

IN THE SUPREME COURT OF FLORIDA

The Wiccan Religious Cooperative
of Florida, Inc.,

Appellant,

v.

Case No. SC05-873

Lower Tribunal No.: 1D03-3325

Jim Zingale and the Florida Department
of Revenue,

Appellees.

AMICUS BRIEF OF LIBERTY COUNSEL IN SUPPORT OF APPELLEES

Erik W. Stanley
FL Bar No. 0183504
LIBERTY COUNSEL
100 Mountain View Rd.
Suite 2775
Lynchburg, VA 24502
(434) 592-3369 - Telephone
(434) 582-7019 - Facsimile
Attorney for Amicus Liberty Counsel

Mathew D. Staver
FL Bar No. 0701092
(Lead Counsel)
LIBERTY COUNSEL
Second Floor
1055 Maitland Center Commons
Maitland, FL 32751
(800) 671-1776 - Telephone
(407) 875-0770 - Facsimile
Attorney for Amicus Liberty Counsel

TABLE OF CONTENTS

TABLE OF CITATIONS iii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I.

WICCAN DOES NOT HAVE STANDING TO CHALLENGE THE SALES TAX EXEMPTION STATUTE.....3

1. *Wiccan Cannot Demonstrate A Special Injury Distinct From That Felt By All Taxpayers Generally.*5

2. *The Constitutional Challenge Exception to the Special Injury Requirement of Standing does not Apply in This Case.*.....8

3. *Adverseness is Still a Requirement for Standing Even when a Taxpayer Invokes the Constitutional Challenge Exception to the Special Injury Requirement.*10

II.

THE SALES TAX EXEMPTION STATUTE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE UNITED STATES CONSTITUTION.....12

A. The Sales Tax Exemption Scheme Does Not Focus Exclusively On Religious Publications.....12

B. This Court Should Not Follow *Texas Monthly v. Bullock.*18

CONCLUSION19
CERTIFICATE OF SERVICE20
CERTIFICATE OF FONT COMPLIANCE21

TABLE OF CITATIONS

<i>ACLU v. City of St. Charles</i> , 794 F.2d 265 (7th Cir. 1986)	7
<i>ACLU-NJ v. Township of Wall</i> , 246 F.3d 258 (3d Cir. 2001)	6
<i>Carpenter v. Wilkinson</i> , 946 F. Supp. 2d 522 (N.D. Ohio 1996)	9
<i>Doe v. Madison Sch. Dist. No. 321</i> , 177 F.3d 789 (9th Cir.1999) (en banc)	7
<i>Doremus v. Board of Education of Hawthorne</i> , 342 U.S. 429 (1952).....	6
<i>Finlator v. Powers</i> , 902 F.2d 1158 (4th Cir. 1990)	14
<i>Flast v. Cohen</i> , 392 U.S. 83 (1968).....	5
<i>Follett v. McCormick</i> , 321 U.S. 573 (1944).....	18
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).....	4
<i>Mueller v. Allen</i> , 463 U.S. 388 (1983).....	13
<i>Poe v. Ullman</i> , 367 U.S. 497 (1961).....	8, 11

<i>Rouser v. White</i> , 944 F. Supp. 1447 (E.D. Cal. 1996)	9
<i>Texas Monthly and Murdock v. Pennsylvania</i> , 319 U.S. 105 (1943).....	18
<i>Texas Monthly v. Bullock</i> , 489 U.S. 1 (1989).....	2, 8, 12-14, 15-18, 19
<i>Walz v. Tax Comm’n.</i> , 397 U.S. 664 (1970).....	13, 14, 17

STATE CASES

<i>Ahlburn v. Clark</i> , 728 A.2d 449 (R.I. 1999).....	14
<i>Department of Admin. of Horne</i> , 269 So. 2d 659 (Fla. 1972)	5, 10, 11
<i>Gregory v. Indian River County</i> , 610 So.2d 547 (Fla. 1st DCA 1992).....	4
<i>Haller v. Commonwealth</i> , 728 A.2d 351 (Pa. 1999).....	15
<i>Paul v. Blake</i> , 376 So. 2d 256 (Fla. 3d DCA 1979).....	5, 11
<i>Peregood v. Cosmides</i> , 663 So.2d 665 (Fla. 5th DCA 1995).....	4
<i>Sun States Utilities, Inc. v. Destin Water Users, Inc.</i> , 696 So. 2d 944 (Fla. 1st DCA 1997).....	4
<i>Thayer v. South Carolina Tax Comm’n.</i> , 413 S.E. 2d 810 (S.C. 1992).....	15

<i>The Wiccan Religious Coop. of Fl., Inc. v. Zingale</i> , 898 So. 2d 134 (Fla. 1st DCA 2005)	7
---	---

STATE STATUTES

Fla. Stat. §212.06 (9)	12, 15
Fla. Stat. §212.06(11)(a)	15
Fla. Stat. §212.08(7).....	10
Fla. Stat. §212.08(4)(m).....	15
Fla. Stat. §212.08(6)(cc)	16
Fla. Stat. §212.08(6)(g).....	16
Fla. Stat. §212.08(6)®.....	16
Fla. Stat. §212.08(6)(w)	16
Florida Statutes §212.06(9).....	12, 15

OTHER AUTHORITIES

<i>About the Church of Satan, available at</i> http://www.religioustolerance.org/satanis1.htm , last accessed Feb 1, 2006	9
---	---

STATEMENT OF THE CASE AND FACTS

This Court has been briefed on the facts and progress of the case by the parties. Amicus will not repeat those statements here. Amicus adds that it has a special interest in the outcome of this case as an organization that represents constituents who will be subject to sales taxes should Appellant be successful in this appeal. *See* Motion and Memo for Leave to File Amicus Brief.

SUMMARY OF THE ARGUMENT

The Wiccan Religious Cooperative of Florida, Inc., (hereafter “Wiccan”) has no standing to challenge the sales tax exemption for religious publications. Wiccan cannot demonstrate a special injury distinct from that suffered by taxpayers generally. Simply buying two books that were inappropriately taxed and were subject to the sales tax exemption on the face of the statute does not equate to a special injury. Further, no injury Wiccan has can be redressed by the Court because Wiccan benefits from the sales tax exemption statute and striking it down would not redress any injury.

Additionally, Wiccan does not fall within the constitutional challenge exception to the special injury requirement because it does not have the requisite adverseness necessary to confer standing.

Should this Court reach the merits of the sales tax exemption statute, the statute does not violate the Establishment Clause because it is part of a broad-based sales tax exemption scheme that benefits both religious and non-religious organizations alike. Further, this Court should not feel bound to follow *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), because it is a highly fractured opinion from justices who no longer sit on the Supreme Court and because it is in conflict and tension with other Supreme Court precedent.

ARGUMENT

I.

WICCAN DOES NOT HAVE STANDING TO CHALLENGE THE SALES TAX EXEMPTION STATUTE.

Wiccan does not have standing to challenge the tax exemption statute because it does not have a personal stake in the outcome of the controversy that can be redressed by a favorable decision of this Court. Because Wiccan is a religion and benefits directly from the sales tax exemption, it does not have the adverseness necessary to maintain standing. Wiccan has no claim of direct injury that can be redressed by this Court because the “injury” of which it complains (that it had to pay sales tax on a few books it purchased) is so de minimis, it cannot form the basis of taxpayer standing. Wiccan also cannot prove that the injury is directly traceable to the sales tax exemption requirement because the sales tax exemption requirement applies on its face to the books Wiccan bought. Additionally, Wiccan’s claim of taxpayer standing to redress a constitutional violation must fail because even in the constitutional exception to direct injury, the party must still seek an outcome that would redress the constitutional injury. Here, all Wiccan seeks is an outcome that would harm it by striking down a tax exemption that it benefits from itself.

“Standing to maintain a lawsuit depends on whether the party has a personal stake in the outcome of the proceeding, such as an injury that may be redressed by the suit.” *Sun States Utilities, Inc. v. Destin Water Users, Inc.*, 696 So. 2d 944, 945 n.1 (Fla. 1st DCA 1997) (citing *Peregood v. Cosmides*, 663 So.2d 665, 668 (Fla. 5th DCA 1995); *Gregory v. Indian River County*, 610 So.2d 547, 554 (Fla. 1st DCA 1992)). As the United States Supreme Court stated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), standing consists of three elements: 1. An injury in fact – “an invasion of a legally protected interest which is (a) concrete and particularized” and (b) actual or imminent, not ‘conjectural’ or ‘hypothetical’”; 2. A causal connection between the injury and the conduct complained of; and 3. A likelihood, not mere speculation, that the injury will be redressed by a favorable decision. The Supreme Court further explained:

The “gist of the question of standing” is whether the party seeking relief has “alleged such a *personal stake* in the outcome of the controversy as to assure that *concrete adverseness* which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” In other words, when standing is placed in issue in a case, the question is *whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue* and not whether the issue itself is justiciable.... A proper party is demanded so that federal courts will not be asked to decide “illdefined controversies over constitutional issues,” or a case which is of “a hypothetical or abstract character.”

Flast v. Cohen, 392 U.S. 83, 99-100 (1968) (emphasis added); *see also Department of Admin. of Horne*, 269 So. 2d 659 (Fla. 1972) (adopting *Flast*). The normal rule for taxpayer standing in Florida is that a taxpayer must demonstrate “special injury to such taxpayer which is distinct from that sustained by every other taxpayer in the taxing unit.” *Paul v. Blake*, 376 So. 2d 256, 259 (Fla. 3d DCA 1979). However, “One exception to the special injury standing requirement in taxpayer suits has been established. A taxpayer may institute such a suit without a showing of special injury if he attacks the exercise of the state or county’s taxing or spending authority on the ground that it exceeds specific limitations imposed on the state or county’s taxing or spending power by the United States Constitution or the Florida Constitution.” *Id.*

Wiccan cannot demonstrate a special injury in this case distinct from that felt by other taxpayers, nor does it fall within the constitutional challenge exception to the special injury requirement.

1. Wiccan Cannot Demonstrate A Special Injury Distinct From That Felt By All Taxpayers Generally.

Wiccan claims as its “injury” from the sales tax exemption statute, that it had to pay sales tax on three books that its members purchased. This is not a special injury distinct from any injury other taxpayers would suffer. At best, this is a generalized grievance and disagreement with the taxing policies of the legislature

and, as such, should be taken up with the legislature. All taxpayers must pay taxes on items that are not specifically exempt. Wiccan is not special in that it had to pay taxes on certain items.¹ Therefore, Wiccan is unable to demonstrate any special injury to itself or its members distinct from that suffered by all taxpayers generally.

Even if the payment of sales tax was to be considered an injury (an impossibility at best), it is such a de minimis injury as to certainly not justify standing. At most, Wiccan would have been subjected to a few dollars of “injury.” Such a de minimis “injury” is not the type of injury that can form the basis of standing. In *ACLU-NJ v. Township of Wall*, 246 F.3d 258 (3d Cir. 2001)², the Third Circuit held that a plaintiff lacked taxpayer standing to sue to have a holiday display enjoined because the Township only expended a de minimis amount of taxpayer funds in lighting the display. *Id.* at 264. The court cited to several other cases where de minimis expenditures of tax monies did not entitle a taxpayer to standing. *Id.* (citing *Doremus v. Board of Education of Hawthorne*, 342 U.S. 429 (1952) (recognizing that no tax monies were spent on the Bible reading in

¹ However, as discussed below, because the books Wiccan purchased were religious, the sales tax exemption on its face applies to those books. Therefore, it is evident that Wiccan is not only unable to demonstrate a special injury, but is also unable to demonstrate any injury at all from the purchase of the books that were taxed. Had Wiccan applied for a refund of the sales tax, no doubt it would have received one.

²Justice Samuel A. Alito, Jr., authored this opinion when he was a Judge on the Third Circuit Court of Appeals.

question); *see also Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 794 (9th Cir.1999) (en banc) (noting that “the school’s expenditures for teacher” salaries, equipment, building maintenance, and the like were insufficient to confer taxpayer standing [in *Doremus*] despite their indirect support of the Bible reading”); *ACLU v. City of St. Charles*, 794 F.2d 265, 267-68 (7th Cir. 1986) (noting that lighting for challenged cross was “put up by the city’s volunteer firemen, on their own time, and the minuscule cost of the electricity required to keep the lights lit [was] defrayed by voluntary contributions from city residents.”). The monies paid by Wiccan members for the three books they purchased were so de minimis that they cannot form the basis of the special injury required to confer standing.

Further, it is impossible for Wiccan to possess the requisite injury to make it an adverse party to this proceeding as required to confer standing. The First District Court of Appeals correctly noted that Wiccan is a religion and that the parties had stipulated to that fact. *The Wiccan Religious Coop. of Fl., Inc. v. Zingale*, 898 So. 2d 134, 136 (Fla. 1st DCA 2005). Under the District Court’s reasoning, “Wiccan, as a religious organization, benefits from the sales tax exemption. Accordingly, Wiccan fails to have the adverse interest necessary for standing and is not the proper party to assert the instant constitutional challenge.” *Id.* Adverseness is a requirement of standing necessary to ensure that a live

controversy is present before the court and that the court is not called upon to decide a case where the party seeking standing will not adequately represent the interest it asserts because it lacks the necessary adverseness of interest to do so. Adverseness is “a safeguard essential to the integrity of the judicial process.” *Poe v. Ullman*, 367 U.S. 497, 505 (1961). In this case, Wiccan obviously does not possess the adverseness of interest required because it benefits from the sales tax exemption as a religious organization. Unlike the parties in *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), who possessed an adverse interest because the sales tax exemption did not apply to them, in this case the sales tax exemption statute applies to Wiccan and benefits it. It is impossible for Wiccan to demonstrate the adverseness required to maintain standing. The First District Court of Appeals ruling should be affirmed.

2. *The Constitutional Challenge Exception to the Special Injury Requirement of Standing does not Apply in This Case.*

Wiccan, attempting perhaps to save itself from a dismissal based on a complete lack of special injury, argues that it has taxpayer standing to challenge the sales tax exemption statute as a violation of the Establishment Clause of the United States Constitution and therefore it does not need to demonstrate a special

injury. This argument fails because Wiccan is not a taxpayer and in fact benefits from the sales tax exemption statute.

Initially, the constitutional challenge exception to the special injury requirement does not apply in this case because Wiccan is not a taxpayer. Even though Wiccan alleges that it paid taxes on two books, those taxes were improperly collected by the store who sold the books. The two books Wiccan mentions as having been subjected to the sales tax are the *Satanic Bible* and the *Witches Bible Compleat*. Satanism is a recognized religion and the *Satanic Bible* is a religious publication of the founder of the Church of Satan. *See About the Church of Satan, available at* <http://www.religioustolerance.org/satanis1.htm>, last accessed Feb 1, 2006 (stating that the founder of the church of Satan wrote the *Satanic Bible* and the doctrines of the Church of Satan are derived from the *Satanic Bible*); *see also Carpenter v. Wilkinson*, 946 F. Supp. 2d 522 (N.D. Ohio 1996) (examining and assuming that Satanism is a religion based on the tenets espoused in the *Satanic Bible*). Likewise, the *Witches Bible Compleat* is a religious book of the Wiccan faith. *See Rouser v. White*, 944 F. Supp. 1447, 1448 n.1 (E.D. Cal. 1996) (adherent of Wiccan faith complaining that prison officials would not allow him access to the *Witches Bible Compleat* to practice his religion). The books Wiccan bought were subject to the sales tax exemption for “religious publications” or “bibles.” On the

face of the sales tax exemption statute, the two books that Wiccan bought were exempt and the collection of sales tax was therefore incorrect. Wiccan cannot make a serious claim that it is a taxpayer because the books it bought were not subject to the sales tax on the face of the exemption statute.³

3. *Adverseness is Still a Requirement for Standing Even when a Taxpayer Invokes the Constitutional Challenge Exception to the Special Injury Requirement.*

Wiccan attempts to remedy its complete lack of injury by attempting to squeeze itself into the constitutional exception to the special injury requirement and arguing that because it challenges the sales tax exemption under the Establishment Clause of the United States Constitution, it has standing. However, merely intoning a constitutional challenge does not confer standing. The requirement of adverseness of interest is still a requirement even in the constitutional exception to the special injury requirement and Wiccan does not have the requisite adverseness.

In *Horne*, this Court allowed taxpayer standing to challenge taxing and spending authority of the legislature on constitutional grounds. *See Horne*, 269 So. 2d at 659. The adverseness of the taxpayer was evident. This Court stated, “[I]t is

³ Wiccan is a nonprofit corporation. Presumably, it would meet the definition for a sales tax exemption under 212.08(7)(p) as a section 501(c)(3) organization. Therefore, it would not have to pay any sales tax, no matter what it bought so long as it was used in carrying on the customary nonprofit activities of the organization.

the “ordinary citizen” and taxpayer who is ultimately affected and who is sometimes the only champion of the people in an unpopular cause.” *Id.* at 663. Because the taxpayer would likely see his taxes raised if the taxing and spending in derogation of the constitution was allowed to stand, the taxpayer obviously had the requisite adverseness to confer standing. Similarly, in *Paul v. Blake*, 376 So. 2d 256 (Fla. 3d DCA 1979), municipal taxpayers were allowed to proceed without demonstrating special injury when they complained that certain tax exemptions violated constitutional provisions. *Id.* at 260. The taxpayers met the adverseness requirement, though, because, like the taxpayers in *Horne*, their taxes would likely be raised by the allegedly unconstitutional action.

This Court has never allowed taxpayer standing under the constitutional challenge exception to the special injury requirement without a demonstrated showing of adverseness. It is the adverseness of the party that allows for the controversy before the Court to be sharpened and effectively argued. Adverseness is “a safeguard essential to the integrity of the judicial process.” *Poe v. Ullman*, 367 U.S. 497, 505 (1961). Wiccan does not have the adverseness because it benefits and falls within the sales tax exemption statute it challenges. The District Court opinion was correct in denying standing for lack of an adverse party.

In sum, Wiccan cannot establish standing to bring the challenge against the sales tax exemption statute. As such, this Court should affirm the First District Court of Appeals' decision.

II.

THE SALES TAX EXEMPTION STATUTE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE UNITED STATES CONSTITUTION.

Wiccan argues that the sales tax exemption violates the Establishment Clause of the United States Constitution because of the reasoning of *Texas Monthly v. Bullock*, 489 U.S. 1 (1989). However, *Texas Monthly* is inapposite and, even if it were applicable, this Court should not follow *Texas Monthly* because it lacks precedential value.

A. The Sales Tax Exemption Scheme Does Not Focus Exclusively On Religious Publications.

The Florida sales tax exemption statute at issue states:

The taxes imposed by this chapter do not apply to the use, sale, or distribution of religious publications, bibles, hymn books, prayer books, vestments, altar paraphernalia, sacramental chalices, and like church service and ceremonial raiments and equipment.

Fla. Stat. §212.06 (9) (2006). This tax exemption, when viewed in its proper context, is not unconstitutional under the *Texas Monthly* reasoning because the

exemptions do not focus exclusively on religion as Texas' tax exemption did in *Texas Monthly*.

In *Texas Monthly*, Texas exempted from sales tax “Periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books that consist wholly of writings sacred to a religious faith.” *Texas Monthly*, 489 U.S. at 4. A plurality of the Supreme Court held that “when confined exclusively to publications advancing the tenets of a religious faith, the exemption runs afoul of the Establishment Clause.” *Id.* The plurality opinion was careful to stress that in cases where it has upheld specific benefits to religion in the form of tax exemptions or otherwise, “the benefits derived by religious organizations flowed to a large number of nonreligious groups as well.” *Id.* at 11 (citing *Walz v. Tax Comm’n.*, 397 U.S. 664 (1970) (upholding property tax exemption that applied to religious properties because it also applied to a wide array of nonprofit organizations); *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding state income tax deduction for cost of tuition, transportation and textbooks paid by a taxpayer for the benefit of a dependent even though it benefitted parochial schools because the benefit also flowed to a large number of secular institutions as well). The plurality opinion cited *Walz* as an example, stating:

Finally, we emphasized in *Walz* that in granting a property tax deduction, the State “has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by non-profit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historic, and patriotic groups.”

Walz, 397 U.S. at 673. The plurality opinion in *Texas Monthly* stated that, “What is crucial is that any subsidy afforded religious organizations be warranted by some overarching secular purpose that justifies like benefits for nonreligious groups.” *Texas Monthly*, 489 U.S. at 14 n.4. Texas’ sales tax exemption was unconstitutional, in the mind of the plurality at least, because it “lacks sufficient breadth to pass scrutiny under the Establishment Clause. *Id.* at 14.

Justices Blackmun and O’Connor concurred in a narrower holding that found, “[B]y confining the tax exemption to the sale of religious publications, Texas engaged in preferential support for the communication of religious messages.... A statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable.” *Id.* at 28 (Blackmun, J., and O’Connor, J., concurring). Texas’ exemption was stricken because it was narrow and applied solely to religious publications. *See also Finlator v. Powers*, 902 F.2d 1158 (4th Cir. 1990) (striking down sales tax exemption under the reasoning of *Texas*

Monthly for the sale of “Holy Bibles”); *Thayer v. South Carolina Tax Comm’n.*, 413 S.E. 2d 810 (S.C. 1992) (striking down sales tax exemption on religious publications “which are devoted to man’s relationship to Divinity; to reverence, worship, obedience and submission to mandates and precepts of supernatural or superior beings”); *Ahlburn v. Clark*, 728 A.2d 449 (R.I. 1999) (striking down sales tax exemption for bibles and other canonized scripture); *Haller v. Commonwealth*, 728 A.2d 351 (Pa. 1999) (striking down sales tax exemption for religious bibles and publications). *Texas Monthly* and its progeny are inapposite here because Florida’s sales tax exemption scheme has an overarching secular purpose that justifies extending the sales tax exemption to similar secular groups. Besides the sales tax exemption for religious publications and other items contained in Florida Statutes §212.06(9), Florida also allows for the following exemptions from sales tax:

- promotional materials which are imported, purchased, sold, used, manufactured, fabricated, processed, printed, imprinted, assembled, distributed or stored in this state. Fla. Stat. §212.06(11)(a).
- Educational materials, such as glue, paper, paints, crayons, unique craft items, scissors, *books*, and education toys purchased by a child care facility. Fla. Stat. §212.08(4)(m)(emphasis added).

- publications made by the Florida Retired Educators Association and its local chapters. Fla. Stat. §212.08(6)(g).
- school books used in the regular course of study, yearbooks, magazines, newspapers, directories, bulletins, and similar publications distributed by public, parochial or nonprofit K-12 educational institutions. Fla. Stat. §212.08(6)®.
- newspaper, magazine and newsletter subscriptions in which the product is delivered to the customer by mail and free, circulated publications that are published on a regular basis, the content of which is primarily advertising, and that are distributed through the mail, home delivery or newsstands. Fla. Stat. §212.08(6)(w).
- works of art sold to or used by an education institution. Fla. Stat. §212.08(6)(cc).

It is evident that Florida's sales tax exemption scheme does not just focus narrowly on religious publications or Bibles as other state's tax exemption schemes have done. Rather, Florida allows for a broad range of sales tax exemptions for various organizations - both secular and religious, nonprofit and for profit. When comparing Florida's sales tax exemption scheme with those that have been struck down, it is evident that Florida's sales tax exemption scheme encompasses more

than just the narrow focus on religious publications *Texas Monthly* held was unconstitutional. This breadth of exemption for both religious and secular groups renders *Texas Monthly* and its progeny inapposite. The same reasoning from that case cannot apply in this circumstance where it is clear that a broad range of both religious and secular publications enjoy an exemption from sales tax.

Florida's sales tax exemption scheme is more akin to the property tax exemption upheld in *Walz* against an Establishment Clause challenge. Like *Walz*, a wide array of nonprofit secular and religious organizations enjoy an exemption from sales tax for their publications. "[T]he benefits derived by religious organizations flow[] to a large number of nonreligious groups as well." *Texas Monthly*, 489 U.S. at 11. "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." *Id* at 15.

In this case, Florida, through its sales tax exemption scheme encourages the dissemination of not just religious publications, but also many other nonreligious publications. Therefore, *Texas Monthly* is inapposite.

B. This Court Should Not Follow *Texas Monthly v. Bullock*.

This Court should not follow *Texas Monthly* because it lacks precedential value. First, the main opinion is a plurality opinion written by three Justices, two of which are no longer on the Supreme Court. The concurrences were written by three Supreme Court Justices who are also no longer on the bench, These Justices were highly fractured in their reasoning. There are more current sitting Justices of the Supreme Court who dissented in *Texas Monthly* than there are Justices who were in the plurality or who concurred. The Supreme Court has changed membership significantly since *Texas Monthly* was decided, and given the lack of adherence to fractured precedent and plurality decisions, it is likely that the Supreme Court would reexamine *Texas Monthly* if it has the opportunity.

Further, the Justices in the plurality opinion recognized a tension and conflict between their holding in *Texas Monthly* and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) and *Follett v. McCormick*, 321 U.S. 573 (1944) (stating in both *Murdock* and *Follett* that taxing the sale of religious pamphlets posed a grave threat to religious freedom because it infringed upon First Amendment protected activities, restrains those liberties in advance and suppresses them). The plurality attempted to disavow these precedents, but the concurrence would not agree. *Texas*

Monthly, 489 U.S. at 21, 28. Therefore, the tension and conflict between these precedents remains.

Texas Monthly is a fractured opinion that is in conflict and tension with other precedents from the Supreme Court. Its precedential value is extremely limited and this Court should not feel bound to follow the reasoning of *Texas Monthly* in deciding this case. Because the Florida sales tax exemption scheme is broad and encompasses both religious and secular publications, it does not violate the Establishment Clause of the United States Constitution.

CONCLUSION

Based on the foregoing, Amicus respectfully requests that this Court affirm the dismissal of Wiccan's case on lack of standing or, alternatively, hold that Florida's sales tax exemption statute for religious publications and items does not violate the Establishment Clause of the United States Constitution.

Dated this 8th day of March, 2006.

Erik W. Stanley
FL Bar No. 0183504
LIBERTY COUNSEL
100 Mountain View Rd.
Suite 2775
Lynchburg, VA 24502
(434) 592-3369 - Telephone
(434) 582-7019 - Facsimile
Attorney for Amicus Liberty Counsel

Mathew D. Staver
FL Bar No. 0701092
(Lead Counsel)
LIBERTY COUNSEL
Second Floor
1055 Maitland Center Commons
Maitland, FL 32751
(800) 671-1776 - Telephone
(407) 875-0770 - Facsimile
Attorney for Amicus Liberty Counsel

CERTIFICATE OF SERVICE

I hereby Certify that on this 8th day of March, 2006, a true and correct copy of the foregoing was sent, via Regular U.S. mail delivery to the following:

Heather Morcroft
5278 Fayann St
Orlando, FL 32812
Attorney for Plaintiff-Appellant

James A. McKee
Office of the Attorney General, PL-01
The Capitol
Tallahassee, FL 32399-1050

Nicholas Bykowsky
Office of the Attorney General
The Capitol, Tax Section
Tallahassee, FL 32399-1050

George Hamm
Florida Department of Revenue
PO Box 6668
Tallahassee, FL 32314-6668
Attorneys for Defendants-Appellees

Erik W. Stanley
FL Bar No. 0183504
LIBERTY COUNSEL
100 Mountain View Rd.
Suite 2775
Lynchburg, VA 24502
(434) 592-3369 - Telephone
(434) 582-7019 - Facsimile
Attorney for Amicus Liberty Counsel

Mathew D. Staver
FL Bar No. 0701092
(Lead Counsel)
LIBERTY COUNSEL
Second Floor
1055 Maitland Center Commons
Maitland, FL 32751
(800) 671-1776 - Telephone
(407) 875-0770 - Facsimile
Attorney for Amicus Liberty Counsel

CERTIFICATE OF FONT COMPLIANCE

I CERTIFY that the foregoing Amicus Brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

Erik W. Stanley