether or not WRCF was entitled to an exemption under another provision of the statute is not legally determinative of the issue. In *Finlator v. Powers*, 902 F.2d 1158 (4th Cir. 1990), the court stated:

> It should also be noted that the North Carolina Department of Justice expressly informed the North Carolina Civil Liberties Union Legal Foundation, the sponsor of this litigation, that the appellants would be entitled to the Exemption. The unavoidable conclusion is that the appellants must or should have known that they would have been entitled to a refund of all sales taxes that had been assessed and paid on sacred literature. Presumably, the Secretary also would have refused to refund any taxes paid on non-sacred texts, and the appellants then indisputably would have had standing to bring this suit. However, these events never occurred. While there is some justification for the Secretary's interpretation of *Arkansas Writers' Project* and *Texas Monthly*, we decline to read such an implicit requirement into these decisions absent a clear statement by the Supreme Court to that effect. Realistically, if this court were to deny standing in this case, the appellants would simply protest the payment and collection of the State's sales tax, and refile their suit. We do not believe that this additional requirement would improve the vigorousness or quality of the parties' advocacy, would enhance the posture of this case, would clarify the legal issues presented for review, would strengthen the justiciability of the appellants' claims, or would contribute in any way

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[4] *Department of Revenue v. Magazine Publishers of America, Inc.*, 604. So.2d 459 (Fla. 1992)(taxing or exempting a publication based on its content violates the Free Press clause of the First Amendment); *Sharper Image Corporation v. Department of Revenue*, 704 So.2d 657 (Fla. 1st D.C.A. 1997)(where taxpayer appellant's constitutional claim was based on a content-based approach to taxation of publications, that taxpayer has standing).

> to our ability to decide a question presented and contested by parties having a demonstrated interest and stake in its resolution. Moreover, we conclude that the appellants did suffer actual injury in this case as a result of the discriminatory treatment dispensed by the Secretary -- purchasers of "Holy Bibles" need not protest the State's sales tax in order to claim the Exemption, while purchasers of other texts, both sacred and non-sacred, must protest the sales tax in order to claim the Exemption. Simply stated, an injury is created by the very fact that the Secretary imposes additional burdens on the appellants not placed on purchasers of "Holy Bibles." Finally, we believe that it would be an untenable waste of judicial resources to deny the appellants standing in this case given the patent unconstitutionality of the Exemption. As noted above, standing is an amalgam of prudential as well as constitutional concerns, but none of the prudential concerns of standing doctrine compels the denial of standing in this case.

In this case, while the statute purports to be broader than the statute challenged in *Finlator*, in fact, other than "bibles, hymnbooks and prayerbooks" no specific religious literature is defined. *Fla. Stat. 212.06(9).* The definition of any other religious literature is undefined, and if a person, an institution, or WRCF, purchases literature it believes is religious in nature that the seller does not identify as such, then the purchaser must pay the tax in order to purchase the book. Similarly, if a seller offers for purchase any publications other than bibles, hymnbooks and prayerbooks, he or she has no way of knowing whether or not the state considers that publication

"religious". The seller therefore cannot determine whether or not he or she is required to collect and remit sales tax on that sale.

Just as in *Finlator*, if there is no constitutionally permissible vehicle for identifying religious literature, then the purchaser would need to apply for a refund, and the state would determine for each refund request, whether or not that item was religious. Alternatively, prospective sellers or purchasers would need to otherwise petition the state for formal recognition of an item as "religious." As the court in *Finlator* said, "it is precisely this type of 'official scrutiny' of the content of publications as the basis for imposing a tax' that is so repugnant to the Free Press Clause of the Constitution." *Finlator* at *1163*. There is no way to fashion a constitutionally permissible system of review for the state to proclaim the religious nature of publications, nor, for that matter, of items of religious worship.

In *Budlong v. Graham*, 414 F. Supp. 2d 1222 (N.D. Ga. 2006), as in this case, the Department's 'filings are virtually bereft of any argument that the challenged exemptions are, in fact, constitutional. Rather, [his] principal arguments in opposition are…(ii) that Plaintiffs lack standing to bring this case. Neither has merit." The *Budlong* court goes on to say:

> Likewise, this Court does not find Defendant's standing argument persuasive. The standing inquiry focuses on

> "[w]hether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy…." Here, Plaintiffs are forced to endure a tax because the literature they seek to purchase and sell does not meet state-imposed religion and content requirements. A number of courts have concluded that persons so situated are entitled to seek judicial redress. The Court finds the reasoning expressed in these decisions persuasive, and sees no reason to depart from their holdings here. (*citations omitted)*

The *Budlong* court dismissed the idea that whether or not a party had to continue paying sales tax on purchases regardless of judicial outcome made any difference, saying:

> It is of no consequence that Plaintiffs themselves will be forced to continue paying sales tax on their purchases, irrespective of this Court's resolution…See Ragland, 481 U.S. 227 (citing its "numerous decisions…in which [it] ha[s] considered claims that others similarly situated were exempt from the operation of a state law adversely affecting the claimant[,]" held that a contrary rule in this context "would effectively insulate underinclusive [tax] statutes from constitutional challenge…")

The court recognized that the harm is not whether the claimant does or does not have to pay sales tax on specific types of books, but whether that determination is discriminatorily made based upon content. The cases involve as parties publishers, distributors and purchasers. In this case, WRCF has shown that it is a purchaser, has indicated that it plans to continue being a purchaser, and that it wishes to sell items with the benefit of the exemption, but cannot do so as the items cannot be clearly identified.

In this way, as well as in the ways set forth in WRCF's initial brief, Appellant has shown specific injurious harm caused to it by the statute.

In fact, as in *Budlong*, the harm is caused by the unconstitutionality of the statute. In that case, the appellate court granted a preliminary injunction. In this case, WRCF has not sought a preliminary injunction, but a permanent injunction. The standard for harm is higher for a preliminary injunction, yet the *Budlong* court had no trouble finding that the Plaintiffs met that standard, and that none of the Defendant's arguments had merit, stating:

> The loss of First Amendment freedoms for even minimal periods of time unquestionably constitutes irreparable injury. Consequently, to the extent that the plaintiffs have established a substantial likelihood that they could succeed on the merits of their First Amendment claims, they have also established the possibility of irreparable harm. These harms, moreover, substantially outweigh those that will be "suffered" by Defendant and the State of Georgia if the injunction issues. Here, the State's revenues will ultimately *increase* as a consequence of an injunction barring the application of the challenged tax exemptions. Finally, [t]he protection of First Amendment rights and vindication of constitutional violations is always in the public's interest. (*citations omitted)*

In *Sharper Image v. Dept. of Revenue*, 704 So.2d 657 (Fla. 1st DCA 1997) *cert. den.* 526 U.S. 1249 (1999), the court makes it clear that a party *can* raise the constitutionality of a part of a statute not only when he is injuriously affected, but also when the unconstitutional feature renders the portion of the statute complained of inoperative, and that portion affects the

parties rights and duties. WRCF has an obligation to comply with the law. It is not recognized as a religious institution[5], so that anything it sells would automatically be exempt from taxation. Therefore, if it sells religious publications or items of worship that would be exempt under the statute, it must have a method of identifying those items so that it can exercise its rights under the exemption statute and meet its duties to the state. The unconstitutionality of this provision makes it impossible for WRCF to exercise those rights or meet those duties. This fulfills the essence of requirements for standing.

In *Budlong*, the State of Georgia attempted to characterize the relief sought by the Plaintiffs as a suit to expand the tax exemption to cover all publications, regardless of their content. Georgia then attempted to argue that this would cost the state too much money, and therefore the suit was prohibited by the Tax Injunction Act. The court rejected this argument, finding that the proper remedy was to enjoin the unconstitutional statute.

The only difference between the Georgia statute at issue in *Budlong* and the Florida statute at issue in this case is that in addition to specified religious publications, Georgia exempted "similar books commonly recognized as being Holy Scripture" while Florida exempts other undefined

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[5] *See* pp. 1-4, *supra*

"religious publications." The fatal flaw in both of the statutes is the same. They "treat certain publications more favorably than others based on their content. It is a fundamental principle of Free Speech jurisprudence that 'regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated…' ".

Both *Finlator* and *Budlong* hold that, under *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 109 S. Ct. 890, 103 L. Ed. 2d 1 (1989) and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 107 S. Ct. 1722, 95 L. Ed. 2d 209 (1987) any type of sales tax exemption for religious literature violates both the Establishment Clause and the Free Press Clause of the United States Constitution. The *Budlong* court states:

> [T]he unique and preferential treatment the State provides to "religious" literature raises serious constitutional concerns under the Establishment Clause, especially following the Supreme Court's decision in Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 109 S. Ct. 890, 103 L. Ed. 2d 1 (1989) (plurality opinion) (holding sales tax exemption applicable to religious literature, but not non-religious texts, violative of the Establishment Clause). Accord Finlator v. Powers, 902 F.2d 1158, 1163 (4th Cir. 1990) (striking down sales tax exemption for "Holy Bibles" under the Establishment Clause.
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> The Establishment Clause of the First Amendment, made applicable to the states through the Fourteenth Amendment, provides that the government "shall make no law respecting an establishment of religion."

Even more plain, however, is the exemptions' incompatibility with the First Amendment's proscription against laws "abridging the freedom of speech, or of the press [.]" The cited statutory provisions, by excepting from tax "religious [p]apers" and "Holy Bibles, testaments, and similar books [,]" treat certain publications more favorably than others based on their content. It is a fundamental principle of Free Speech jurisprudence that "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated. . ."

Indeed, more than twenty years ago, the Supreme Court relied on this principle to strike down a state law exempting religious, professional, trade, and sports journals from taxation, but subjecting general interest magazines to a sales tax. See Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 107 S. Ct. 1722, 95 L. Ed. 2d 209 (1987). It reasoned:

In order to determine whether a [publication] is subject to sales tax, [the State's] enforcement authorities must necessarily examine the content of the message that is conveyed . . . .' Such official scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press. Id. at 230; id. at 229 (describing law that made a publication's "tax status depend[ent] on its *content*" as "particularly repugnant to First Amendment principles") (emphasis in original). It held that, "to justify such differential taxation, the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end." Id. at 231. Because the State in Ragland failed to make such a showing, the Court held the exemption before it violated the First Amendment. Id. at 234; see also Finlator, 902 F.2d at 1163 (striking down as unconstitutional sales tax exemption for "Holy Bibles," because, *inter alia*, exemption forced state to differentiate between sacred and non-sacred texts in

> contravention of the Free Speech guarantee); Ahlburn v. Clark, 728 A.2d 449 (R.I. 1999) (striking down, on free press grounds, tax exemption for sale of "any canonized scriptures . . . including but not limited to the Old Testament and the New Testament versions)."
>
> Here, Defendant has not demonstrated, and has not attempted to demonstrate, a compelling interest that the exemptions at issue are necessary and narrowly tailored to serve. Indeed, his filings are virtually bereft of any argument that the challenged exemptions are, in fact, constitutional. Rather, his principal arguments in opposition are (i) that this Court lacks jurisdiction to consider Plaintiffs' challenge as a consequence of the Tax Injunction Act, and (ii) that Plaintiffs lack standing to bring this case. Neither has merit.
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> The Court acknowledges that Plaintiffs' arguments against the exemptions are predicated on several provisions of the United States and Georgia Constitutions. In light of the foregoing analysis, however, and in view of Defendant's failure to mount any meaningful response to Plaintiffs' Free Speech and Establishment Clause objections, the Court finds it neither necessary nor appropriate to evaluate the ability of the exemptions to withstand other avenues of constitutional attack… (*some citations omitted)*

While the case before this Court does not involve a defense based on the Tax Injunction Act, the *Budlong* case is nonetheless directly on point. In this case, WRCF sought both declaratory and injunctive relief, seeking to have a statute which provides a sales tax exemption to publications based on their religious content declared facially unconstitutional and enjoined. In *Budlong* the Plaintiffs sought to have the

Court enjoin the state from applying the unconstitutional provisions. The underlying constitutional problem in both cases is that, other than the specified religious publications (bibles in Georgia; bibles, hymnbooks and prayerbooks in Florida) other "similar books" (Georgia) and "religious publications" (Florida) are not defined.[6]

Other than the now repealed Administrative Code Provisions, the record shows that the Department, acting as an arm of the State, has consistently refused to define "religious publications". At bottom, this failure, and the reasons behind it, renders all arguments, standing-related and constitutional, put forth to save this statute fatally flawed. The gravamen of what little argument has been advanced to uphold the constitutionality of the sales tax exemption at issue is that the statute is sufficiently "broad" to encompass all religious literature, and therefore it passes constitutional muster. However, First Amendment protections prohibit the government not

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[6] The Department suggests for the first time in its Answer Brief to this Court that the sales tax on one of the publications purchased by WRCF was "erroneous". The Department could not possibly know if it was erroneous or not, as it has no method for determining, or for advising anyone who sells publications, what specific publications fall under the rubric of the exemption. In the record, the Department has already argued that it does not collect sales tax, that the seller collects the tax and remits it to the state. Yet the state provides no instruction as to what items fall under this exemption. This is yet another example of the Department changing its "facts" or introducing new "facts" in an attempt to correct the fatal defects in this legislation.

only from discriminating amongst religions, but also from preferring religion over non-religion. No matter how broadly the Department attempts to interpret this exemption, it is not possible to find in the exemption a legitimate secular purpose, nor has the Department advanced such a purpose. Without such a purpose, there is no way to save this exemption. *Texas Monthly,* at 15, 16; *Finlator,* at 1163.

When a state puts the weight of its approval behind religious expression to the exclusion of secular expression, it is establishing religion over non-religion, and this is impermissible. Given that America is a highly religious country, the idea of the government promoting religious expression generally does not trouble a vast majority of people, and certainly makes WRCF's position in some ways offensive to many – they feel that a small group is spoiling the party for most of the people. But there are good reasons, reasons that protect all of us, why the government should not promote religious ideas and expression over secular ideas and expression, or *vice versa*.

The tension for all of us, particularly demanding for legislatures who must craft the laws and courts who must interpret and apply them, is that the government must balance this requirement with an equally important mandate to respect wildly diverse forms of religious expression, to protect,

but not promote, often contradictory and passionately held religious ideas, and to preserve the free exercise of religion for all these different groups. This can be very difficult – religion, like politics, arouses passionate emotions. As many hateful and destructive things have been done in the name of religion, any and all religions, by the way, as have powerfully life affirming, kind and gracious things. That is why it is crucial that the balance set forth in the Constitution be maintained – this is an experiment unlike any other in the world, and we owe it to ourselves and to the world to make this experiment successful.

This is a constant tension in First Amendment cases, but in this case, that tension is not at issue - the Free Exercise clause does not come into play. The applicable cases are consistent that there is no Free Exercise right to freedom from sales tax. The issue in this case is the definition and control of ideas, the official recognition or rejection of religious content in all publications, and that is *never* an appropriate exercise of governmental authority.

The *amici* present to this court numerous cases finding that public expression of religious belief in places controlled by governmental entities may be appropriate within given parameters. Some cases define when and if state or federal funds can be spent to assist religious schools, or allowable

public religious expression of students in a variety of contexts. Other cases involve property tax exemptions for religious institutions that provide a variety of both religious and secular services to communities and individuals. A third class of cases permit diverse historical and celebratory religious displays on government property, within certain limits. While these cases are interesting and instructive on the role of religion in American life and the ways in which it intersects with constitutional proscriptions, judicial resolution, and the balance between the Establishment Clause and the Free Exercise Clause, they are not in any way applicable to the very narrow issue at hand.

2. <u>This Court Properly Accepted Jurisdiction in this Case and Should Refuse to Reconsider that Decision</u>

The jurisdictional issue was fully briefed and considered by this Court, and should not now be reconsidered. A review of the ten specific cases directly applicable to the issues in this case before the Court shows that standing requirements in constitutional cases, particularly First Amendment case, are broader than standing requirements in cases where the harm is primarily monetary in nature. The District Court erred in its analysis of the standing requirements, and WRCF has sufficiently met the jurisdictional requirements of this Court.

CONCLUSION

This is a simple case involving constitutional construction, where the result is compelled by the United States Supreme Court. In addition to *Texas Monthly v. Bullock*, 489 U.S. 1; 109 S.Ct. 890; 103 L.Ed.2d 1 (1989) and *Arkansas Writer's Project v. Ragland*, 481 U.S. 221 (1987), Appellant suggests that eight additional lower court progeny of the first two: *Finlator v. Powers*, 902 F.2d 1158 (4th Circ. N.C. 1990); *Haller v. Commonwealth of Pennsylvania*, 693 A.2d 266 (Pa. 1997); *Ahlburn v. Clark*, 728 A.2d 449 (R.I. 1999); *Thayer v. South Carolina Tax Commission*, 413 S.E. 2d 819 (S. C. 1992); *Budlong v. Graham*, 414 F. Supp. 2d 1222 (N.D. Ga. 2006); *Department of Revenue v. Magazine Publishers of America, Inc.*, 604. So.2d 459 (Fla. 1992); and *Sharper Image Corporation v. Department of Revenue*, 704 So.2d 657 (Fla. 1st D.C.A. 1997) are the only cases this Court need rely upon in order to determine the standing and the constitutional issues in these cases. In addition, in order to resolve the conflicts reflected in the First District Court of Appeals opinion, Appellant further suggests that the primary jurisdictional cases, *Department of Admin. v. Horne*, 269 So. 2d 659 (Fla. 1972); *Paul v. Blake*, 376 So.2d 256(Fla. 3d DCA 1979); and *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) be reconciled with the ten cases

addressing the substantive issues surrounding this type of sales tax exemption.

This court now has the issue of the facial unconstitutionality of a sales tax exemption solely for religious publications and items of religious worship placed squarely before it. Every single court that has considered this constitutional issue - the U.S. Supreme Court, the Fourth Circuit Court of Appeals in North Carolina, the Federal District Court in the Northern District of Georgia, the Pennsylvania Supreme Court, the Rhode Island Supreme Court, and the South Carolina Supreme Court - has found that a sales tax exemption for items based on their religious content is unconstitutional. 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. The only adequate remedy available is for the court to enjoin the enforcement of this exemption.

REQUEST FOR RELIEF

WHEREFORE, Appellant requests that this court **reverse** the decision of the First District Court of Appeal, **declare** that WRCF has standing to bring

this suit, thus resolving the conflicts set forth in the jurisdictional brief, **declare** the Statute unconstitutional, and permanently **enjoin** its application.

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, PL-01, The Capitol, Tallahassee, FL 32399-1050, Nicholas Bykowsky, The Capitol, Tax Section, Tallahassee, FL 32399-1050; George Hamm, P.O. Box 6668, Tallahassee, FL, 32314-6668; Erik Stanley, 100 Mountain View Road, Ste. 2775, Lynchburg, VA 24502; Mathew Staver, 1055 Maitland Center Commons, Maitland, FL 32751; Kevin Shaughnessy and Caroline Landt, P.O. Box 112, Orlando, FL 32802-0112 this _____ day of April, 2006.

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.

_____
HEATHER MORCROFT, Esq.
Florida Bar No.0709859
5278 Fayann St.
Orlando, FL 32812
Phone: 407-325-0585
Fax: 407-843-9713
Attorney for Petitioner