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**OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: TEXAS MONTHLY, INC., Appellant V. BOB BULLOCK,
COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF
TEXAS, ET AL.

CASE NO: 87-1245

PLACE: WASHINGTON, D.C.

DATE: November 1, 1988

PAGES: 1 thru 44

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 TEXAS MONTHLY, INC., :
4 Appellant, :
5 V. : No. 87-1245
6 BOB BULLOCK, COMPTROLLER OF PUBLIC :
7 ACCOUNTS OF THE STATE OF TEXAS, :
8 ET AL. :

9 -----x
10 Washington, D.C.

11 Tuesday, November 1, 1988

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 12:58 o'clock p.m.

15 APPEARANCES:

16 ROGER JAMES GEORGE, JR., ESQ., Austin, Texas;

17 on behalf of the Appellant.

18 HARRIET D. BURKE, ESQ., Assistant Attorney General of
19 Texas, Austin, Texas;

20 on behalf of the Appellee.

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C O N T E N T S

ORAL ARGUMENT OF:

PAGE

ROGER JAMES GEORGE, JR., ESQ.

On behalf of the Appellant

3

HARRIET D. BURKE, ESQ.

On behalf of the Appellee

25

REBUTTAL ARGUMENT OF:

ROGER JAMES GEORGE, JR., ESQ.,

On behalf of the Appellant

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P R O C E E D I N G S

(12:58 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 87-1245, Texas Monthly versus Bob Bullock. Mr. George, you may proceed whenever.

ORAL ARGUMENT OF ROGER JAMES GEORGE, JR.,
ON BEHALF OF THE APPELLANT

MR. GEORGE: Mr. Chief Justice, may it please the Court:

Texas Monthly is a general interest magazine published by a commercial corporation in Texas with circulation of roughly 280,000 copies. It covers various topics of interest to people in Texas ranging from politics to religion, to sports, to food, to social occasions, to all sorts of things, to humor. It is not published by a religious faith, and it is not a religious magazine. It is simply a commercial magazine.

It brought this lawsuit in the Travis County District Court in Travis County, Texas, to recover \$149,107 in sales tax that it had paid in protest under the applicable Texas procedure for subscription sales during a period in 1985 when the state legislature had imposed a tax on subscription sales of magazines.

Now, the Texas sales and use tax system is a system similar to sales and use tax systems throughout

1 the country. Generally, any tangible personal property
2 that someone purchases or uses in Texas is subject to
3 the tax.

4 Thus, if I go across the street from my office
5 and buy a pair of socks, I have to pay 6.125 percent of
6 the purchase price to the State of Texas. If I buy a
7 typewriter, I have to pay the tax. If my wife brings
8 back a blouse from Washington after this argument, she's
9 supposed to pay a use tax when she puts it on because
10 she owes 6.125 percent of the purchase price for using
11 it in the state of Texas.

12 QUESTION: Is that down there?

13 MR. GEORGE: Well, that was one of the issues
14 that raised in the court below, in the District Court,
15 and our contention was that that was a provision that
16 was ignored and ignored involving sales and use taxes
17 generally.

18 There are a plethora of exemptions from this
19 tax. Horses and mules, for example, that are used as
20 draft animals are exempt. As one might expect in Texas,
21 drill stem bits for drilling equipment, all drilling
22 equipment is exempt from the tax. And various other
23 items are exempt from the tax ranging from fertilizer to
24 airplanes to certain shrimp boats.

25 Now, two of the exemptions that exist in this

1 tax are relevant to the case this court has before it
2 today.

3 QUESTION: Why aren't the others?

4 MR. GEORGE: Well, the others may be relevant
5 and if so that there is a system of general exemptions
6 or random system of exemptions but two are most relevant
7 to the court's consideration today.

8 QUESTION: So, you don't claim that there's an
9 unconstitutional distinction between mules and this
10 magazine?

11 MR. GEORGE: Well, I suppose that would be an
12 interesting case, Your Honor, but I don't have to make
13 that contention today, and I'm not here trying to make
14 that contention.

15 QUESTION: Yes.

16 MR. GEORGE: I am here concerning only two of
17 the exemptions, really one of the exemptions.

18 The first exemption is one to -- is an
19 illustration, and that is there is an exemption -- and
20 I'll refer to them by the last three digits of these
21 code numbers -- Section 310 of the statute -- which is a
22 general exemption from tax for charitable, religious,
23 civic organizations, volunteer fire departments, the Boy
24 Scouts, and the Chamber of Commerce. If any of those
25 institutions -- Goodwill Industries, for example -- buys

1 something -- the Methodist Church -- when my church buys
2 something and uses it, it does not have to pay the tax.

3 There is no exemption for the sale of goods
4 that is generally applicable to those institutions. So
5 that if the St. Vincent de Paul Store down on Third and
6 Brazos Street in Austin or the Goodwill store sells my
7 magazine or sells a used bicycle or sells a used book,
8 they have to collect the tax and remit it to the state.
9 And if the tax isn't collected, the state comes after
10 them for the tax.

11 QUESTION: If they buy it, they are exempt?

12 MR. GEORGE: Yes. It's the use of the tax --
13 you have -- the tax works so that people who use it are
14 subject to tax except for religious, charitable,
15 educational, the Boy Scouts and all those people. But
16 if those institutions sell anything --

17 QUESTION: How about the sale by a church of a
18 religious item, a Bible or a crucifix or something of
19 that sort? Is there an exemption?

20 MR. GEORGE: Now, we come to the subject of
21 this lawsuit, which is the exemption. The statutes of
22 the state of Texas tax the crucifix. If they sell the
23 crucifix, they've got to collect the tax. The
24 regulation involving this very statute. If they sell a
25 film about a religious subject, they have to collect the

1 tax from the taxpayer.

2 The regulation specifically provides that if
3 they sell sheet music -- for example, if someone sells
4 the Methodist hymnal, if my church sells a Methodist
5 hymnal, that's sheet music, and I suppose the
6 Comptroller of the State of Texas requires them to
7 collect the tax and remit it to the State of Texas.

8 Now, the exemption that we're here about today
9 reads that exempt from these taxes are periodicals that
10 are published or distributed by a religious faith and
11 they consist wholly of writings promulgating the
12 teachings of the faith and books that consist wholly of
13 writings sacred to a religious faith are exempt from the
14 taxes imposed by this statute.

15 QUESTION: Mr. George, if you prevail on this
16 argument, do you get your money back? Do you get a
17 refund?

18 MR. GEORGE: That's right. And the trial
19 court --

20 QUESTION: Is there any question about that?

21 MR. GEORGE: No, sir. In the trial court we
22 won the judgment for \$149,107.73, I believe, plus
23 interest, and that's what we're trying to recover here
24 today.

25 QUESTION: Why is that? I mean, why wouldn't

1 it be possible, at least, if you were to prevail that
2 the tax would be extended by Texas to religious
3 periodicals --

4 MR. GEORGE: Because the court -- excuse me,
5 ma'am.

6 QUESTION: -- so that you wouldn't benefit
7 from it?

8 MR. GEORGE: Excuse me, Justice O'Connor. The
9 system that this court has recognized, and it's every
10 court except the courts of Arkansas and Tennessee and I
11 can find, recognize the rule that courts can't impose
12 taxes. The legislature of the state of Texas has
13 exempted these publications, period. This court nor
14 other court can change that decision. Its only remedy
15 that as taxpayers of under-inclusive statutes have, for
16 generations have is that they don't have to pay the tax
17 until the legislature changes the law and taxes all the
18 people that are similarly situated. And that's --

19 QUESTION: Well, does the state concede that
20 you get your money back if you prevail?

21 MR. GEORGE: No, no, they do not. They have
22 contended that the rule ought to be otherwise.

23 Now, the rule in Texas has, since 1885, been
24 in my favor under state law. There is the famous
25 Pullman case --

1 QUESTION: But the state appellate court did
2 not reach this issue, just the state trial court?

3 MR. GEORGE: The state trial court said. The
4 appellate court, of course, ruled that the statute that
5 I contend is unconstitutional wasn't unconstitutional
6 and hadn't reached that issue. This dissenting --

7 QUESTION: So, I should think that's an issue
8 of state law that's not before us and that's still open?

9 MR. GEORGE: Well, I believe that's an issue
10 that -- well, I suppose that the state -- a possible
11 remand to the court would be possible. Technically that
12 court did not reach that issue. The sitting judge,
13 Judge Carroll, in that court, did say that in course the
14 remedy was that we don't have to pay the tax.

15 QUESTION: But so, then, we're not certain
16 that you're going to get your money back?

17 MR. GEORGE: Well, we have some -- I believe
18 every court in the state of Texas to rule on that has
19 ruled in my favor. The Comptroller and Attorney General
20 of the State of Texas take a contrary position in this
21 case.

22 QUESTION: Well, in any event, you have to get
23 over this hurdle first before you can get the --

24 MR. GEORGE: I've got to win the merits before
25 I would get to that issue, but --

1 QUESTION: And why is it relevant for us at
2 all?

3 MR. GEORGE: Well, I don't believe it is
4 relevant. This court addressed this very argument in
5 the Arkansas Writers' Project case.

6 QUESTION: Well, do we often make decisions
7 that have no meaning?

8 MR. GEORGE: No, you don't, and that's the
9 reason why you decided in the Arkansas Writers' Project,
10 the Arkansas Times got its money back. It was suing to
11 get money back it had paid under the Arkansas statute,
12 and this court entered a judgment allowing it to recover
13 that money.

14 QUESTION: Well, that was treated as a
15 question of standing, though, wasn't it, in Writers'?

16 MR. GEORGE: I suppose it's either -- its
17 standing or remedy is a two-sided coin, obviously.

18 QUESTION: Now, Ragland treated the question
19 as one of standing, did it not?

20 MR. GEORGE: Yes. Well, the Supreme Court of
21 Arkansas in that case --

22 QUESTION: No, at this court.

23 MR. GEORGE: -- decided that the remedy wasn't
24 available, and this court dealt with it as a standing
25 issue. Do you have standing to bring it?

1 And it was exactly the same fact situation in
2 exactly the same pattern; that is, the Arkansas
3 magazine, the Arkansas Times sought to recover taxes it
4 had paid and tried to get back, and the Arkansas Supreme
5 Court said you're wrong on the Constitution, but if you
6 were right, you couldn't get your money back because
7 that's not the appropriate remedy.

8 This court in its opinion in April of '87 said
9 no, that's wrong, you have standing to bring it. Now, I
10 think that given the court's decision in the Supreme
11 Court of Arkansas that, in fact, this court has decided
12 that issue; that at least as a matter of law of the
13 United States that my client is entitled to bring this
14 action and seek this remedy and if it is entitled to get
15 it back.

16 Now, again, Arkansas decided the remedy wasn't
17 available. This court reversed and rendered in favor of
18 the taxpayer, and I believe that case is directly on
19 point. Now -- it's as on point as any case you're
20 likely to see in this court.

21 Now, my client brought this action raising
22 three basic kind of arguments. The first were under the
23 -- the first two were under the Minnesota Star issue
24 that we raised: One, that the statute as applied in
25 Texas was discriminatory against in-state magazines,

1 that there was a policy of not collecting the tax if the
2 magazine was distributed in Texas by somebody who wasn't
3 a Texas resident, and that as applied the system
4 discriminated against subscription sold magazines.

5 The District Court chose not to find any facts
6 or deal with those issues at all and simply determined
7 that the statute was unconstitutional because it
8 constituted a discrimination based upon the content of
9 the speech; that is, if a magazine contained, in the
10 words of the statutes, "It consisted wholly of writings
11 promulgating the teachings of the faith," the taxpayer
12 didn't have to pay the tax.

13 And that was unconstitutional under the line
14 of cases that includes this court's decisions from
15 Police versus Mosley through FCC versus the League of
16 Women Voters to Kerry versus Brown and a whole series of
17 cases that say that the government cannot discriminate
18 and impose regulations upon speech based upon the
19 content of that speech.

20 QUESTION: This is a subsidy rather than a
21 regulation. What do you think, Mr. George, about the
22 Post Office granting of specially lower rates to
23 educational materials? That's one category of speech.

24 MR. GEORGE: Justice Scalia, that --

25 QUESTION: Why shouldn't amusement materials

1 get the same exemption?

2 MR. GEORGE: Justice Scalia, that is a logical
3 conclusion, the dissent that you reached in those cases,
4 in the Arkansas Writers' case, was a logical
5 conclusion. This is simply a subsidy and obviously we
6 can support the Kennedy Center, using your example, from
7 that case.

8 The problem is history not logic. And if this
9 court will review the history of the imposition of
10 penalties involving speech from the Stamp Acts imposed
11 upon the English press through Grosjean versus American
12 Publishing Company, you will see that we have had a
13 history where sometimes legislatures impose taxes and
14 where there is a suspicion, at least, that it was
15 because they want to either silence or in some way chill
16 speech.

17 QUESTION: But you're talking there -- you
18 must distinguish between a tax that just taxes a
19 particular activity and an exemption for a particular
20 activity from a general tax. Is there no difference
21 between those two in our cases?

22 MR. GEORGE: Well, if you will look back at
23 the English example of the Stamp Act taxes, the Stamp
24 Act was a general tax, and it was applied to
25 newspapers. And if you will review the court's reciting

1 of Justice Sutherland's opinion in Grosjean, you will
2 see that that was indeed the case. It wasn't -- the
3 Stamp Act was applied to all sorts of things, including
4 newsprint, and there was a great outcry about that.

5 But, in fact, the problem is intrusiveness in
6 my judgment. The problem with the logical position
7 about subsidy versus history is that my magazine, for
8 example, my client contends every two years the
9 legislature of the state of Texas meets, and in those
10 sessions they have all kinds of statutes. One time they
11 had my clients were exempt. The next session they
12 weren't exempt. And now they are. Subscription sales
13 are exempt, but newsstand sales aren't exempt. Now,
14 that back and forth, back and forth occurs in this area.

15 Now, each year my client writes an article,
16 write the ten best and ten worst legislators, and there
17 is a great interest in that because it is a widely
18 circulated magazine. And there is some political
19 careers who believe that they have been seriously
20 damaged by being on the ten worst and some that have
21 been greatly enhanced by being on the ten best.

22 QUESTION: (Inaudible)

23 MR. GEORGE: Right. My problem is I cannot
24 prove that Stan Sludder, a representative who was
25 chairman of the committee in 1978, took that exemption

1 out because he didn't like being on the "ten worst"
2 list. I can't prove that. And the courts should not be
3 inquiring into that.

4 That's why we need and why the court's
5 majority in Arkansas Writers' Project have a salutary
6 rule that because while exemptions from tax and
7 subsidies have a logical symmetry -- we have Justice
8 Brennan's dissent in the Walz case involving exemption
9 from church property -- they are some similar, but not
10 the same. And the lack of sameness comes from history
11 as much as logic.

12 QUESTION: And the threat, the threat that
13 you're worried about would be eliminated if Texas
14 provided that this, this tax would apply uniformly to
15 all magazines including those sold by religious
16 organizations and dealing with religion provided,
17 however, that every religious organization that pays
18 such a tax will receive a subsidy from the state in the
19 amount of that tax that they've paid. That would be all
20 right?

21 MR. GEORGE: Well, you rapidly -- from
22 breaking this case down into its logical components, the
23 part of the First Amendment that deals with the press
24 and the speech you would have solved. But the problem
25 with the speech that you deal with the establishment

1 clause, you certainly wouldn't have solved because it's
2 clear there is one fundamental message.

3 If you start back with Everson, run through
4 Lindlin, run through the Bowen case from last term about
5 establishment clause cases, and that is the state cannot
6 subsidize delivery of religious message. Justice
7 O'Connor's concurrence in that case says if there's
8 nothing else clear about this area of the law about
9 establishment clause law, you can't do that.

10 Now, you could not have a system that said
11 every time I pay a dollar to the First Methodist Church
12 in Austin, Texas, for the Methodist Layman that comes
13 every week, that they give that church six and a quarter
14 cents for delivering that message to me. Now, because
15 it is a direct, it violates every tenet of the Lemon
16 test, and it goes to the heart of the establishment
17 clause.

18 QUESTION: Religious organizations do not get
19 special mail rates?

20 MR. GEORGE: I don't know the answer to that.

21 QUESTION: I think they do. That's granted.

22 MR. GEORGE: And obviously they are not alone
23 in getting that.

24 QUESTION: Well, that may well be --

25 QUESTION: But the problem --

1 QUESTION: -- but they're not excluded either.

2 MR. GEORGE: That's true.

3 QUESTION: Your argument is the establishment
4 clause excludes them. We can subsidize everybody else
5 but not these religious organizations because if you
6 establish the clause --

7 MR. GEORGE: Well, Justice Scalia, we have had
8 since Walz a system and a recognition by this court that
9 when you have carved out a general category of
10 institutions, as in the Texas constitution and Texas
11 statutes that range from the Boy Scouts to the Methodist
12 Church, to the volunteer fire department, to hospitals,
13 to libraries, and you give those, all those good works
14 or good institutions a special kind of benefit, a tax
15 break, a subsidy, as in the Bowen case. One of the
16 basic -- basis of the court's opinion was the religious
17 organizations weren't singled out for special treatment.

18 The problem with this statute is that only
19 whatever religious faiths are, are singled out for the
20 treatment.

21 QUESTION: Mr. George, I take it, then, if the
22 exemption here applied also to publications sold by
23 charitable and educational institutions as well as
24 religious, you think that Walz would be satisfied?

25 MR. GEORGE: You would not have the

1 establishment clause case, and if it didn't depend on
2 the message, we'd have the kind of Regan case, Regan
3 versus Taxpayers League, that involved the exemption for
4 veterans' organizations and 501 -- 50(c)(3)(1) -- I'm
5 not a tax lawyer -- exemption that involved lobbying
6 because it wouldn't depend on the message if all those
7 institutions could distribute magazines or periodicals
8 or other institutions free of the message being
9 determined.

10 The problem among others with this exemption
11 is that it focuses upon the message. Someone has to
12 determine whether the message is the appropriate message
13 to get the tax benefit whether it be the -- it says --
14 it has to -- it has to consist wholly of the teaching of
15 that faith.

16 QUESTION: How do you reconcile that with our
17 other line of cases that say that the First Amendment
18 not only prevents -- not only does not prevent special
19 treatment for religion but, indeed, requires it in such
20 areas as employment benefits. Somebody who says I don't
21 want to work on a Saturday because my faith prohibits
22 it. We say you have to make an exemption for that --

23 MR. GEORGE: Yes.

24 QUESTION: -- even though you don't have to
25 make it for sportsmen who want to shoot on Saturday or

1 any other people who want to do anything else on
2 Saturday, right?

3 MR. GEORGE: There's no question that there's
4 the whole line of cases, Jehovah Witness cases about
5 working munitions plants that this court has decided.

6 QUESTION: So, now, why is -- why is special
7 treatment of religion required there, but here it is not
8 only not required, it is not even permitted.

9 MR. GEORGE: One, it is an accommodation to
10 the exercise, and it is possible -- and remember in
11 Texas we don't have special treatment for religions
12 except for delivering the message. If they sell you a
13 crucifix, they've got to pay the tax. And in this
14 exemption, for example, if you'll look at the last page
15 of the jurisdictional statement, the regulation
16 promulgated by this Comptroller says if they sell you a
17 film, they've got to pay the tax.

18 It is possible that you could have a system
19 that provided for exemptions for all religious messages
20 or something, and that might be a different case because
21 somehow taxing the message would be intrusive into
22 religions.

23 The rationale for all of those accommodations
24 of exercise is that we're accommodating the -- we're
25 somehow accommodating the exercise of that religious

1 activity.

2 Now, here --

3 QUESTION: But the religion clauses don't say
4 anything, in haec verbis, about any duty to
5 accommodate. I can see how that would explain the Title
6 VII accommodation cases. But how about the ones that
7 are based purely on the Constitution?

8 MR. GEORGE: Well, those cases are based upon
9 a concept that you are forcing someone to violate their
10 religious tenets. Okay? That is, I am forcing that
11 gentleman to work in the munitions factory on the tank
12 turret or forego his worker's compensation, and it is
13 against his religion to work on the tank turret.

14 Now, we have decided, the Court has decided as
15 a matter of constitutional principle that you can't
16 require him to choose between a benefit and his
17 religion. There would be no choice between benefit and
18 religion to treat the delivery of this tangible good
19 like all other tangible goods, for to collect the 6.125
20 percent tax. They can give it away, they can deliver it
21 free and there's no tax. It's only when they get paid
22 by the person who buys it from the religion.

23 QUESTION: Well, is this a -- is your First
24 Amendment argument based on religious clauses or just on
25 the First Amendment?

1 MR. GEORGE: Well --

2 QUESTION: Or is it an equal protection case
3 or both?

4 MR. GEORGE: Well, the argument runs first
5 that it's a content-based discrimination, Justice White,
6 and thus you get Arkansas Writers' Project versus
7 Ragland --

8 QUESTION: Well, then, it doesn't make any
9 difference whether it's a religious message that's
10 discriminated for or against.

11 MR. GEORGE: In my judgment, no, it does not.

12 QUESTION: All right. You would be here if
13 they exempted magazines about agriculture and taxed, God
14 forbid, magazines about oil?

15 MR. GEORGE: God forbid. And I would -- in
16 connection with the Arkansas Writers' Project --

17 QUESTION: But wouldn't you be making the same
18 argument?

19 MR. GEORGE: I would say Arkansas Writers'
20 Project -- in that case the Arkansas statute exempts
21 religious, professional, trades, and sport journals.
22 And this court's opinion said that was unconstitutional.

23 QUESTION: Because?

24 MR. GEORGE: Because of discrimination --

25 QUESTION: It taxed somebody else.

1 MR. GEORGE: -- on the base of content. It's
2 a discrimination based on content.

3 QUESTION: And I suppose it could be argued
4 that it violates the equal protection clause because
5 it's an irrational distinction.

6 MR. GEORGE: Well, it's not one. It is an
7 irrational distinction.

8 QUESTION: The First Amendment proved it's an
9 irrational distinction.

10 MR. GEORGE: Now, I come to the religious
11 issue only after --

12 QUESTION: Why? Why? Why?

13 MR. GEORGE: Why? Because it's there, I
14 suppose. And when I brought this case Arkansas Writers'
15 Project had not been decided.

16 QUESTION: I notice you put it in your second
17 paragraph.

18 MR. GEORGE: Well, I think Arkansas Writers'
19 Project is directly, precisely on point with this case,
20 and it is a direct decision in this case. I didn't have
21 the benefit of that case when I --

22 QUESTION: Let me make a suggestion. Maybe
23 you got to the religious issue because you have to
24 grapple with it to determine that this is an irrational
25 distinction because the state is going to say -- I

1 haven't heard the state yet, but I'm sure they're going
2 to say, you know, we're dealing with a Constitution that
3 gives special privileges to religion. We have a Supreme
4 Court jurisdiction that gives special privileges to
5 religion. We have decided that religion is important
6 enough that we're going to give special privileges to
7 religion in this tax law.

8 Now, if it's rational for the Constitution and
9 if it's rational for the Supreme Court, it's rational
10 for the State of Texas. Maybe that's why you drew

11 MR. GEORGE: Maybe that is why. And I think I
12 got there, however, because it seems to me that any
13 equal protection analysis requires the achievement of a
14 legitimate stadiant and to achieve a legitimate
15 stadiant, it cannot be a law respecting the
16 establishment of religion.

17 And I believe that in addition to being
18 Arkansas Writers' Project versus Ragland all over again,
19 this case is also a law respecting the establishment of
20 religion as well.

21 Now, the reason why I arrived at that argument
22 is because I believe both of them are correct.

23 QUESTION: Mr. George, do you think it would
24 be unconstitutional to grant an exemption for crucifixes?

25 MR. GEORGE: For what?

1 QUESTION: For crucifixes.

2 MR. GEORGE: Probably not, although the
3 problem with crucifixes and all other religious symbols,
4 that they are delivery of a message. The problem is,
5 you got to -- it is clear that you can't subsidize
6 deliveries of messages.

7 Now, you may be able to accommodate conduct,
8 and somewhere physical things become conduct as in the
9 man who won't work in the munitions plant. Now, you
10 would have to stop and say is that conduct or is that a
11 message?

12 It is symbolic. You could very well argue
13 that the crucifix by its definition is a statement of
14 your religious principles and thus is a delivery of a
15 message.

16 Now, you have to accommodate the man going to
17 the church to light the candle. Now, how about buying
18 the candle? The candle, in lighting the candle may be
19 conduct; that is, has to be accommodated. But it
20 doesn't -- but when it is the message and delivering the
21 message, we certainly can't subsidize it. Now, I'm not
22 sure how you deal with that.

23 I'll reserve the balance of my time.

24 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
25 George.

1 Ms. Burke, we'll hear now from you.

2 ORAL ARGUMENT OF HARRIET D. BURKE

3 ON BEHALF OF THE APPELLEES

4 MS. BURKE: Mr. Chief Justice, and may it
5 please the Court:

6 It is the position of the State of Texas in
7 this appeal that there's been no violation of the
8 establishment clause; that in judging this exemption,
9 Section 151.312, it should be viewed on a violation of
10 an equal protection standard and not a standard
11 involving violation of First Amendment rights.

12 The test to be applied should be one of a
13 rational basis test. The rational basis that the state
14 asserts is that, one, it seeks to accommodate religion
15 in the sense of being neutral towards religion and
16 helping effectuate the free distribution of religious
17 messages by a religious faith.

18 The second rational basis is that the
19 exemption seeks to avoid any violation of the
20 establishment clause.

21 The third basis is it seeks to avoid any
22 violation of the free exercise clause of the First
23 Amendment to the Constitution.

24 QUESTION: What about the message of the
25 Arkansas case? That was just a freedom of the press

1 case, wasn't it?

2 MS. BURKE: The Arkansas case, Your Honor, the
3 way Texas views the Arkansas case is that in that
4 particular case, you had a different tax structure than
5 what you have in Texas.

6 QUESTION: Well, but it was a free -- a
7 freedom of the press case?

8 MS. BURKE: It did involve the issue of First
9 Amendment right, free press, yes, Your Honor.

10 QUESTION: And here some publications are,
11 some parts of the press are taxed and some aren't, in
12 this case.

13 MS. BURKE: Texas taxes all parts of the press
14 except for religious periodicals.

15 QUESTION: So, some are taxed and some
16 aren't --

17 MS. BURKE: The state does not --

18 QUESTION: -- based on content.

19 MS. BURKE: The way the state reads Arkansas
20 Writers' Project is that to have a First Amendment
21 violation, there must be a tax that singles out the
22 press as a whole and targets the press for that tax, or
23 it must target a small group within the press. And
24 then, beyond that, you look to content-based
25 discrimination.

1 If that is not the way the Arkansas case is to
2 be read, then we must be judging this one a strict
3 scrutiny approach. However, the state doesn't see that
4 Texas Monthly has been harmed any more than any other
5 retailer in the state of Texas having to pay the tax.
6 If the court --

7 QUESTION: I'm not sure that I understand
8 that. You're saying that this is not a press tax as was
9 involved in Arkansas. This is a general sales tax.

10 MS. BURKE: Yes.

11 QUESTION: And, therefore, the public harmed
12 by the exemption is not just the rest of the press, but
13 rather the entire body politic.

14 MS. BURKE: Yes, Your Honor. That's the way
15 the state views it. However, if the Court does not view
16 it in that manner and determines that a strict scrutiny
17 approach should be applied in this case, the compelling
18 state interests are the same that I have enunciated as
19 being rational basis to sustain the exemption.

20 I would like to point out that if the Court so
21 determines that there has been a constitutional
22 violation, the state would request the court to
23 invalidate the exemption, leave Texas Monthly subject to
24 the tax, and remand the case to the trial court level to
25 determine whether or not religious periodicals would

1 then become subject to the tax under Texas Law.

2 QUESTION: Texas Monthly would not get its
3 money back under that, is that right? Texas Monthly
4 wouldn't get its money back?

5 MS. BURKE: Not at that point in time, Your
6 Honor, until a decision was made as to whether religious
7 periodicals become subject to the tax because under the
8 current tax structure, all sales of tangible personal
9 property are taxable. All property brought into the
10 state for use or shipped into the state are presumed to
11 be subject to the tax.

12 Therefore, we think in arguing before the
13 state courts that the intent of the legislature is quite
14 clear that if the legislation is invalidated, this
15 exemption falls, that these sales will become
16 automatically subject to the tax, and everyone will be
17 treated equally under the Texas tax structure.

18 QUESTION: Ms. Burke, what if I think it's
19 unconstitutional for the Texas courts to say after the
20 fact, after the years have passed, we are retroactively
21 going to subject religious periodicals to taxes? Then I
22 wouldn't have to remand to the Texas courts at all if I
23 thought there's no power in the Texas courts whatever?

24 Isn't that a strange procedure to decide after
25 the fact that prior sales have been subject to tax, even

1 though the statute says on its face they are not? How
2 can Texas do that?

3 MS. BURKE: It's an unusual procedure, Your
4 Honor. I haven't seen this argued before, but it's no
5 more unusual than invalidating, striking down the entire
6 tax system here just because you have one exemption from
7 an otherwise equal tax.

8 All retailers of publications are subject to
9 the tax in Texas, including newspapers for this period
10 of time.

11 QUESTION: Well, that doesn't harm anybody,
12 though, to do that. I mean, I agree. It's very
13 upsetting for the state, but it doesn't tromp on any
14 individual rights. But I'm -- the other solution that
15 you suggest is open to the state suddenly subjects
16 somebody to a law that was not in effect at the time the
17 sales were made.

18 MS. BURKE: Of course, Your Honor, there would
19 be a limitations time period running against the state
20 on necessities taxes. So, the state would not be able
21 to go back and assess for unlimited time periods.

22 QUESTION: Is this Appellant the only entity
23 that has filed a protest on this theory?

24 MS. BURKE: No, Your Honor. There are two
25 other taxpayers who have suits now pending on this

1 particular issue.

2 QUESTION: And has the statute run as to all
3 others, because, I take it, this statute has been
4 repealed, the one that we're looking at?

5 MS. BURKE: The statute was repealed in 1987,
6 effective October 1, 1987.

7 QUESTION: Has the time run on any further
8 protests?

9 MS. BURKE: No, Your Honor. There's a
10 four-year statute of limitations in Texas.

11 QUESTION: Four-year, a four-year statute?

12 MS. BURKE: Yes, sir. Four years from the
13 time the taxes become due and payable.

14 QUESTION: So, if we told this appellant that
15 it could get its money back, then any number of others
16 could file?

17 MS. BURKE: That is correct, Your Honor. The
18 state would be subjected to having numerous refund
19 claims filed against it. Depending, of course, some
20 would be of larger amounts than others, depending on how
21 the court rules in this particular case.

22 If the court, though, however finds that the
23 tax itself should be struck in this instance, the state
24 asks the Court to remand this case -- not with regard to
25 Texas Monthly -- they should get their money back, but

1 to determine from a state court perspective, let the
2 state court determine how to handle the refund situation
3 that might be occasioned as a result of this decision.

4 The state, though, just as I said before, does
5 not view this as a First Amendment-type issue. What we
6 have here is an exemption --

7 QUESTION: Ms. Burke, let me interrupt you
8 just a moment. Does the state have any statistics as to
9 what the amount of tax that might be collected from
10 exempt organizations if this exempt organization -- if
11 this exemption weren't in effect compared as a matter of
12 percentage with the amount of revenue brought in by the
13 state sales tax?

14 MS. BURKE: No, Your Honor, there is nothing
15 in the record and I do not have that kind of evidence
16 since the state has not been taxing religious
17 organizations.

18 QUESTION: Do you have any figures in the
19 record or that you know of what the gross revenue from
20 the state sales tax is in any given year?

21 MS. BURKE: Your Honor, it is the largest
22 revenue-raising tax in the state of Texas. Last year
23 alone it brought in about two-thirds of the taxes that
24 were paid to the State of Texas. I don't have a dollar
25 figure for you, but it is a substantial tax to the State

1 of Texas.

2 The exemption in Section 151.312 I have heard
3 been called basically a content-based type exemption.
4 The state would characterize it more in the nature of
5 first a status-based exemption.

6 The first decision to be made under the
7 exemption is whether or not the periodical is being
8 distributed or published by a religious faith. Then,
9 the second part of the exemption deals whether it wholly
10 contains writings promulgating the teachings of the
11 faith.

12 The aim of this exemption, the state would
13 submit, is to accommodate religious faiths and their
14 adherents by exempting them from the tax on their
15 publications which are disseminating the teachings of
16 the faith. It allows, therefore, religion to advance
17 itself, but also to be neutral between church and
18 state. So, it's more of an activity-based exemption
19 even though to a degree you must look at content. It is
20 allowing the church to be free from religious restraints
21 in disseminating its religious messages.

22 QUESTION: Ms. Burke, may I ask you on the
23 status point, the first prong, what about an
24 organization of atheists who published a magazine
25 promulgating their views about religion? Would that

1 qualify for the exemption?

2 MS. BURKE: I believe it might, Your Honor.
3 I'm trying to think that the state has granted -- and
4 this is not in the record -- that the state has granted
5 an exemption to a religious faith that was an atheistic
6 organization.

7 QUESTION: The statute said religious faith.
8 I mean, you would really have to interpret religious
9 faith to include an atheist in that. It's rather
10 strange, isn't it?

11 MS. BURKE: Yes, it is, Your Honor, but it is
12 a belief, even though it's anti-religion. The state has
13 tried to extend this exemption as far as it can.

14 QUESTION: You would interpret religious faith
15 to include anti-religious faith?

16 MS. BURKE: Yes, in a sense.

17 QUESTION: That's stretching it about as far
18 as you can, isn't it?

19 MS. BURKE: Yes, but the state has tried to
20 accommodate religion to the extent that it can, and I
21 believe I'm correct on that.

22 QUESTION: How in the world does that
23 accommodate religion? How do you accommodate religion
24 by saying atheism is religion?

25 MS. BURKE: How do you -- accommodation is by

1 allowing the organization to be free from having to
2 support the state. It is maintaining a physical
3 neutrality between the organization and the state.

4 QUESTION: Wouldn't you have to name religion
5 and atheism? Wouldn't you have to name both of them?
6 And you didn't name both of them.

7 MS. BURKE: No, unless --

8 QUESTION: And that was deliberate.

9 MS. BURKE: -- the state considers atheism to
10 be a form of faith.

11 QUESTION: And the distinction was
12 deliberately made by the state.

13 MS. BURKE: The state legislature did make a
14 deliberate enactment to exempt religious-type
15 periodicals being distributed by a religious faith.

16 QUESTION: Ms. Burke, you don't take the
17 position that this accommodation is required, do you, by
18 the free exercise clause?

19 MS. BURKE: Your Honor, as I understand the
20 free exercise clause, it does mandate that accommodation
21 be required. It's not just permitted; it's required.

22 QUESTION: So, you take the position that
23 Texas may not impose a general sales tax on religious
24 publications?

25 MS. BURKE: No, Your Honor. I'm not saying it

1 would be an absolute violation --

2 QUESTION: Well, that's what I'm asking.

3 MS. BURKE: -- to impose the tax.

4 No, that is not the position of the state.

5 QUESTION: Can the state impose its sales tax
6 on the sale of candles in a Catholic church, too?

7 MS. BURKE: Yes, Your Honor, it could.

8 QUESTION: Okay.

9 MS. BURKE: And the state is certainly not
10 asserting that it would be an absolute violation of
11 either the establishment clause or the free exercise
12 clause if the exemption were not in place. They
13 recognize that rational bases have to meet -- be drawn
14 under the statute.

15 With regard to the Arkansas tax, Texas again
16 does see a distinction there because Arkansas did tax
17 only general interest periodicals and exempted
18 everything else from the terms of the tax including
19 newspapers. Texas tax structure is just the reverse.
20 It taxed all publications, including newspapers, but
21 exempted only religious periodicals from the terms of
22 the tax.

23 If the exemption were not in place, as I have
24 said, the state is not saying that the rational basis is
25 that there would be a violation of the establishment

1 clause, but without the exemption there would be a
2 greater involvement between the church and the state in
3 the sense that the church would have the authority to be
4 subject to paying the tax, have an obligation and duty
5 to pay the tax, and if it did not, then the state could
6 go in and file liens against church property if there
7 was a delinquency. It could seek to seize the church
8 property and sell it to pay a tax debt, and it also
9 could freeze church bank accounts.

10 This is certainly a greater involvement
11 between the church and the state than if the exemption
12 were not present.

13 This also pertains with regard to the free
14 exercise of religion. If the exemption were not
15 present, there's a possibility of a violation under the
16 free exercise clause in that it has previously been held
17 that Jehovah's Witnesses, for example, going out and
18 disseminating their religious messages by selling
19 publications containing their religious messages when
20 they were required to pay a tax and obtain a license
21 before they could engage in these activities, this was
22 held to be a violation of their free speech rights and
23 also a violation of their free exercise rights.

24 Under the Texas Sales and Use Tax Act, as it
25 was structured during the time period in question, what

1 you had was a situation that engaged in operation as a
2 retailer within the state of Texas, you had to post a
3 bond first. Then you had to obtain a permit, and then
4 you had to collect and remit the tax or remit the tax to
5 the State of Texas.

6 Without the exemption in place there is a
7 possibility of a violation of the free exercise clause
8 of the First Amendment.

9 QUESTION: Ms. Burke, I'm not sure -- were you
10 saying that one of our cases we have a Jehovah's Witness
11 case that rested on establishment clause grounds?

12 MS. BURKE: Free exercise clause grounds.

13 QUESTION: Free exercise clause grounds?

14 MS. BURKE: Yes, which was Murdock versus
15 Commonwealth of Pennsylvania.

16 QUESTION: Murdock. And you're saying just as
17 we, just as the state couldn't -- must make an exemption
18 from a general licensing law for the sale of those pub
19 -- was it clear that that was a sale case?

20 MS. BURKE: Yes, Your Honor, they were
21 directly going out and selling their Watchtower
22 publications, and sometimes they were receiving
23 donations from them. But that would fall within the
24 definition of a sale under the Texas Sales and Use Tax
25 Act, which is a transfer of tangible personal property

1 for a consideration.

2 And under that particular case, as I said, it
3 was a general regulatory-type situation, but it also was
4 a tax that was being imposed upon the sale of these
5 magazines. They had to pay the tax in advance, and they
6 also had to obtain a license, and this is pretty much
7 the same structure under the Texas Sales and Use Tax Act.

8 The state, therefore, feels that it has
9 asserted either rational basis or compelling state
10 interest to sustain the exemption in this case.

11 Texas Monthly has also raised the fact that
12 Section 151.312 does not or -- they say it does
13 constitute a law respecting establishment of religion.
14 The position of the state is that the lower court
15 correctly determined that this exemption does not fall
16 under that category; that it meets a three-part test in
17 Lemon versus Kurtzman: Number one, that it has a
18 secular legislative purpose in that it restricts the
19 physical relationship between church and state, and this
20 is what the Court of Appeals in Texas so determined. It
21 also held that its primary purpose was not to advance or
22 inhibit religion. To the contrary, the effect was to
23 permit religious periodicals, religious organizations in
24 effect to be free from state sponsorship or support.
25 And, thirdly, that the exemption did not foster an

1 excessive entanglement with religion.

2 QUESTION: Do you think the Lemon test is the
3 exclusive test?

4 MS. BURKE: I think it's a test that should be
5 applied, Your Honor, in this case. I think it probably
6 should not be so rigidly applied in this type of
7 context, but I think it should be applied.

8 And I think the exemption meets all elements
9 of the test because I feel that it doesn't constitute
10 excessive entanglement with religion in the respect that
11 it doesn't create the appearance of an ongoing
12 partnership between church and state that, like, say, a
13 direct aid or subsidy would, even though you might refer
14 to an exemption as being a subsidy.

15 Certainly it has been held in the past that
16 determining in the Walz case that real property being
17 exclusively used for religious purposes didn't
18 constitute an excessive entanglement with religion and
19 also determine whether secular books that were to be
20 given to students of parochial schools, there had to be
21 a determination made there as to whether it contained
22 religious material or whether it was secular in nature.
23 That was held not to constitute excessive entanglement
24 with religion.

25 What the state is doing here is being mutual

1 towards religion. It is trying to accommodate religion
2 by allowing for the free distribution of religious
3 teachings and materials. It is not advancing or
4 inhibiting religion, it is a secular, legislative
5 purpose, and it does not foster an excessive
6 entanglement with religion.

7 In the past in that area on advancing
8 religion, just going back to that for a minute, it has
9 already been held that time-release programs where
10 students that were released from public schools to go
11 off school grounds to attend religious instruction, that
12 this type of program did not create a symbolic union
13 between church and state so as to constitute an
14 advancement of religion.

15 I think this same sort of approach can be
16 applied to tax case in that the voluntary sale and
17 purchase of these types of religious periodicals
18 likewise does not constitute excessive entanglement,
19 does not advance religion.

20 It has been pointed out that under the Texas
21 tax structure that what we have here is an exemption
22 exempting the sales of religious periodicals based on
23 content. We previously said we don't feel that the
24 whole exemption is really content-based. It's more
25 status-based and activity-based.

1 There are other exemptions, however, in the
2 Texas Sales and Use Tax Act, one of which is an
3 exemption that allows religious organizations and other
4 organizations to make one-day sales in a calendar year
5 of any items that they so desire to sell.

6 And I realize that is broader based than just
7 the religious aspect. But, there's another exemption
8 that permits the sale of food, food products by church
9 or the church function, and that can occur any time
10 during the church year. So there are other exemptions
11 that are basically religious-based in the Texas Sales
12 Tax Act.

13 The state perceives this, as I've said earlier
14 and submits to the Court that what we have here is a
15 nondiscriminatory tax. If the Court, however, perceives
16 this as a situation where there is content-based
17 discrimination, a strict scrutiny test should be applied
18 and the exemption should be upheld under this type of
19 test because what we have here is two competing
20 constitutional interests, the right to free speech by
21 the press and the right to free speech by religion. And
22 to avoid any violation of the free exercise clause or
23 the establishment clause in which we feel a compelling
24 state interest, we submit that the exemption should be
25 upheld. Thank you.

1 QUESTION: Thank you, Ms. Burke.

2 Mr. George, you have three minutes remaining.

3 REBUTTAL ARGUMENT OF ROGER JAMES GEORGE, JR.

4 ON BEHALF OF THE APPELLANT

5 MR. GEORGE: Two points. First, the Arkansas
6 Writers' Project case involved an Arkansas general sales
7 tax statute. It provided a taxation of all tangible
8 property, according to the court's opinion, in the state
9 of Arkansas, and there were a series of exemptions, like
10 in Texas, for mules and various things, but there was
11 only an exemption for religious, trade, sports, and
12 professional journals.

13 So, there were a lot of -- or media, I
14 suppose. The agricultural magazines, magazines about
15 the oil and gas industry or other things were subject to
16 tax, along with general interest magazines.

17 QUESTION: Well, all newspapers were exempted.

18 MR. GEORGE: In Arkansas they exempted
19 newspapers. That was a separate grounds for writ
20 petition in that area, in the appeal in that case.

21 Second -- and thus, this case is similar in
22 that only the restriction is -- does not include sports,
23 professional journals and trade journals. It just
24 includes religion, one of the five topics that were
25 involved in the Arkansas case.

1 And there the evidence was, according to this
2 court's opinion, one to three magazines paid the tax.
3 In our evidence, the Comptroller's people testified that
4 20 to 30 paid the tax. Given the relative size of
5 Arkansas and Texas, I think that's a distinction without
6 a difference in that we, in fact, have as few as 20 of
7 the hundreds and hundreds of magazines that are
8 circulated in Texas are subject to tax -- not because of
9 the exemptions, because of the enforcement policy.

10 Finally --

11 QUESTION: Because of what?

12 MR. GEORGE: Our enforcement policy argument
13 that was part of the trial court evidence.

14 Finally, let me point to the question of does
15 the taxpayer get his money back. And, in fact, if you
16 look at this court's opinions about taxpayers contending
17 statutes or schemes were unconstitutional for interstate
18 commerce reasons, a whole range of reasons.

19 This court's Armco versus Hardesty case and
20 West Virginia statute taxing certain interstate sales --

21 QUESTION: That may be somewhat different if
22 the holding rests on an equal protection basis than it
23 does on a commerce clause. Because our case -- some of
24 our cases have said when it's an equal protection
25 violation, the state can choose whether to eliminate the

1 favored treatment or the disfavored treatment and just
2 make sure they're all treated equal.

3 MR. GEORGE: Well, I suppose the state has to
4 -- if it has a statute, it can repeal it and then solve
5 the problem, and you can't repeal -- I suppose you could
6 repeal the -- there is no equal protection in commerce
7 clause. Obviously you can't tax it because in commerce
8 you can't solve it by corrective legislation.

9 You can solve this by corrective legislation.
10 But you can't solve -- court's don't have powers to
11 impose taxes. It can't go out and make those people who
12 distributed the Watchtower and the Baptist Standard and
13 the Methodist Layman pay the tax because the legislature
14 has exempted them.

15 Thank you.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
17 George. The case is submitted.

18 (Whereupon, at 1:52 p.m., the case in the
19 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 87-1245 - TEXAS MONTHLY, INC., Appellant V. BOB BULLOCK, COMPTROLLER OF PUBLIC
ACCOUNTS OF THE STATE OF TEXAS, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY alan friedman
(REPORTER)

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