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**Wiccan Religious Cooperative v. Jim Zingale
SC05-873**

MARSHAL: HEAR YE. HEAR YE. HEAR YE. THE SUPREME COURT OF THE GREAT STATE OF FLORIDA IS NOW IN SESSION. ALL WHO HAVE CAUSE TO PLEA, DRAW NEAR, GIVE ATTENTION AND YOU SHALL BE HEARD. GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA AND THIS HONORABLE COURT. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

CHIEF JUSTICE: GOOD MORNING, LADIES AND GENTLEMEN, AND WELCOME TO THE FLORIDA SUPREME COURT. I KNOW WE HAVE IN OUR AUTOGRAPH TODAY, THE GOVERNMENT LAWYERS SECTION OF THE FLORIDA BAR, WHO ARE HERE FOR AN APPELLATE PRACTICE SEMINAR, AND SO WE WELCOME YOU AND LOOK FORWARD TO SEEING YOU LATER THIS MORNING. ALSO I WAS INFORMED BY ONE OF THE DEPUTY MARSHALS THAT TODAY IS MY LAST DAY SITTING AS CHIEF JUSTICE FOR ORAL ARGUMENT AND HE WISHED ME CONGRATULATIONS. I DON'T KNOW WHAT THAT MEANS. SO BE KIND ON US TODAY. THE FIRST CASE ON THIS MORNING'S CALENDAR IS THE WICCAN RELIGIOUS COOPERATIVE OF FLORIDA VERSUS ZINGALE. HEARING FOR PETITIONER, MS. MORCROFT.

MAY IT PLEASE THE COURT. MY NAME IS HEATHER MORCROFT. I AM HERE FOR THE PETITIONER APPELLANT.

CHIEF JUSTICE: ADJUST THEM, MIKE.

IS THAT BETTER? THIS CASE ORIGINALLY CAME ABOUT BECAUSE AT THE TIME IT WAS BROUGHT, A RELIGIOUS PUBLICATION WAS DEFINED AS A BIBLE, HYMN BOOK OR PRAYER BOOK OR ANYTHING SOLD BY A RELIGIOUS INSTITUTION THAT HAD AN ESTABLISHED PHYSICAL PLACE OF WORSHIP.

CHIEF JUSTICE: WELL, YOU KNOW THE FIRST ISSUE IS THE STANDING OR THE MAIN ISSUE, AND MY FIRST QUESTION TO YOU YOU REALLY IS THE JURISDICTIONAL ONE, WHICH IS WHAT BASIS DO YOU ASSERT THAT THERE IS CONFLICT JURISDICTION, AND IF YOU COULD JUST BRIEFLY ADDRESS THAT.

SURE. THE U.S. SUPREME COURT TALKS ABOUT TAXPAYER STATUS, TO BRING A LAWSUIT. THE GRAVAMENT OF THE STANDING IN THIS CASE HAS TWO POINTS, ONE THE ACTUAL HARM TO THE PLAINTIFF AND THE OTHER IS THE CONSTITUTIONAL HARM ITSELF, CREATES STANDING AND THE CASES UP HOLD THAT.

CHIEF JUSTICE: IS THAT ISSUE, THE TAXPAYER STANDING ISSUE WHICH IS CERTAINLY A RECOGNIZED EXCEPTION, WAS THAT RAISED BEFORE THE FIRST DISTRICT, BECAUSE THEY DON'T DIRECTLY ADDRESS, IT AND THAT IS MY CONCERN AS TO THE CONFLICT ISSUE. DID YOU RAISE TAXPAYER STANDING BEFORE?

THE TAXPAYER STANDING WAS AN ISSUE THAT WAS ADMITTED ALL ALONG. THE FIRST DCA SIMPLY DIDN'T ADDRESS IT. IN ADDITION, HOWEVER, TO THE TAXPAYER STANDING, THIS COURT IN SHARPER IMAGE, THE SHARPER IMAGE CASE ADDRESSED EXACTLY THE SAME STATUTE AND THE CONSTITUTIONALITY OF THAT STATUTE, AND THE QUESTION OF WHETHER OR NOT SHARPER IMAGE HAD STANDING TO RAISE THE ISSUE, CAME BEFORE THE COURT, AND THE FIRST DCA SAID THAT WHERE THERE IS A CONTENT-BASED REGULATION, A CONTENT-BASED

DISCRIMINATION AS TO WHETHER OR NOT A PUBLICATION IS GOING TO BE TAXED , THEN THAT FACT ALONE IS THE CHALLENGER TO THAT STATUTE STANDING. THAT CASE ALSO TALKED ABOUT-

CHIEF JUSTICE: THAT IS UNDER THE TAXPAYER STANDING.

WELL , IT DOESN'T REALLY SAY TAXPAYER STANDING OR NOT. IT SAYS IF THERE IS A CONTENT - BASED REGULATION, THAT PERSON HAS STANDING. IF THAT PERSON IS AFFECTED BY THE STATUTE --

CHIEF JUSTICE: ARE YOU ALLEGING CONFLICT WITH THAT CASE AS WELL?

NO. NO. I AM NOT ALLEGING. WELL --

JUSTICE: YOU ARE ALLEGING CONFLICT WITH HORN AND --

WHICH ADDRESSES TAXPAYER STANDING.

JUSTICE: AND YOU SAID EARLIER THAT THE DCA DID NOT ADDRESS TAXPAYER STANDING IN THIS OPINION.

THAT'S CORRECT .

JUSTICE: SO THEN HOW CAN IT CONFLICT WITH ANY TAXPAYER STANDING CASE?

WELL, IT ADDRESSED STANDING, IN THAT IT SIMPLY , IT SAID THERE IS NO STANDING . AND THE WHOLE BASIS FOR STANDING IN THIS CASE WOULD BE ARTICLE I II STANDING , AS SET FORTH AND APPLIED TO THE STATE EXERCISE OF THE TAXING AND SPENDING POWER THROUGH HORNE.

CHIEF JUSTICE: THE ONLY HIM HAVING PROBLEMS WITH THAT IS BECAUSE YOUR CLIENT WENT TO GREAT LENGTH AFTER LITIGATION STARTED, TO PURCHASE A BOOK. THINGS HAPPENED ALONG THE WAY WHERE THE RELIANCE WAS MORE ON ACTUAL HARM AS A TAXPAYER, VERSUS YOUR STATUS AS A BOOKSELLER , AND SO IN TERMS OF TRYING TO GET , THERE IS , MAYBE SOME VERY MERITORIOUS ARGUMENT , SUBSTANTIVE ARGUMENT .

RIGHT.

CHIEF JUSTICE: BUT I AM TRYING TO GET TO THE PROCEDURAL POSTURE, AND IT FEELS LIKE IT CHANGED THROUGHOUT THE LITIGATION.

WELL, YOU KNOW , YOUR HONOR , THAT'S CORRECT. IT HAS CHANGED THROUGHOUT THE LITIGATION , AND IT HAS CHANGED FOR ONE REASON THAT IT HAS CHANGED IS THAT THE STATE HAS KEPT CHANGING THE REASON WHY THE COURT SHOULD NOT REACH THE CONSTITUTIONAL ISSUE.

JUSTICE: BUT WHAT WAS THE , EXPLAIN FOR MY BENEFIT, IF YOU WOULD , THE PROCEDURAL HISTORY OF THIS MATTER. HOW DO WE GET TO --

THE PROCEDURAL HISTORY OF THE CASE BEGAN BECAUSE THERE WAS THIS ESTABLISHED PHYSICAL PLACE OF WORSHIP. AFTER THIS CASE STARTED , MANY OF THE FLORIDA ADMINISTRATIVE CODE --

JUSTICE: STARTED WHERE?

IN 2000 IN THE FIRST DCA .

JUSTICE: OKAY. DID IT START BEFORE THAT?

YES , ACT UALLY IT DID START BEFORE.THAT IT STARTED BECAUSE WR CF HAD AN ESTABLISHED PHYSICAL PLACE OF WORSHIP AND THEY HAD A CONS UMER SA LES TAX EXEMPTION.A T SOME POINT, THEY STOPPED HAVING AN ESTABLISHED PHYSICAL PLACE OF WORSHIP , AND THEY BEGAN TO RENT VARIOUS DIFFERENT PLACES OF WORSHIP FOR THEIR WORSHIPSERVICES. WHEN THEY WENT TO RENEW , THEIR SALES TAX EXE MPTION CERTIFICATE , THE STATE SAID YOU HAVE TO HAVE AN ESTABLISHED PHYSICAL PLACEOF WORSHIP OR WE WILL NOT GIVE THIS CONSUMER SALES TAX EXEMPTION CERTIFICATE TO YOU AS A RELIGIOUS INS TITUTION , AND AT THAT TIME THERE WAS NOTHING ELSE THAT WR CF QUALIFIED UNDER. THE STATE SENT NUMBER OF , SENT TWO LETTERS, BASI CALLY SAYING IF YOU HAVE ANOTHERREASON THAT WE CAN GIVE YOU THE STATUS , PL EASE TELL US F YOU DON'T, WE WILL ISSUE A NOTICE OF IN TENT TO DE NY AND WE WILL DENY. THE STATE REQUESTED THAT WR CF SU BMIT AN AFFIDAVIT , SAYING THAT THEY WERE A N ADMINISTRATIVE ORGANIZATION OVER OTHER SUBORGANIZATIONS. WR CF COULD NOT SUBMIT THAT AFFIDAVIT BECAUSE THAT IS NOT TRUE , HAS N EVER BEEN TRUE.

JUSTICE: THEN WHAT YOU DID WAS STEP IN TO THE SECOND CIRCUIT , CORR ECT?

WHERE WE ORIGINALLY FI LED WAS IN TALLAHASSEE.

JUSTICE: RI GHT .

BECAUSE IT WAS A TAX.

JUSTICE: YOU YOU FILED A JUDGMENT ACT ION?

RIGHT. AND WHEN --

CHIEF JUSTICE: AT THAT P OINT WERE YOU SEEKING , WERE YOU CHALLE NGING JUST FACT THAT THEY HAD DENIED YOU TAX , THE EXEM PTION AS A SEL LER OF RELIGIOUS OR NONRELIGIOUS MATERIALS AS OPPOSED TO A PURCHASER ?

BOTH .

CHIEF JUSTICE: OR ARE YOU PURCHASED, AT THE TIME THAT YOU FILED THE LAWSUIT IN THE SECOND CIRCUIT, HAD YOU PURCHASED ANY OF THE BOOKS THAT YOU ARE NOW SA YING YOU IMPROPERLY HAD TO PAY TAXON?

YES. NO. NOT THE ONE S THAT WE NOW LIST IN THE THIS LAWSUIT. HOWEVER, WHEN WR CF HAD THE SALES TAX EXEMPTION CERTIFICATE AND THE RECORD SHOWS THIS, THEY REGULARLY PURCHASED PUBLICATIONS AND ITEMS OF WORSHIP FOR THEIR EDUCATIONAL AND RELIGIOUSPROGRAM.ONCE THEY NO L ONGER HAD THAT SALES TAX EX EMPTION CERTIFICATE, THEY CONTINUED TO MAKE TH OSE PU RCHASE S , BUT THEY DIDN'T HAVE THE CONSUMER SALES TAX EXEMPTION CERTIFICATE , SO THEY CONTINUED TO PAY TAX.

CHIEF JUSTICE: NOW, THAT IN THE PLEADINGS?

THAT IS IN THE AFF IDAVIT ATTACHED TO THE SUMMARY JUDGMENT MOTION.

JUSTICE: SO WHAT DOES THE TRIAL JU DGE ACTUALLY BASE YOUR STANDING ON? THE TRIAL JUDGE MAK ES THE DETERMINATION THAT YOU HAD TAXPAYER STAND SOMETHINGANOTHER TRIAL JUDGE SAID THAT WR CF HAS STANDING ANDWE FIND THIS CONSTITUTIONAL BECAUSE IT DOESN'T S KIM N ALT BEGINS YOUR -- DISCRIMINATE AGAINST YOUR RELIGION .

JUSTICE: IT IS NOT CLEAR AS TO TAXPAYER STANDING , SO HOW DO WE GET TO CONFLICT , IF NEITHER THE TRIAL COURT NOR THE DISTRICT COURT MADE THE DETERMINATION?

I THINK THE DISTRICT COURT DID SAY, I MEAN THE DISTRICT COURT DIDN'T DISPUTE IN ANY WAY, IN FACT REFERENCED THAT THESE MATERIALS WERE PURCHASED , SO I DON'T THINK THERE WAS ANY REAL DISPUTE AS TO WHETHER OR NOT THERE WAS TAXPAYER STATUS. THAT WAS NEVER EVEN RAISED AS AN ISSUE , UNTIL AFTER THE FIRST DCA CAME DOWN WITH THEIR OPINION. NOBODY, EVERYBODY ASSUMED THAT THERE WAS TAXPAYER STATUS. I MEAN , THAT WAS , I BELIEVE THAT BOTH TAXPAYER, WHAT WE WERE TALKING ABOUT IN THE SUMMARY JUDGMENT MOTION WAS TAXPAYER STATUS AND STATUS OF ACTUAL HARM , AND THAT IS WHAT WE WERE TALKING ABOUT.

JUSTICE: DO YOU AGREE THAT THE FIRST DISTRICT RULED ON A VERY NARROW ISSUE , AND THAT WAS THAT YOU WERE A PARTY THAT APPEARED TO BE A BENEFICIARY OF THIS STATUTE , AND THEREFORE AS A BENEFICIARY , STANDING TO GAIN , EXCEPT THE PUN , THAT YOU HAD NO STANDING. AND THAT IS THE ONLY ISSUE, IT APPEARS, THAT THE FIRST DISTRICT RULED ON HERE. IS THAT CORRECT ?

I BELIEVE THAT THAT INCLUDED RULING ON TAXPAYER STATUS.

JUSTICE: LET'S NOT TALK ABOUT WHAT IT INCLUDED. THAT IS -- THE RATIONALE FOR THEIR DECISION WAS THAT YOU WERE A PARTY AND THAT THE OTHER SIDE AGREED , AND YOU ADVANCED THAT YOU BENEFITED BY THE PROVISIONS OF THIS STATUTE , AND AS SOMEBODY THAT BENEFITED , ISN'T THAT THE ONLY ISSUE DISCUSSED IN THE FIRST DISTRICT OPINION?

NOT PRECISELY THE WAY YOU WORD IT , NO.

JUSTICE: TELL ME WHAT THEY DISCUSSED, OUTSIDE OF WHAT I JUST OUTLINED IT.

YOU SAID THAT PARTIES STIPULATED THAT WRCF BENEFITS FROM THIS. THAT IS NOT --

JUSTICE: WE HAVE GOT TO FOCUS ON THE DECISION, AND WE WILL FOCUS EVEN MORE BROADLY ON THE DISCUSSION OF THE FIRST DISTRICT OPINION , AND SO I AM ASKING YOU WHETHER YOU WOULD AGREE THAT THE ONLY DECISION THAT THE FIRST DISTRICT MADE WAS THAT YOU WERE A PARTY THAT BENEFITED FROM THE PROVISIONS OF THIS STATUTE , AND THEREFORE AS BENEFICIARY , YOU LACK STANDING. WAS THERE A DISCUSSION OF ANY OTHER RATIONALE FOR THEIR DECISION ?

THERE WAS A DISCUSSION OF THE PURCHASE OF THE ACTUAL BOOK IN THE DISSENT , YES.

JUSTICE: IT CAN'T TAKE JURISDICTION ON THE BASIS OF A DISSENT, SO WHAT WE ARE TRYING TO HAVE YOU CONFRONT IS, WE HAVE THIS VERY NARROW DECISION, AND SO FOR INSTANCE, IF WE HAD AN OTHER DISTRICT COURT OF APPEAL THAT SAID IT DOESN'T MATTER WHETHER THE PARTY IS A BENEFICIARY OF THE STATUTE BEING CHALLENGED. THEN WE WOULD HAVE DIRECT CONFLICT WITH THE FIRST DISTRICT OPINION. HELP US WITH, SINCE THIS IS A VERY NARROW OPINION , IT DOES NOT APPEAR THAT THERE ARE ANY DISTRICT COURT DECISIONS THAT CONFLICT WITH THAT VERY NARROW DECISION THAT THEY HAVE MADE , ARE THERE?

WELL , I THINK THAT THE SHARPER IMAGE CASE DOES DO THAT.

JUSTICE: IT SAID THAT SOMEBODY CAN BE THE BENEFICIARY AND STILL COMPLAIN THAT THE STATUTE IS UNCONSTITUTIONAL ?

IT SAYS THAT IT DOESN'T , AND SO DOES , I BELIEVE , "TEXAS MONTHLY" BUT IT DOESN'T MATTER IF YOU ARE THE BENEFICIARY OR NOT , WHEN WHAT YOU HAVE IS CONSTITUTIONAL

HARM, PARTICULARLY ON A CONTENT BASIS. AND I BELIEVE THAT THE BUDLONG CASE THAT JUST CAME DOWN IN FEBRUARY IN GEORGIA , SAYS THE SAME THING. THE HARM , WRCF DOES NOT BENEFIT FROM THIS EXEMPTION STATUTE. THAT IS THE BOTTOM LINE. THE HARM IS THAT THIS KIND OF STATUTE HARMS RELIGIOUS LIBERTY , BECAUSE IT REQUIRES THE STATE TO MAKE A CONTENT DETERMINATION. IT DEFINES COMMON SENSE TO SAY THAT THAT IS BENEFIT.

JUSTICE: WE MAY HAVE , ON CONSIDERATION , COMPLETELY WITH YOUR POSITION, BUT BUT I AM STILL HAVING DIFFICULTY WITH YOU DEMONSTRATING A CONFLICT WITH ANOTHER FLORIDA DISTRICT COURT DECISION OR DECISION OF THIS COURT ON THE VERY NARROW GROUNDS DISCUSSED IN THE FIRST DISTRICT OPINION.

CHIEF JUSTICE: JUSTICE LEWIS HAS A QUESTION. NO? I THOUGHT .

WELL , I, THE SHARPER IMAGE IS VERY , VERY DIRECTLY ON POINT, AND I BELIEVE THAT IT DOES SAY , DOESN'T REALLY MATTER WHETHER YOU BENEFIT OR NOT , AND I BELIEVE THAT HORNE DOES THE SAME THING , BUT IT IS THE CONSTITUTIONAL HARM ITSELF THAT CREATES THE STANDING. I THINK THAT THE FIRST DISTRICT MISPOKE , WHEN IT CHARACTERIZED THIS AS A BENEFIT .

CHIEF JUSTICE: DO YOU SEE THAT YOU WOULD BE PRECLUDED FROM FILING ANOTHER ACTION AND SPECIFICALLY GOING ONLY ON THE TAXPAYER STANDING EXEMPTION FOR CONSTITUTIONAL CHALLENGES AND MAKING THAT A VERY SPECIFIC CLAIM , AS OPPOSED TO TALKING ABOUT I PURCHASED THIS OR I PURCHASED THAT. DO YOU, AND I AM GOING TO ASK THE RESPONDENT THAT QUESTION. IN OTHER WORDS BECAUSE IT WAS A NARROW ISSUE THAT WAS DECIDED.

RIGHT.

CHIEF JUSTICE: DO YOU THINK THAT YOU COULD GO BACK AND RE FILE THIS COMPLAINT AND ALLEGING WHAT YOU ARE ALLEGING HERE UNDER LOUIS AND HORNE ?

YES, AND I THINK THAT UNDER BUDLONG, THE PLAINTIFF COULD NOW GO BACK AND FILE THIS IN FEDERAL COURT, BUT I DON'T THINK THAT THAT IS NECESSARY . I THINK THAT THE ISSUE IS PROPERLY BEFORE THIS COURT , AND THAT THE COURT SHOULD CONSIDER IT.

JUSTICE: BY MAKING THAT CONCESSION, ARE YOU NOT, THEN, CONCEDED THAT THIS COURT NEVER, THE LOWER COURT REALLY DID NOT ADDRESS THAT ISSUE , AND THAT ISSUE COULD NOT HAVE BEEN ADDRESSED AS PART OF A RES JUDICATA CONCEPT ?

I AM SO RRY. AM I AGREEING THAT THE LOWER COURT DIDN'T ADDRESS THE ISSUE?

JUSTICE: DID THE COURT INQUIRE AS TO WHETHER YOU COULD FILE THIS SAME LAWSUIT BUT ALLEGING IT IN A DIFFERENT CAPACITY, AND YOUR ANSWER WAS YES. IS THAT NOT A CONCESSION, THEN, THAT THE FIRST DISTRICT, THIS WAS NOT PART OF THE CASE AT ALL IF YOU ARE NOT PRECLUDED BY AN ISSUE PRECONCLUSION OR RES JUDICATA .

NOT WRCF AS A PARTY, NO , NO , NOT WRCF AS A PARTY, NO. ANOTHER PERSON COULD COME ALONG AND DO THAT.

CHIEF JUSTICE: YOU MIGHT WANT TO SAVE THE REST OF YOUR TIME FOR REBUTTAL.

YES. I DO WANT TO SAVE THE REST OF MY TIME. THANKS.

CHIEF JUSTICE: WE ARE GOING TO HAVE MR . McKEE REPRESENTING MR . ZINGALE AND YOU HAVE 15 MINUTES AND THEN YOU WILL CEDE FIVE MINUTES TO MR . SHAUGHNESSY . IT WILL BE UP TO YOU. I MIGHT TRY TO REMIND YOU, BUT OTHERWISE HE CAN TUG AT YOUR COATTAIL .

MAY IT PLEASE THE COURT. JAMES Mc KEE ON BEHALF OF THE RESPONDENT. JUST SDWRUS IT MAKE ANY DIFFERENCE , AS FAR AS STANDING IS CONCERNED - -

JUSTICE: DOES IT MAKE ANY DIFFERENCE AS FAR AS STANDING IS CONCERNED, THAT YOUR OPPO NENT TE LLS US THAT THIS WAS ORIGINALLY FILE D AS A DECLARAT ORY JUDGMENT ACTION?

FOR PURPOSES OF THIS COURT'S JURISDICTION , I DON'T THINK I T MAKES ANY DIFFERENCE.

JUSTICE: I AM ASKING YOUAS FAR AS STANDING.

I THINK WHAT THE COURT HAS TO LO OK AT, AS FAR AS THE DECLAR ATORY JUDGMENT IS CONCERNED , THERE ARE SPECIFIC PRINCIPLES THAT M UST BE SHOWN IN ORDER TO SHOW STANDING , AND THE ABILITY TO B RING DECLARATORY JUDGMENT ACTION. IN THIS CASE IT SEEMS LIKE THE SOLE BASIS THAT PETITIONER RELIES UPON FOR STANDING IS TAXPAYER STANDING , AND I THINK AS THE COURT HAS QUESTIONED THE PETITIONER ABOUT, THERE IS ACTUALLY NO CONFLICT BETWEEN THE CASES THAT ARE ALLE GED IN THIS C ASE, THE HORN CASE , THE BLAKE CASE AND THE LO UIS C ASE. THOSE -- AND THE LEWIS CASE. THOSE CASES SPECIFICALLY ADDRESS TAXPAYER STANDING , AND IN IN THOSE CASES --

JUSTICE: DOES THE DECLARATORY JUDGMENT HAVE A STANDING REQUIREMENT?

THE DECLARATORY JUDGMENT STATUTE REQU IRES CERTAIN THINGS. IT REQUIRES THAT THERE IS A, THAT A PARTY HAVE A BONA FIDE ACTUAL PRE SENT PRACTICAL NE ED FOR THEDECLARATION. IT REQUIRES THAT , IT REQUIRES A PRESENT CONTROVERSY . IT REQUIRES THAT UNIT , PO WER, PRIVILEGE OR RIGHT OF THE COMPLAINING PARTY IS DEPENDENT ON THE FACTS OR THE LAW APPLICABLE TO THE FACTS , AND IN ADD ITION THE DECLARATORY JUDGMENT STANDARD, I BELIEVE , IS THE TAXPAYER STANDING R ULE THAT HAS BEEN ANNOUNCED BY THIS COURT IN HOR NE.

CHIEF JUSTICE: THIS IS MY PROBLEM.I AM ASKING YOU THE SAME QUESTION. IF WICCAN REF ILES AND SPECIFICALLY ALLEGED TAXPAYER STANDING, THAT THIS IS A TAXING AND SPE NDING STATUTE , AND THEY ARE CLEARLY CHALLENGING THIS AS A FIRST AMENDMENT VIOLATION, THAT THERE ARE CONTENT -B ASSED DECISIONS THAT THEDEPARTMENT OF REVENUE MAKES APPARENTLY ALL THE TIME IN DECIDING WH ICH RELIGIOUS, WHICH PUBLICAT IONS ARE RELIGIOUS AND WHICH ARE NOT , TO GET THE TAX EXEMPTION , WHICH IS DIFFERENT THAN WHETHER THEY QUALIFY TO BE AB LE TO SELL THEIR MATERIAL AS AN UNIT WITH AN EXE MPTION. W OULD THEY BE AB LE TO REFILE AND SPEC IFICALLY ALLEGE THAT INJURY, OR ARE THEY PRECLUDED BASED UPON WHAT HAS BEEN LITIGATED BEFOREHAND?

I DON'T THINK THEY WOULD BE PRECLUDE. I THINK THAT NOW THAT IT HAS BEEN SHOWN THAT THEY PA IDTAX AND THAT THEY ACTUALLY ARE A TAXPAYER , THERE WOULD BE AN ISSUE AS TO WHETHER OR NOT TAXPAYER STANDING , AND I DON'T THINK THIS COURT HAS ADDRESSED WHETHER OR NOTU NDER THE TAXPAYER STANDING PRINCIPLE , ADVERSEMENT M UST STILL BE SHOWN. THE TAXPAYER STANDING RULE THAT HAS BEEN ANNOUNCED DOES AWAY WITH ANY SORT OF SPECIAL IN JURY REQUIREMENT. BUT WHETHER OR NOT ADVERSEMENT HAS TO BE SHOWN IS AN ISSUE THAT WAS NOT ADDRESSED BY THE FIRST DCAIN THIS CASE.

CHIEF JUSTICE: DO YOU AGREE, WAS IT BRIEFED AS AN ALTERNATIVE BASIS FOR STANDING OR AS THE MAIN BASIS FOR STAND SOMETHING.

AT THE FIRST.

CHIEF JUSTICE: AT THE FIRST DISTRICT?

YES AND I THINK WHAT THE FIRST DISTRICT RULED UPON WAS NOT TAXPAYER STANDING BUT

JUST UNDER GENERAL STANDING PRINCIPLES WHETHER OR NOT WICCAN HAD AN ADVERSE INTEREST.

JUSTICE: WE HAD A LITTLE UNUSUAL PROCEDURAL POSTURE, BECAUSE APPARENTLY A PART OF THE DECISION OF THE TRIAL COURT WAS STANDING. THERE WAS NO CROSS APPEAL.

RIGHT.

JUSTICE: AND THEN THE FIRST DISTRICT ADDRESSED THIS IN THE NATURE OF A WAIVER. THE PARTIES DISCUSSED ALL OF THESE THINGS. DOES THAT ALTER -- ALTER OUR ANALYSIS WITH REGARD TO WHAT THAT ISSUE WAS, BECAUSE IT APPEARS THAT THEY DID ACCEPT IN THAT PARAGRAPH OF THE OPINION, TALK ABOUT STANDING AND WHETHER THAT BRINGS AS PART OF THE OPINION, THE ISSUES OF STANDING THAT ARE ACTUALLY INVOLVED IN THE CASE?

THE FIRST DISTRICT, WHEN IT CONSIDERED THE CROSS APPEAL, SIMPLY FOUND THAT IT WAS A PROBABLY RULE THAT -- A PROCEDURAL RULE THAT COULD BE WAIVED AND IT WAS -- PROCEDURAL RULE THAT COULD BE WAIVED, AND IT WAS WAIVED ON THE PART OF THE PARTIES AND BRINGS IN ALL OF THESE OTHER THINGS.

JUSTICE: THE STATUTE DOES NOT SPECIFICALLY SAY BUT INHERENTLY, IS THAT WHERE OUR PROBLEM IS HERE?

WELL, I DON'T THINK THE OPINION INHERENTLY SAYS ANYTHING REGARDING TAXPAYER STANDING. FOR THE PURPOSES OF THIS COURT'S JURISDICTION, DIRECT CONFLICT JURISDICTION, YOU HAVE TO LOOK TO THE FOUR CORNERS OF THE DCA'S OPINION.

CHIEF JUSTICE: IF WE GET PAST THE JURISDICTIONAL ISSUE, I HAVE SOME CONCERNS ABOUT THE BASIS, AS JUSTICE ANSTEAD CALLS IT, A NARROW BASIS FOR THE FIRST DISTRICT'S RULING. IT SEEMS TO BE SORT OF A VALUE DETERMINATION, AS TO WHETHER THEY HAVE AN ADVERSE INTEREST. IF I AM CLAIMING TO BE A RELIGIOUS ORGANIZATION OR I AM A RELIGIOUS ORGANIZATION, I GUESS YOU HAVE RECOGNIZED THEM BEFORE AS ONE, AND I HAVE GOT THE DEPARTMENT OF REVENUE DECIDING WHETHER MY BIBLE IS REALLY A RELIGIOUS TEXT OR IF IT IS HISTORICAL OR SOMETHING ELSE, WHY AM I NOT IN THE CAPACITY, NOT AS A PURCHASER BUT AS A SELLER, ADVERSELY AFFECTED BY A GOVERNMENTAL ENTITY MAKING A DETERMINATION ON AN ONGOING BASIS, AS TO WHETHER WHAT I SELL IS OR IS NOT GOING TO BE SUBJECT TO SALES TAX?

WELL, I WOULD HAVE TWO ANSWERS TO THE QUESTION. FIRST DEPARTMENT OF REVENUE ITSELF, DOES NOT DETERMINE WHAT A RELIGIOUS PUBLICATION IS. THAT DETERMINATION IS LEFT TO THE BOOK SELLER. SIMILAR TO A STATUTE THAT EXEMPTS CERTAIN FOOD ITEMS. THE GROCERY STORE IS ACTUALLY THE ONE THAT MAKES THE DETERMINATION. SO THE DEPARTMENT ITSELF KIND OF STAYS OUT OF THAT.

CHIEF JUSTICE: SO THEY CAN SAY ANYTHING IS RELIGIOUS AND THERE IS NO CHALLENGE TO IT?

AT THIS POINT THERE HAS BEEN, THE DEPARTMENT ITSELF HAS NOT CONSIDERED WHETHER OR NOT ANY PARTICULAR PUBLICATION WAS RELIGIOUS OR OTHERWISE.

CHIEF JUSTICE: AS LONG AS THEY HAVE THEIR RELIGIOUS EXEMPTION? THEY HAVE TO, FIRST, HAVE THEIR RELIGIOUS EXEMPTION.

WELL, NO. THE RELIGIOUS, THE REQUIREMENT THAT IT BE A RELIGIOUS INSTITUTION, THAT ADMINISTRATIVE RULE HAS BEEN REPEALED. AS OF THIS POINT, THE --

CHIEF JUSTICE: WE ARE REALLY DEALING WITH --

IT IS UP TO THE BOOK SELLER TO DETERMINE WHETHER IT IS A RELIGIOUS CONTENT OR NOT. THE LANGUAGE THAT WE ARE CONCEDING ON AT THIS POINT THE PETITIONER SPECIFICALLY STATED WILLING TO SELL RELIGIOUS PUBLICATIONS AND OTHER RELIGIOUS PUBLICATIONS TO MEMBERS OF ITS PARTY WITHOUT SALES TAX. THAT SEEMS TO BE CONTRARY TO THE DECLARATORY JUDGMENT THEY ARE REQUESTING IN THIS CASE. IN THIS CASE THEY ARE REQUESTING TO HAVE THE ENTIRE STATUTE DECLARED UNCONSTITUTIONAL WHICH WOULD ALLOW THEM TO DO SO AND WOULD ALLOW ANY OF THEIR MEMBERS TO GO OUT AND PURCHASE A WICCAN RELIGIOUS PUBLICATION TAX FREE, SO AS TO ADVERSEMENT, I THINK THAT DIRECTLY UNDERMINES IT. HAD THEY REQUESTED A DECLARATORY JUDGMENT AS TO WHETHER OR NOT A SPECIFIC RELIGIOUS PUBLICATION, A WICCAN RELIGIOUS PUBLICATION WAS EXEMPT FROM THE TAX, THEN I THINK THAT MAY HAVE BEEN PROPER.

JUSTICE: WERE THEY ASKING, IS THAT, UNCONSTITUTIONAL ON ITS FACE OR UNCONSTITUTIONAL AS APPLIED?

I THINK IT IS UNCLEAR, BUT I THINK IT IS A FACIAL CONSTITUTIONAL CHALLENGE. AND IN THAT RESPECT, I THINK IT DIRECTLY IS CONTRARY TO WHAT APPEARS TO BE THEIR STATED INTEREST IN THIS.

JUSTICE: IS IT YOUR POSITION THAT THERE COULD NOT BE A DECLARATORY JUDGMENT AS TO THE CONSTITUTIONALITY OF A STATUTE?

I THINK THERE CAN BE, BUT I THINK THAT THAT WOULD HAVE TO BE BROUGHT BY A TAXPAYER, UNLESS THE SPECIFIC STANDING PRINCIPLE, THE DECLARATORY JUDGMENT STANDING PRINCIPLE ARE SPECIFICALLY AND STRICTLY FOLLOWED, AND I THINK THERE ARE SPECIFIC PEOPLE THAT COULD BRING THAT CHALLENGE. THERE ARE TAXPAYERS.

JUSTICE: IS THERE SOME CASE THAT LIMITS DECLARATORY JUDGMENT ACTIONS IN RESPECT TO TAX MATTERS TO TAXPAYERS?

WELL, THE TAXPAYER STANDING PRINCIPLES ARE AN EXCEPTION TO THE GENERAL STANDING PRINCIPLE. SO I BELIEVE THE --

JUSTICE: I AM ASKING YOU ABOUT THE DECLARATORY JUDGMENT STATUTE. I MEAN, WE HAVE HAD A PRETTY BROAD INTERPRETATION FROM THIS COURT AS TO THE DECLARATORY JUDGMENT STATUTE.

THERE IS NO CASE THAT I CAN RECALL RIGHT NOW THAT SPECIFICALLY CONSIDERS OR SPECIFICALLY REFERS TO THE, A DECLARATORY JUDGMENT STATUTE AND TO THE FACT OF THEIR STANDING BASIS, BUT I BELIEVE IN FOREIGN AND IN THE CASES THAT FOLLOWED THAT, THERE MIGHT BE MIGHT HAVE BEEN DECLARATORY JUDGMENT ACTIONS BUT I DO NOT RECALL OFFHAND, BUT I THINK THAT WHETHER A PARTY IS A TAXPAYER OR NOT, THEY COULD BRING A DECLARATORY JUDGMENT ACTION, IF THEY COULD SHOW THAT THEY HAD MET THE DECLARATORY JUDGMENT STANDARD, THE STANDING REQUIREMENTS THERE.

JUSTICE: WHAT IS THAT REQUIREMENT AS YOU UNDERSTAND IT UNDER THAT STATUTE?

WELL, I THINK YOU HAVE TO HAVE, WELL, ONE, AN ADVERSE INTEREST, AND I THINK IN THIS CASE, THERE IS NO ADVERSE INTEREST, BECAUSE AS I STATED IT APPEARS THAT WHAT THE COMMISSIONER WANTS IS TO BE ABLE TO SELL AND HAVE ITS MEMBERS BE ABLE TO BUY THEIR WICCAN RELIGIOUS PUBLICATIONS TAX-FREE.

JUSTICE: DO YOU BELIEVE THAT IS PART OF THE STATUTE THAT SAYS THAT IS THE DECLARATORY RELIEF?

THAT IS HOW IT HAS BEEN INTERPRETED BY THE COURT IN MAYBE THE HOWIE CASE.

JUSTICE: THE PEOPLE THAT BRING THE STANDING, SAY IF I PUBLISH A SECULAR BOOK AND PEOPLE HAVE TO PAY TAXES ON IT, THEN I COULD BRING THIS ACTION CHALLENGING THIS TAX EXEMPTION.

I THINK THAT THEY PROBABLY COULD UNDER THE DECLARATORY JUDGMENT STANDARD, BUT I THINK ALSO THAT ANY TAXPAYER IN THE STATE COULD ASK FOR STANDING.

JUSTICE: SO IF ANY TAXPAYER IN THE STATE WOULD BRING THIS CHALLENGE, HOW DOES THIS STATUTE NOT VIOLATE "TEXAS MONTHLY"?

WELL, I THINK THE OTHER THING TO KEEP IN MIND, TOO, IS AS RELATES TO THE JURISDICTIONAL BASIS OF THIS CASE, THE ONLY JURISDICTIONAL BASIS HAS BEEN, THAT HAS BEEN ALLEGED IS CONFLICT WITH HORNE, BLAKE, AND DEPARTMENT OF EDUCATION V LEWIS ON THE TAXPAYER STANDING PRINCIPLES.

JUSTICE: AND WE SAY THAT THIS GROUP DOES IN FACT HAVE TAXPAYER STANDING, AND THEN WE GET TO THE MERITS OF WHETHER OR NOT THIS STATUTE IS IN FACT UNCONSTITUTIONAL, WHY ISN'T THIS STATUTE A VIOLATION OF THE PRINCIPLES DISCUSSED IN "TEXAS MONTHLY"?

WELL, I THINK MR IS BETTER PREPARED TO ADDRESS CONSTITUTIONALITY THAN I AM, BUT THE BROADER STATUTE IN "TEXAS MONTHLY" THERE WAS A NUMBER OF DECISIONS, A PLURALITY DECISION. THERE WAS NO MAJORITY THAT SPECIFICALLY ANNOUNCE ADD RULE OF LAW OR AN ANALYSIS AND RULED FOR THE COURT, SO THAT WAS A NARROW HOLDING THAT THE TEXAS STATUTE, ITSELF, VIOLATED THE ESTABLISHMENT CLAUSE.

JUSTICE: AND SO, BUT, THE ESTABLISHMENT CLAUSE BASICALLY SAYS THAT THE CONFLICT IN THIS CASE, IN THIS CASE FLORIDA LEGISLATURE, SHOULD MAKE NO LAWS RESPECTING THE ESTABLISHMENT OF RELIGIONS, SO THIS STATUTE SAYS BASICALLY THAT YOU GET TAX EXEMPTION, A SPECIAL DEAL, IF IT IS IN FACT A RELIGIOUS PUBLICATION, SO WHY ISN'T THAT A VIOLATION OF THE ESTABLISHMENT CLAUSE?

WELL, IF YOU LOOK AT THE "TEXAS MONTHLY" DECISION, AND I THINK YOU ALSO HAVE TO LOOK TO THE OTHER UNITED STATES SUPREME COURT CASES THAT HAVE CONSIDERED THAT, THE LOTT CASE AND WALLS, IN TEXAS MONTHLY, THE CONCURRENT, TWO JUDGES CONCURRENT, I BELIEVE JUSTICE BLACKMON'S OPINION, STATED THAT IF THE SALES TAX EXEMPTION STATUTE OR PRESUMABLY THE SALES TAX EXEMPTION AS A HOLE IN A CERTAIN STATE WERE BROAD ENOUGH, THEN IT WOULD NOT BE A VIOLATION OF THE ESTABLISH CLAUSE THAT ANY PARTICULAR EXEMPTION MIGHT HAVE BEEN AFFECTING THE WICCAN RELIGIOUS SPECIFICALLY.

JUSTICE: THIS STATUTE IS TALKING ABOUT RELIGION. IT COVERS EVERY RELIGIOUS UP, IS THAT WHY YOU ARE SAYING IT IS BROAD?

WELL, NO. I MEANT THE FACT THAT IT COVERS EVERY RELIGION GOES TO WHETHER OR NOT IT IS RELIGION NEUTRAL, BUT I THINK IF YOU LOOK TO THE FLORIDA SALES TAX EXEMPTION STATUTE AS A WHOLE NOT SPECIFICALLY 212.069, BUT IF YOU LOOK TO THE GENERAL SALES TAX SCHEME THERE ARE A NUMBER OF EXEMPTIONS THAT EXEMPT SUCH THINGS AS EDUCATIONAL TEXTBOOKS, CERTAIN PROMOS -- PROMOTIONAL MATERIALS, PUBLICATIONS, NEWSPAPERS AND MAGAZINES IF THEY MEET CERTAIN CRITERIA. THERE ARE A NUMBER, AND I THINK UNDER THE "TEXAS MONTHLY" DECISION, THERE IS SUFFICIENT AMBIGUITY.

JUSTICE: IT WOULD HAVE TO, THEN, BE APPLICABLE ONLY TO RELIGIOUS PUBLICATIONS TO MAKE IT UNCONSTITUTIONAL? IS THAT --

I THINK IF YOU COULDN'T LOOK TO THE REST OF THE FLORIDA SALES TAX SCHEME AND FIND ANY OTHER EXEMPTIONS THAT IN ANY WAY COULD BE INTERPRETED IN CONJUNCTION, THEN ARGUABLY UNDER "TEXAS MONTHLY" UNDER THE NARROW, LOOKING ONLY NARROW TO THE STATUTE THERE, MAY BE SOME DIFFICULTY TO THE "TEXAS MONTHLY".

CHIEF JUSTICE: DO YOU SEE WHERE IT IS THE BOOKSELLER THAT MAKES THE DETERMINATION - THE BOOKSELLER THAT MAKES THE DETERMINATION, RATHER THAN A GOVERNMENTAL ENTITY? THAT IS A CHANGED DEVELOPMENT DO. AS FAR AS DOES THAT AFFECT THE ON -- AFFECT THE CONSTITUTIONAL ISSUE, AS FAR AS WHO DETERMINES IT?

I THINK IT IS LEFT TO THE BOOKSELLERS. I SEE THAT MY TIME IS RUNNING OUT AND WITH THE COURT'S PERMISSION, MR WILL CONTINUE WITH THE CONSTITUTIONALITY ISSUE.

MAY IT PLEASE THE COURT. KEVIN SHAUGHNESSY ON BEHALF THE FLORIDA CATHOLIC AND THE "FLORIDA BAPTIST WITNESS". WITH REGARD TO THE CONSTITUTIONALITY OF THE STATUTE, IT IS CONSTITUTIONAL, BECAUSE THE "TEXAS MONTHLY" CLEARLY HELD THAT, AND THE CONCURRING OPINION OF JUSTICE BLACKMON THAT YOU HAVE TO LOOK AT THE WHOLE FRAMEWORK THAT WE ARE DEALING WITH.

JUSTICE: THERE WERE ALSO OTHER EXEMPTIONS, CORRECT?

THERE WERE OTHER EXEMPTIONS IN THE STATUTE BUT NO EXEMPTIONS FROM THE RECORD IN THAT CASE CONCERNING NONRELIGIOUS PUBLICATIONS, UNLIKE FLORIDA, WHERE THERE ARE NUMEROUS EXEMPTIONS FOR NONRELIGIOUS PUBLICATIONS, AND I THINK THAT IS AN IMPORTANT POINT, BECAUSE THE STANDARD THAT WE HAVE HERE IS THAT THIS STATUTE COMES WITH A PRESUMPTION OF CONSTITUTIONALITY, AND THIS COURT IS EMPOWERED TO LOOK AT IT AND TRY TO INTERPRET IT IN SUCH A WAY TO MAKE IT CONSTITUTIONAL, AND IT IS A VERY HIGH BURDEN TO FIND A STATUTE UNCONSTITUTIONAL IN THE STATE OF FLORIDA. GIVEN THAT, IF YOU LOOK AT WHAT THE SUPREME COURT HAS DONE IN MANY OF THESE CASES, THEY ANALYZED THE ENTIRE STATUTE TO SEE IF THERE IS SOME WAY THAT IT IS NEUTRAL ON ITS FACE, OR IF THERE IS SOME BENEFIT, A SECULAR PURPOSE THAT IS EXTENDED TO MANY PEOPLE IN SOCIETY OR MANY DIFFERENT RELIGIOUS AND NONRELIGIOUS INSTITUTIONS. THAT IS WHAT THE WALLS COURT HOLDS.

JUSTICE: IS THERE AN OVERALL PATTERN IN THE TYPE OF PUBLICATIONS THAT ARE GIVEN EXEMPT STATUS UNDER THE STATUTORY SCHEME?

WELL, THE PATTERN IN FLORIDA IS A FAIRLY BROAD ONE. IT RANGES FROM RETIRED EDUCATORS ASSOCIATION PUBLICATION TO EDUCATIONAL TEXTBOOKS, TO SOME COMMUNITY NEWSPAPERS, TO SOME NEWSLETTERS. IT IS A VERY BROAD PATH AND WHAT I WOULD SAY IS IT ENCOURAGES FREEDOM OF SPEECH IN THESE TYPES OF PUBLICATION THAT IS THEY ARE ENCOURAGING, AND THEY TEND TO BE NONPROFIT OR EDUCATIONAL TYPES THAT BENEFIT FROM IT.

CHIEF JUSTICE: DO YOU THINK IT MATTERS TO DETERMINE WHETHER IT IS A RELIGIOUS OR NONRELIGIOUS PUBLICATION?

I THINK IT DOES MATTER BECAUSE YOU AVOID ENTANGLEMENT WITH THE STATE AND THE PUBLISHER SEEKING AN EXEMPTION AND YOU LEAVE IT UP TO, IF YOU WILL, THE RETAILER. I THINK IT IS IMPORTANT BECAUSE THE WHOLE PURPOSE OF THE SEPARATION OF CHURCH AND STATE IS TO AVOID EXCESSIVE ENTANGLEMENT BETWEEN THE GOVERNMENT AND RELIGIOUS ENTITIES.

JUSTICE: YOUR PRIMARY POINT IS WE SHOULDN'T REACH THE RELIGIOUS ISSUE FOR PRIMARY

STANDING. THAT IS THE ISSUE WE SHOULD DECIDE?

I THINK THE ISSUE THAT YOU SHOULD ADDRESS IS HOW THE CASE WAS FILED , WHAT WERE THE ALLEGATIONS , WHAT WAS THE DECISION OF THE FIRST DCA. I THINK THOSE STRUGGLES WITH REGARD TO THE STANDING ARE SIGNIFICANT OF THE. WHEN YOU TALK ABOUT A CONSTITUTIONAL ISSUE, THE RECORD BELOW IS NOT FULLY DEVELOPED.

CHIEF JUSTICE: MY CONCERN IS I THINK THIS HAS SORT OF EVOLVED , CHANGED OVER THE TIME SINCE THE COMPLAINT WAS FILED , BUT I WOULDN'T WANT TO PREVENT THE PLAINTIFF , PETITIONER FROM GOING BACK AND BEING ABLE TO REPLEAD IT , IF THEY STILL ARE INTERESTED IN CHALLENGING THE CONSTITUTIONALITY OF THE STATUTE , BECAUSE , AND LET ME GO TO THIS, WOULDN'T THEY HAVE, UNDER LEWIS AND HORNE , THE ABILITY TO , IF THE , AGAIN IF WE REACHED IT BUT IF THEY HAD PROPERLY PLED IT , TO HAVE STANDING BASED ON THE TAXPAYER EXCEPTION TO THE GENERAL STANDING REQUIREMENTS?

I THINK THAT THE VERY GOOD OBSERVATION , CHIEF JUSTICE PARTICIPANTE , BUT I THINK THEY WOULD HAVE TO GO BACK TO THE VERY BEGINNING, BECAUSE THE SECOND AMENDED COMPLAINT HERE , THEY WERE ASKING TO UPHOLD --

CHIEF JUSTICE: I UNDERSTAND BUT I WOULDN'T WANT SOMEONE ALONG THE WAY IF IT WERE ME PERSONALLY BECAUSE OF THE WAY IT HAS ALREADY GONE , TO SAY THAT IT HAS ALREADY BEEN DETERMINED THAT THEY DON'T HAVE TAXPAYER STANDING.

I THINK IF THEY WENT BACK AND REPLED IT AND SATISFIED THE ELEMENTS OF EITHER THE DECLARATORY JUDGMENT STATUTE OR STANDING , THEN --

JUSTICE: WHAT ELEMENTS OF THE DECLARATORY JUDGMENT STATUTE WERE THEY --

THERE WASN'T ANY DISPUTED ISSUE WHEN THEY PLED DECLARATORY JUDGMENT. THEY WERE SAYING THAT THEY WANTED TO PLEAD IT.

JUSTICE: WERE THEY UNCERTAIN OF THEIR RIGHTS AS TO THE STATUTE?

I AM NOT SURE IF THEY PLED IT EXACTLY THAT WAY BUT IT SEEMS TO ME THAT THEY WERE TRYING TO HAVE THE STATUTE INTERPRETED TO UPHOLD THE CONSTITUTIONALITY OF IT AND NOW SEVERAL YEARS LATER, THEY ARE HERE AT THIS COURT TRYING TO FIND IT UNCONSTITUTIONAL.

JUSTICE: YOU WOULD AGREE THAT THIS COURT HAS SAID THAT THE PURPOSE OF THE DECLARATORY RELIEF IS TO AVOID RELIEF FROM INSECURITY AND UNCERTAINTY, WITH RESPECT TO RIGHT, STATUS OR OTHER EQUITABLE OR LEGAL RELATION. THIS COURT HAS TAKEN A VERY BROAD STANCE ON DECLARATORY JUDGMENT STATUTE , AND HAS BEEN VERY RELUCTANT TO SAY SOMEONE DOESN'T HAVE STANDING IF THEY CAN PLEAD THAT THEY ARE AFFECTED BY THE STATUTE .

I WOULD AGREE WITH THAT , BUT IN THE POSTURE OF THIS CASE WHERE THEY ARE PLEADING FOR THE CONSTITUTIONALITY OF THE STATUTE , AND THEN IT FALLS INTO UNCONSTITUTIONALITY.

CHIEF JUSTICE: BUT THERE ARE TWO STATUTES. WE KEEP TALKING AS IF THERE WERE ONLY ONE STATUTE. THEY AT THE BEGINNING WERE ALLEGING TWO STATUTES UP CONSTITUTIONAL, ONE THAT THEY HAD AN EXEMPTION OR NOT AND THEN THE OTHER, THE ONE FOR THE RELIGIOUS PUBLICATIONS ARE EXEMPT. CORRECT?

THAT'S CORRECT. I SEE THAT MY TIME IS ALMOST EXPIRED .

CHIEF JUSTICE: YES, IT IS EXP IRED. THANK YOU. REBUTTAL.

THANK YOU. I JUST WA NT TO MAKE THE POINT THAT "TEXAS MONTHLY" DIRECTLY ADDRESSEST STATEMAKING THE DECISION VER SUS THE STATE G IIVING IT TO THE BOOK SELLERS. THAT WAS PART OF THE "TEXAS MONTHLY " " CASE , AND THE COURT SAID WE DON'T MAKE THAT DECISION. THAT IS UP TO THE --

CHIEF JUSTICE: IF YOU COULD DESI GN A STATUTE , HOW WOULD YOU DESIGN IT? WHAT YOU SAY THAT EVERYONE OUGHT TO BE TAXED? IS THAT WAUR SEE K ING? YOU WANT TAX?

IN TERMS OF EVERY RELIGIOUS PUBLICATION SHOULD BE TAXED, AND IN FACT THAT ARGUMENT THAT WRCF WAS SEEKING NOT TO BE TAXED WAS ALSO CONSIDERED IN BUDLONG , BUT WHAT IT REA LLY COMES BACK TO IS THE COMP LAIN T A BOUT THE UNCONSTITUTIONALITY OF THESTATUTE IS THE FACT THAT IT IS CONTENT -BASED.

CHIEF JUSTICE: LE T ME MAKE SU RE I UNDERSTAND. I THO UGHT , YOU ARE SAYING THAT YOU ARE SEEKING RELIEF TO SEE THAT EVERY RELIGIOUS ORGANIZATION SHOULD B E , THAT THEIR PUBLICATIONS SHOULD BE TAXED.

WELL, THE FIRST THIN G WE WERE TR YING TO DO WAS ADDRESS THE STATUTE ABOUT THE ESTABLISHED PHYSICAL LOCATION, BECAUSE THAT WAS T YING THE FREEDOM OF SPE ECH ISSUE TO WHO WAS SAYING , WHO WAS MAKING THE SPEE CH. AND THAT WAS A PROBLEM. THAT BECAME A PROCEDURAL ISSUE. THE LOWER COURT DECIDED THAT REMEDIES HAD NOT BEEN EXHAUSTED ON THAT ISSUE , AND THEREFORE WRCF CHOSE NOT TO PURSUE IT AND SAID , LOOK, THE WHOLE STATUTE , THIS EXEMPTION ITSE LF IS UNCONSTITUTIONAL, SO WE ARE GOING TO JUST GO AFTER THAT .

CHIEF JUSTICE: GI VEN WHAT I CONSIDER A CONCESSION , WHICH IS THAT THIS CASE SEEMS LIKE IT HAS GONE THROUGH A LO T OF CYCLES AND A LOT OF THINGS HAVE CHANGED. WHAT IS WRONG WITH GIVING YOU AN OPPORT UNITY TO GO BACK TO THE CIRCUIT COURT AND START FROM S QUARE ONE , WHERE YOU WON'T BE BOUND BY ANY RACE ADJUDICATA OR RULE OF THE --

I DON'T THINK THAT WE WOULDN'T BE BOU ND.

CHIEF JUSTICE: -- LAW OF THE CASE S ITUATION.

I DON'T THINK THAT IT WOULD HAPPEN THAT WAY. BECAUSE IT HAS BEEN SO CONVOLUTED AND BECAUSE THE STATE HAS CONSISTENT LYCHANGED , THE STATE HAS VERY CLEARLY DONE ITS JOB. THE STATE'S JOB IS TO TRY TO PROTECT THE CONSTITUTIONALITY OF THESTATUTE , AND THE STATE HAS DONE THAT, AND THEY K EEP CHANGING THEIR POS ITION IN ORDER TO DO THAT. SO I DON'T SEE , I AM QUITE SURE THAT , I F WRCF WERE TO REFILE THIS CASE , THERE WOULD BE ANOT HER SEVERALYEARS OF LITIGATION AS TOWHETHER OR NOT THIS WAS RES JUD ICATA .

JUSTICE: CAN I ASK YOU SOMETHING ABOUT "TEXAS MONTHLY". CAN YOU RESPOND TO YOUR OPPONENT'S ARGU MENT THAT, WHEREAS I N "TEXAS MONTHLY" THE ONLY PUBLICATIONS GRANTED TAX EXEMPT STATUS WERE RELIGIOUS ONES , AND UNDER THE FLORIDA STATUTE THERE IS A BROAD AR RAY OF PUBLICATIONS THAT ENJOY TAX EXEMPT STATUS, AND THEREFORE THAT DISTINGUIS HES THIS CASE F ROM "TEXAS MONTHL Y"?

I DON'T AGREE THAT THAT IS TRUE.IF YOU LOOK AT SH ARPER I MAGE , THE FLORIDA STANDARD OF LOOKING AT THESE CASE S IS THAT , IF A PARTICULAR PORTION OF A STATUTE IS COMPLETELY UNCONSTITUTIONAL , THEN THAT STATUTE , THAT PROVISION CAN BE INDEPENDENT LY DECLARED UNCONSTITUTIONAL , WITHOUT HAVING TO DECLARE --

JUSTICE: YOU ARE SAYING THAT WE HAVE TO LOOK AT ONE NARROW SECTION OF A STATUTE, A

SUBSECTION OF A STATUTE, RATHER THAN LOOKING AT THE SECTIONS IN AND AROUND IT BEFORE AND AFTER? WE CAN'T LOOK AT THOSE TO DETERMINE WHETHER THERE WERE OTHER PUBLICATIONS GIVEN TAX EXEMPT STATUS? <\$ \$? WE HAVE TO BIND OURSELVES TO THAT?

YES.

JUSTICE: DO YOU AGREE WITH YOUR OPTION'S STANDARD FOR CONSTITUTIONAL REVIEW HERE, WITH REGARD TO PRESUMPTIONS THAT HAVE BEEN STATED AND WHAT KIND OF SCRUTINY HAS TO BE APPLIED TO THE CONSTITUTIONAL ANALYSIS?

WELL, IT IS TRUE THAT YOU HAVE TO LOOK AT, I THINK THAT IN THIS CASE, THE LAW FAVORS YOU DOING, GOING AHEAD AND REVIEWING THE CONSTITUTION, EVEN THOUGH YOU NORMALLY ARE CONSERVATIVE IN DOING THAT. THE CASES IN THIS STATE AND IN THE OTHER STATES, SUGGESTS FOR EXAMPLE, THE BUDLONG CASE WHICH I THINK YOU WOULD LOOK TO IN THIS CASE, STATES THAT THIS PARTICULAR TYPE OF EXEMPTION, IS SO BLATANTLY UNCONSTITUTIONAL IN SUCH AN OBVIOUS ABUSE OF THE STATE'S POWER, THAT THE COURT MUST STEP IN AND CORRECT THAT. AND I THINK THAT THAT IS WHAT THE COURT SHOULD DO IN THIS INSTANCE.

CHIEF JUSTICE: THANK YOU VERY MUCH.