IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THOMAS BUDLONG, and
CANDACE APPLE,

Plaintiffs,

v.

BART L. GRAHAM, in his individual and official capacity as Commissioner of the Georgia Department of Revenue,

Defendant.

CIVIL ACTION NO.
1:05-CV-2910-RWS

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The Plaintiffs, a book buyer and book seller, are challenging the Georgia State laws that exempt certain religious publications from the state sales and use tax. The Plaintiffs argue that these statutes grant favored treatment to certain texts because of their religious content, which violates the Free Speech and Establishment Clauses of the United States and Georgia Constitutions. In addition, the laws are so vague that they also violate the Due Process Clauses of the United States and Georgia Constitutions.

The pleadings, declarations and other evidence show that there is no genuine issue of material fact and that the Plaintiffs are entitled to judgment as a matter of

law. Fed. R. Civ. P. 56 (c). Accordingly, the Plaintiffs' Motion for Summary Judgement should be granted.

STATEMENT OF FACTS

Statutes

O.C.G.A. § 48-8-3(16) establishes a statewide tax exemption for "[t]he sales or use of Holy Bibles, testaments, and similar books commonly recognized as being Holy Scripture regardless of by or to whom sold." No similar sales or use tax exemptions exist for other "philosophical publications devoted to such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong." (*Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 27-28 (1989) (plurality); O.C.G.A. § 48-8-3.) "Holy Scripture," "testaments," and "similar books commonly recognized as Holy Scripture," as used in O.C.G.A. § 48-8-3(16), are not defined in this or any other state statute or regulation. (Ex. 1, First Stips. ¶ 9; O.C.G.A. § 48-1-1, *et. seq.*; Ga. R. & Regs. 560-12-2.01, *et seq.*)

O.C.G.A. §48-8-3 (15)(A) exempts from sales tax "any religious paper in this state when the paper is owned and operated by religious institutions or denominations and no part of the net profit from the operation of the institution or denomination inures to the benefit of any private person." No similar sales or use tax exemptions exist for either religious or non-religious papers owned and operated by secular organizations or for religious organizations that publish non-

religious papers. (O.C.G.A. § 48-8-3.) This is true even if the papers discuss the same issues, ideas, or topics as those entitled to an exemption. (O.C.G.A. § 48-8-3.) No state statute or regulation defines the term "paper" or "religious" as used in O.C.G.A. §48-8-3 (15)(A). (First Stips. ¶ 9; O.C.G.A. § 48-1-1, *et. seq.*; Ga. R. & Regs. 560-12-2.01, *et seq.*)

Plaintiff Budlong

Mr. Budlong, a Georgia citizen, is a retired librarian, who was formerly employed by the Atlanta-Fulton Public Library System. (First Stips. ¶ 17; Ex. 2, Budlong Aff. ¶ 3.) He is the former President of the Georgia Library Association and a board member of the Georgia First Amendment Foundation. (First Stips. ¶ 17; Budlong Decl. ¶ 3.)

At various times, Mr. Budlong has purchased non-exempted books and papers in the state of Georgia. (First Stips. ¶ 18; Budlong Decl. ¶ 4.) On October 27, 2005, which was before the filing of this lawsuit, Mr. Budlong purchased *Zen and the Art of Motorcycle Maintenance: An Inquiry into Values* and the sacred Hindu text, *The Bhagavad Gita.* (First Stips. ¶ 19; Budlong Decl. ¶ 5.) Mr. Budlong was charged and paid an 8-percent sales tax on both publications that totaled $2.15 . (First Stips. ¶ 19; Budlong Decl. ¶ 5 & Attach. A.)

Since the filing of this lawsuit, Mr. Budlong has purchased additional papers and books in the State of Georgia. (Budlong Decl. ¶ 6 & Attach. D.) On September

28, 2006, Mr. Budlong purchased *The Everything Philosophy Book* and a copy of the periodical, *Parabola: Tradition, Myth, and the Search for Meaning*. (*Id.*) Mr. Budlong was charged and paid an 8-percent sales tax on both items that totaled $1.80. (*Id.* ¶ 6 & Attachs. D.)

The Everything Philosophy Book, is a book geared towards helping a person "understand the basic concepts of great thinkers - from Socrates to Sartre." *(Id.* ¶ 7 & Attach. B.) *Parabola* is a quarterly journal and "[e]very issue explores one of the faces of human existence from the point of view of as many of the world's religious and spiritual traditions as possible, through the prism of story and symbol, myth, ritual, and sacred teachings." (*Id.* ¶ 8 & Attach. E.) The copy of *Parabola* that Mr. Budlong purchased explores thinking. (*Id.* ¶ 9 & Ex. C.) It includes articles, such as *Thinking as Prayer: The way of Lectio Divina, Divine Reading*; *Essential Thought*: *Thinking along the Buddhist path*; and *Imagine That . . .: Kabbalistic lessons on the power of thinking*. (*Id.* ¶ 9 & Attach. D.)

Mr. Budlong objects to the State forcing him to pay the State-imposed tax on these books and papers because the State disfavors their content. (*Id.* ¶ 10.) He believes that the state should not give special exemptions to publications based upon their content. (*Id.*) In particular, the State should not exempt certain religious books and papers, but tax non-religious and other religious books and papers that address similar topics, ideas, and issues. (*Id.*)

Mr. Budlong also objects to the exemptions challenged in this case because the terms used in the statutes are so vague that he cannot determine whether a bookseller is properly charging him sales tax. (*Id.* ¶ 11.) For example, Mr. Budlong cannot determine whether he was properly taxed on *The Bhagavad Gita*, which is a sacred text to Hindus, because he does not know what the state considers "similar books commonly recognized as being Holy Scripture." (O.C.G.A. § 48-8-3 (15) (A); Ex. 3, WEBSTER'S NEW WORLD DICTIONARY (4th Ed. 2001).)

Even though the retailer is responsible for collecting sales tax , (O.C.G.A. § 48-8-30(b)), and can be held liable for neglecting to collect the tax, (O.C.G.A. § 48-8-7), the primary liability for paying the tax is on the purchaser. (O.C.G.A. § 48-8-30(b)). Therefore, even if Mr. Budlong is not charged a tax at the time of purchase, a retailer could later request that he pay the tax, if the State determines that a tax was actually due. (*Id.; Ahlburn v. Clark*, 728 A.2d 449, 452 (R.I. 1999).)

Mr. Budlong believes that the "Holy Bible, testaments and other similar books of Holy Scripture" and "religious papers" should only be exempt from sales and use tax if other similar literature of a philosophical, religious, and/or spiritual nature are also exempt from the tax. (Budlong Decl. ¶ 12.) For example, even though it discusses many questions of life, *The Everything Philosophy Book* is denied a tax exemption simply because it is not written from a religious perspective. *(Id.* ¶ 7 & Attach. B.) Mr. Budlong objects to such a content-based distinction.

Plaintiff Apple

Ms. Apple owns and operates the Phoenix and Dragon Bookstore, ("The Bookstore"), which has an Atlanta, Georgia address, but is now located in the newly created city of Sandy Springs, Georgia. (First Stip ¶ 12; Ex. 4, Apple Decl. ¶ 3.) The Bookstore sells various items, but specializes in the sale of metaphysical, spiritual, and religious periodicals and books. (*Id.* ¶ 4.) Even though many of the books and articles that Plaintiff Apple offers for sale are metaphysical, religious, or spiritual in nature, they may not "commonly" be considered "Holy Scripture" and thus are perhaps not eligible for an exemption under O.C.G.A. § 48-8-3(15) (a) or (16). (Apple Decl. ¶ 8.) Ms. Apple does not believe that any of the periodicals she sells would be eligible for an exemption under O.C.G.A. § 48-8-3 (15) (A). (*Id.* ¶ 9.) As a result of the exemptions, a significant part of her inventory of religious books, papers, articles, and other publications are at a price disadvantage when compared to the religious books, papers, articles, and other publications that the Defendant grants an exemption under O.C.G.A. 48-8(15) (A) & (16). (*Id.* ¶ 10.)

In accordance with Georgia law, the Bookstore is obligated to charge and collect sales tax from customers, and distribute the taxes to the state of Georgia. (O.C.G.A. § 48-8-7 (a); Apple Decl. ¶ 5.) The Bookstore is therefore, registered with the Department of Revenue and is authorized and empowered to collect Georgia sales and use taxes. (Apple Decl. ¶ 5 & Ex. 1.) Indeed, the Bookstore has filed

Georgia sales and use tax returns (Forms ST-3) for all months during the period from November 2002 to November 2005. (First Stips. ¶ 16.) When sales tax collected by the bookstore is remitted to the state, Ms. Apple signs a form certifying that the submissions are true and complete. (Apple Decl. ¶ 5.)

For purposes of Chapter 8 of Title 48 of the Georgia Code, the bookstore is a "dealer." (First. Stip. ¶ 14.) Under Georgia's Public Revenue Code, a "dealer" is liable for the sales and use taxes imposed by the Code as of the moment of sale, whether he collects the tax or not. (O.C.G.A. § 48-8-7.) If the taxes are not collected, Ms. Apple or her bookstore would be liable to the state for the taxes that were not collected from the customers. (O.C.G.A. § 48-8-7 (b); Apple Decl. ¶ 11.) Plaintiff Apple, who signs the certifications, would also be guilty of a misdemeanor and subject to a $100.00 fine, three months in jail, or both. (*Id.* ¶ 11; O.C.G.A. § 48-8-7 (b).)

Ms Apple objects to the exemption under O.C.G.A. §§ 48-8-3 (16) because she, at her own peril and with no guidance from the State, must try to determine whether books are "Holy Bibles, testaments, and similar books commonly recognized as being Holy Scripture" and thus, whether a state sales tax is due on their respective sale. (*Id.* ¶ 13.) If her determination differs from the State, she could be subject to prosecution under O.C.G.A. § 48-8-7. (*Id.* ¶ 13; O.C.G.A § 48-8-7.)

The Georgia Department of Revenue has never provided Ms. Apple with any documents or materials that explain what is subject to the exemptions in O.C.G.A. §§ 48-8-3(15) (A) & (16). *(Id.* ¶ 7.) Because the terms used in the statutes are vague, Ms. Apple cannot discern what items are and are not eligible for exemptions under O.C.G.A. §§ 48-8-3(15) (A) & (16). *(Id.* ¶ 7.) Ms. Apple is fearful of granting exemptions for any books or publications that are metaphysical, religious, or spiritual in nature because if she fails to collect tax on something that the State has determined is not eligible for an exemption under the statutes in question, then she would be subject to the punishment in O.C.G.A. § 48-8-7. *(Id.* ¶ 12.)

Ms. Apple also objects to the exemption under O.C.G.A. §§ 48-8-3 (15)(A) because she must, at her own peril and with no guidance from the State, determine whether a periodical is a "paper," whether it is "religious," whether the owner or operator of the paper is a religious institution or denomination, and whether any part "of the net profit from the operation of the institution or denomination inures to the benefit of any private person." (O.C.G.A. § 48-8-3(15)(A); Apple Decl. ¶ 14.) If her determination differs from that of the State, she is also subject to prosecution under O.C.G.A. § 48-8-7. (O.C.G.A. § 48-8-3(15)(A); Apple Decl. ¶ 14.)

Furthermore, Ms. Apple objects to the exemptions because they require her to treat her customers differently depending upon the content of their purchase.

(Apple Decl. ¶ 15.) Customers who purchase books and publications favored by the State are eligible for the exemption, but customers who purchase disfavored publications are required to pay sales tax. (Apple Decl. ¶ 15.) Because Ms. Apple does not want to treat customers differently based upon the content of their purchases and because she does not know how the State defines a "religious paper " or a book "commonly recognized as being Holy Scripture," she currently collects sales tax on the sale of all religious publications. (*Id.* ¶ 16.)

Ms. Apple believes that the "Holy Bible, testaments and other similar books commonly recognized as being Holy Scripture" and "religious paper" should only be exempt from sales and use tax if other similar literature of a philosophical, religious, and/or spiritual nature are also exempt from sales and use tax. (*Id.* ¶ 17.)

ARGUMENT

Georgia could have written a tax-exemption statute that applies religious materials without violating the Constitution: "For example, a state statute might exempt the sale not only of religious literature distributed by a religious organization but also philosophical literature distributed by nonreligious organizations devoted to such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong." *Texas Monthly*, 489 U.S. at 27-28. Georgia's exemptions, however, are limited to specific religious books and papers and, thus,

cannot survive strict scrutiny.

I. **The Exemptions Constitute Content-Based Discrimination in Violation of the First Amendment of the United States Constitution.**

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Accordingly, "regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Regan v. Time,* 468 U.S. 641, 648-49 (1984); *Budlong v. Graham*, 414 F. Supp. 2d 1222, 1225 (2005). Content-based tax exemptions, therefore, face "a heavy burden" and 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." *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 231 (1987); *Budlong*, 414 F. Supp. 25 at 1226. Accordingly, every Court to reach the issue, has held that a tax scheme that exempts only religious publications violates the Free Speech Clause of the United States Constitution. *Finlator v. Powers*, 902 F.2d 1158 (4th Cir. 1990) (tax exemption for "Holy Bibles"); *Ahlburn*, 728 A.2d 449 (tax exemption for "any canonized scriptures").

In the case at bar, this Court has already concluded that the "statutory provisions, by excepting from tax 'religious paper[s]' and 'Holy Bibles, testaments,

and similar books[,]' treat certain publications more favorably than others based on their content." *Budlong*, 414 F. Supp. 2d at 1225. Furthermore, this Court concluded that the "Defendant has not demonstrated . . . a compelling interest that the exemptions at issue are necessary and narrowly tailored to serve." *Id.* at 1226.

A. <u>The Tax Exemption is Content-based</u>

In *Ragland*, 481 U.S. 221 (1987), the Supreme Court held that the Arkansas tax scheme that imposed a tax upon general interest magazines, but exempted newspapers and religious, professional, trade, and sports journals was content-based and unconstitutional. *Id.* The Court found that the tax was discriminatory "because it is not evenly applied to all magazines." *Id.* at 229. This scheme was "particularly repugnant to the First Amendment principles" because a publication's "tax status depends entirely on its *content." Id.* Indeed, "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; *Budlong*, 414 F. Supp. 2d 1226.

The Fourth Circuit Court of Appeals, in *Finlator*, 902 F.2d 1158, struck down a North Carolina statute that exempted "Holy Bibles" from the State's retail sales and use tax because it violates the "free press clause under the rationale of *Arkansas Writer's Project." Id.* at 1163. The Fourth Circuit explained:

> In the instant case, the Exemption differentiates between a Christian sacred text and other publications, both sacred and non-sacred, Christian and non-Christian. This distinction forces the State to discriminate on the basis of the contents of a book, test or other published work, **which is intolerable under the first amendment**.

Id. (emphasis added). Even if the state had applied its exemption to "any sacred scripture of any religion," rather than just those of the Christian religion, the exemption still could not have passed constitutional scrutiny as it is the "official scrutiny of the content of the publications as the basis for imposing the tax" that creates the constitutional problem. *Id.*

The Supreme Court of Rhode Island reached a similar conclusion when it struck down a state statute that exempted Bibles and other canonized religious scriptures from the state sales tax. *Ahlburn*, 728 A.2d 449. The court concluded that the "statute unlawfully defines and rewards recipients based upon the content and type of the publications in question." *Id.* at 452-53. It further explained that "by confining these particular tax exemptions exclusively to the sale of canonized scriptures and other favored types of publications–but not others–the General Assembly obviously has engaged in a preferential effort to foster the communication of certain privileged communications in a manner that is anything but content-neutral." *Id.* at 454.

The exemptions in Georgia are strikingly similar to those in both *Finlator* and *Ahlburn*. Like in those states, the State of Georgia exempts certain publications - "Holy Bibles, testaments, and books commonly recognized as Holy Scripture" and "religious papers" – but not others. O.C.G.A. § 48-3-3(16). To determine whether a publication receives either tax exemption, the State must examine the content of the publication. Publications with preferred content are exempt and publications with disfavored content are taxed. *Budlong*, 414 F. Supp. 2d at 1225. In accordance with *Ragland, Finlator,* and *Ahlburn*, the Georgia statutes must be struck down because they are content-based. *Budlong*, 414 F. 2d at 1225.

B. The Content-based Tax Exemptions Cannot Survive Strict Scrutiny

In *Ragland*, 481 U.S. 221, the Supreme Court held that none of the State's proffered interests justified a content-based tax exemption. A "general interest in raising revenue," an interest in encouraging "fledgling" publishers, and an interest in fostering communication were not sufficiently compelling to justify selective taxation. *Id.* at 232. And, the exemptions were not narrowly tailored to meet such alleged interests. Accordingly, the Court struck down the exemption.

The Rhode Island Supreme Court applied strict scrutiny to its State tax exemption scheme and found that even if the "proffered government interest in advancing the well-being of Rhode Island's citizenry via the promotion of religious

activity and supportive nonprofit organizations, is indeed compelling the sales tax exemption . . . is not carefully drawn to achieve that end." *Ahlburn,* 728 A.2d at 453-54. Here too, the state tax scheme cannot withstand strict scrutiny. In the Defendant's previous filings, he "has not demonstrated, and has not attempted to demonstrate, a compelling interest that the exemptions at issue are necessary and narrowly tailored to serve." *Budlong*, 414 F. Supp. 2d at 1226. Indeed, the Georgia exemptions are ""incompatib[le] with the First Amendment's proscription against laws 'abridging the freedom of speech, or of the press." *Id.* at 1225.

II. The Tax Exemptions Constitutute Content-Based Discrimination in Violation of Article I, Section 1, Par. 5 of the Georgia State Constitution.[1]

"Our state constitution provides even broader protection of speech than the first amendment" of the United States Constitution. *Statesboro Pub. Co., Inc. v. City of Sylvania*, 271 Ga. 92, 95 (1999). The Georgia free speech provision prohibits regulations that are "predicated on the content of the regulated speech." *State v. Café Erotica*, 269 Ga. 486, 489 (1998). A content-based law can only survive if it is "narrowly tailored to serve a vital government interest." *Cunningham v. Georgia*, 260 Ga. 827, 831 (1991). "Under this test, a government must "draw its regulations to

[1] Article I, Section 1, Paragraph 5 of the Georgia Constitution states, "No law shall be passed to curtail or restrain the freedom of speech or of the press. Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that liberty."

suppress no more speech than is necessary to achieve [its] goals." *Coffey v. Fayette County*, 279 Ga. 111, 111-112 (Ga. 2005). Criminal statutes, like the one before us, are examined even more carefully: "Since the statute imposes criminal sanctions, a careful examination is critical." *Cunningham*, 260 Ga. at 831.

As examined above, there is no compelling or vital state interest that could justify treating Bibles and religious papers differently than other philosophical publications "devoted to such matters of conscience as life and death, good and evil, being and nonbeing, right and wrong." *Texas Monthly,* 489 U.S. at 26. Nor could these statutes be considered to be drawn with such accuracy as to "suppress no more speech than necessary to achieve the goals of the state." *Coffey*, 279 Ga. at 111.

III. The Tax Exemptions Violate the Establishment Clause of the United States Constitution.

In this case, "the unique and preferential treatment the State provided 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 (1989) (plurality opinion)." *Budlong,* 414 F. Supp. 2d at 1225.

In accordance with the *Lemon* test, "the challenged practice must have a valid secular purpose, not have the effect of advancing or inhibiting religion, and not foster excessive government entanglement with religion." *Glassroth v. Moore*, 335 F.3d 1282, 1295 (11th Cir. 2003); *see also McCreary*, 125 S. Ct. 2772, 2734-36 (2005)

(reaffirming the *Lemon* test.)

In *Texas Monthly*, 489 U.S. at 5, the Supreme Court struck down a tax exemption for religious periodicals.[2] The Court held that "when confined exclusively to publications advancing the tenets of a religious faith, the exemption runs afoul of the Establishment Clause." *Id.* at 5. All of the lower federal courts and state supreme courts that have reached this issue have come to the same conclusion. *Finlator,* 902 F.2d at 1162-63 (an exemption for the "Holy Bibles"); *Haller v. Commonwealth of Pennsylvania,* 728 A.2d 289, 298 (Pa. 1999) (a tax exemption for "religious publications sold by religious groups and Bibles and religious articles"); *Thayer v. South Carolina Tax Comm'n*, 413 S.E. 2d 810, 815 (S.C. 1992) (a tax exemption for "religious publications, including the Holy Bible"). The Georgia exemptions are indistinguishable from these cases, and thus, the Georgia exemptions for religious publications violate the Establishment Clause.

A. The Exemptions Lack A Secular Purpose

"Government action must have a 'secular purpose.'" *McCreary*, 125 S. Ct. at 2736. To meet this prong of the *Lemon* test, "[e]xemptions benefitting religion must be 'warranted by some overarching secular purpose that justifies like benefits for

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[2] The law exempted "periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and the books that consist wholly of writings sacred to a religious faith." *Id.* at 5.

nonreligious groups.'" *Thayer*, 413 S.E. 2d at 813-14 (internal citations omitted). For example, in *Widmar v. Vincent*, 454 U.S. 263 (1981), a property tax exemption that applied to religious properties was constitutional because it also applied to real estate owned by "a wide array of non-profit organizations." *Ragland*, 489 U.S. at 12. In *Widmar*,

> [The Court] emphasized that the benefits derived by religious organizations flowed to a large number of nonreligious groups as well. Indeed, were those benefits confined to religious organizations, they could not have appeared other than as state sponsorship of religion; if that were so, we would have not have hesitated to strike them down for lacking a secular purpose and effect.
> *Id.* at 10.

The tax exemptions in question do not apply to both religious and non-religious texts as required by *Widmar* and *Ragland*. Both exemptions are reserved *only* for religious texts.[3] Furthermore, the tax exemption for "papers" explicitly applies *only* to papers owned by religious organizations. O.C.G.A. § 48-8-3-3(16)(A). Granting a tax exemption to religious organizations and publications, but not other organizations and publications has no secular purpose. The exemptions do not

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[3] It is true that there are various tax exemptions permitted in O.C.G.A. § 48-8-3 and that, the bill that was passed to create O.C.G.A. § 48-8-15(A) included other tax exemptions. First Stips. ¶ 6. But, those tax exemptions are unrelated to the tax exemptions in question. That the state grants tax exemptions "for different purposes," even if those exemptions are passed within the same statute, is not relevant. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 n.4 (1989) (plurality opinion). "What is critical is that any subsidy afforded religious organizations be afforded religious organizations be warranted by some overarching secular purpose that justified like benefits for nonreligious groups." *Id.*

"result from the natural inclusion of religion within the perimeter of a broad circle of nonsectarian groups also benefitting from the subsidy." *Thayer*, 413 S.E. 2d. at 814. Therefore, the exemptions fail the first prong of the *Lemon* test.

B. The Exemptions Endorse Religion

The effects prong of the *Lemon* test asks whether "the 'principal or primary effect' of a challenged law or conduct is to 'advance or inhibit religion.'" *See King v. Richmond County*, 331 F.3d 1271, 1278 (11th Cir. 2003) (citations omitted). Application of this prong requires the Court to apply the endorsement test: "The effects prong asks whether . . . the practice under review in fact would convey a message of endorsement or disapproval to an informed reasonable observer." *Glassroth*, 335 F.3d at 1297.

In *Texas Monthly*, 489 U.S. at 15, the Supreme Court held that a tax exemption for religious publications endorsed religion: "It is difficult to view Texas' narrow exemption as anything but state sponsorship of religious belief, regardless of whether one adopts the perspective of the beneficiaries or of uncompensated contributors." Indeed, the fact that a subsidy is given exclusively to religious publications provides unjustifiable rewards to religion, and conveys a message of endorsement to the community. *Id.* "This is particularly true, where here, the subsidy is targeted at writings that *promulgate* the teachings of religious faiths." *Id.* (emphasis in original).

In *Haller*, 728 A.2d at 3551, the Pennsylvania Supreme Court held that a Pennsylvania tax scheme that exempted only the "sale at retail or use of religious publications sold by religious groups and Bibles and religious articles" was unconstitutional because it "suffers from the same defects as the Texas exemption" in *Texas Monthly*. The Pennsylvania exemption, like the Texas exemption had "the same preference for communication of religious messages" that violates the Establishment Clause. *See also Finlator*, 902 F.2d at 1162-63 (striking down an exemption for the "Holy Bible").

Similarly, the South Carolina Supreme Court found that the state's exemption for religious publications had a religious effect because it "clearly single[d] out 'religious proselytizing as an activity deserving of public assistance." *Thayer*, 413 S.E. 2d at 814 (S.C. 1992) (*quoting Ragland*, 489 U.S. at 15 n.5).

Like *Texas Monthly, Haller, and Thayer*, the Georgia statutes grant exemptions to religious organizations and publications that it does not grant to other organizations and publications. Indeed, the Georgia statutes are so similar to the one in *Texas Monthly* that Justice Scalia, in his dissent to that opinion, stated that the *Texas Monthly* opinion "topples" both of Georgia's exemptions for religious publications. *Texas Monthly*, 489 U.S. at 30 & n.2 (J., Scalia, *dissenting*) (stating that *Texas Monthly* "topples an exemption for religious publications of a sort that

expressly appears in the laws of at least 15 of the 45 States that have sales and use taxes States from Maine to Texas, from Idaho to New Jersey," and listing both O.C.G.A. §§ 48-8-3 15 (A) and (16) as statutes that are unconstitutional in accordance with the decision.") Because the Georgia exemptions cannot be distinguished from those in *Texas Monthly*, *Haller*, and *Thayer*, the Court must strike down the exemptions as unconstitutional.

C. The Exemptions Entangle Government and Religion

Excessive entanglement occurs when the state must engage in "pervasive monitoring" of religious activities, develop expertise in religious worship or evaluate the merit of different religious practices or beliefs. *Midrash Shephardi, Inc. v. Surfside*, 366 F. 3d 1214, 1241 (11th Cir. 2004).

The Rhode Island Supreme Court explained the entangling effect of exempting religious publications but not other publications:

> [The law requires that book sellers and buyers would] need to call upon the state government, sales-tax authorities with some regularity to determine whether particular religious literature–especially newly published material–falls within or without Rhode Island's limited statutory exemption for bibles and other scriptures canonized by one or more of the established religions. To make such a determination, the state's sales tax administrators either will have to consult with the appropriate religious authorities and then decide in each case whether particular publications qualify for the tax exemption, or else they will have to review the various publications at issue themselves and then make their own determination.

Ahlburn, 728 A.2d at 453. Such effort is a paradigmatic example of excessive entanglement. *Id.* Yet, that is the same effort that the Defendant has to undertake in this case. The Defendant must determine whether a book is a "testament" or "is commonly recognized as being Holy Scripture." O.C.G.A. § 48-8-3 (16). He must also determine whether a "paper" is "religious" or non-religious. O.C.G.A. § 48-8-3 (15)(A). He cannot make these determinations without taking a position on religious issues. Such excessive entanglement is unconstitutional.

V. **The Exemptions Are Unconstitutionally Vague and thus Violate the Fourteenth Amendment of the United States Constitution**.

In accordance with the vagueness doctrine of the Due Process Clause of the Fourteenth Amendment, a law is unconstitutional if it has one or both of the following deficiencies: "First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *National Endowment for the Arts v. Finely*, 524 U.S. 569, 588 (1998) ("The terms of the provision are undeniably opaque, and if they appeared in a criminal statute or regulatory scheme, they could raise substantial vagueness concerns.").

A. These Statutes Fail to Give Notice as to What Is Subject to Taxation.

"It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-3 (1966); *see also Morales*, 527 U.S. at 56. The purpose of this requirement is "to enable the ordinary citizen to conform his or her conduct to the law." *Morales,* 527 U.S. at 58.

The Georgia tax exemptions are impermissibly vague. Neither a statute nor a state regulation defines the terms "testament," "books commonly recognized to be Holy Scripture," "religious paper" or even "paper." O.C.G.A. §§ 48-8-3 (15)(a) & (16). Persons of common intelligence could differ as to what these terms mean.

With no guidance from the State, a bookseller must try to determine whether a book is a "testament" or is "commonly recognized as Holy Scripture" and thus, whether a state sales tax is due on their respective sale. She also must determine whether a periodical is a "paper," whether the "paper" is "religious" and, thus whether a state sales tax is due on that sale. If her determination is different than the State's determination and she does not collect tax on a publication that the state believes is subject to taxation, she would be guilty of a misdemeanor and subject to a $100.00 fine, three months in jail, or both. O.C.G.A. § 48-8-7. She or her bookstore would also be liable to the state for the taxes that were not collected from the

customers. *Id.*

A book buyer also has no guidance on the matter and he cannot determine whether a bookseller is overcharging a tax that is not warranted, or if the tax should apply. Even where a book buyer was originally granted an exemption from the sales tax, he may still be required to pay it later,[4] leaving him in limbo.

B. The Statutes Invite Arbitrary and Discriminatory Enforcement.

The exemptions are also void for vagueness because they allow the Defendant vast discretion to determine what publications fall within the exemption. This invites arbitrary and discriminatory decisions. *Morales*, 527 U.S. at 56. For example, a Tax Commissioner unfamiliar with the thousands of religions in this country, could deny publications from a small minority religion a tax exemption because he does not know that they are "testaments," "Holy scripture," or even "religious." The vague standards also open the door to a state Tax Commissioner, whether purposefully or inadvertently, to grant favored religions tax exempt status and deny exemptions to disfavored or unpopular religions. The likelihood that minority

[4]The law directs that a bookseller "shall collect the tax . . . from the purchaser or consumer." O.C.G.A. § 48-8-33. If a "retailer maintains personal identification records for purchasers–for example, credit card receipts–or is able to identify buyers using other means, a purchaser may be liable to indemnify the seller for any unpaid taxes that the seller failed to collect when the sale occurred." *Ahlburn*, 728 A.2d at 452.

religions would not receive the same tax benefit as more popular religions was clearly shown when Plaintiff Budlong was taxed on his purchase of the *Bhagavad Gita*, even though it is a sacred Hindu text. (First Stips. ¶ 19; Budlong Decl. ¶ 5; Webster's New World Dictionary (4th Ed. 2001).)

VI. <u>The Exemptions are Unconstitutionally Vague and Thus Violate the Georgia Constitution.</u>

A. The Statutes Fail to Give Notices as to What is Subject to Taxation.

The state constitutional standard for vagueness under Georgia Constitution Article I, Sec. 1, Par. 1 and Article I, Section I, Paragraph V, mirrors the federal test explained above. In *Johnson v. Athens-Clarke County*, 272 Ga. 384, 385 (2000), the Supreme Court of Georgia adopted the vagueness standard applied by the U.S. Supreme Court in *Morales*:

> This Court and the United States Supreme Court have consistently equated the "sufficient warning" of prohibited conduct required of criminal statutes to the provision of "fair notice" that by engaging in such conduct, one will be held criminally responsible. The Due Process Clause requires that the law give a person of ordinary intelligence fair warning that her specific contemplated conduct is forbidden, so that she may conduct herself accordingly. All persons are entitled to be informed as to what the state commands or forbids.

Id. Similarly, criminal statutes are subjected to an even higher standard than civil statutes: "[w]ith regard to a vagueness challenge, there is a 'greater tolerance of enactments with civil rather than criminal penalties because the consequences of

imprecision are qualitatively less severe." *Satterfield v. State*, 260 Ga. 427, 428 (1990).

As examined above, the Georgia provisions, which have criminal penalties, are vague because neither the statutes nor a state regulation define the terms "testament," "books commonly recognized to be Holy Scripture," "religious paper" or even "paper." Persons of common intelligence could differ as to what these terms mean. Accordingly, the provisions are unconstitutional.

VI <u>The Court Has Jurisdiction Over this Case.</u>

In previous filings, the Defendants have challenged Court jurisdiction of this case based on standing and the Tax Injunction Act, and the Court has rejected both arguments. *Budlong*, 414 F. Supp. 2d 1226-27; July 14, 2006 Order at *5-6. That the Plaintiffs have standing is clear from other court rulings that have declared book sellers and book buyers proper Plaintiffs in similar tax cases. *Finlator*, 902 F.2d at 1159, 1162 (4th Cir. 1990); *Ahlburn*, 728 A.2d 449; *Haller*, 728 A.2d at 352.

The Court twice rejected the Defendants' claim that the Tax Injunction Act barred this lawsuit. *Budlong*, 414 F. Supp. 2d 1226-27; July 14, 2006 Order at 14. Though the Tax Injunction Act prevents the federal courts from hearing some tax cases, the prohibition does not apply to third-party challenges of tax exemptions. *Budlong*, 414 F. Supp. 2d at 1226. This case involves third-party plaintiffs and the relief sought "would actually enrich the State of Georgia's coffers, not deplete

them," thus, "the Tax Injunction Act's prohibitions are in no way implicated by this case." *Id.* at 1227.

CONCLUSION

Accordingly, the Plaintiffs asks the Court to declare the exemptions unconstitutional and enjoin the State from enforcing them.

DATED: This the 1st day of November, 2006.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THOMAS BUDLONG, CANDACE APPLE, Plaintiffs, v. BART L. GRAHAM, in his individual and official capacity as Commissioner of the Georgia Department of Revenue, Defendant.	)	CIVIL ACTION NO. 1:05-CV-2910-RWS

CERTIFICATE OF COMPLIANCE WITH TYPE / STYLE LIMITS

This brief is filed in Book Antigua 13 point type and complies with LR 7.1(D).

DATED: This the 1st day of November, 2006.

Respectfully submitted,

/s/ Margaret F. Garrett
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