IN THE SUPREME COURT OF FLORIDA

MICHAEL JOHN SIMMONS,

Petitioner,

v. **CASE NO. SC04-2375**

STATE OF FLORIDA,

Respondent.
_____/

On Discretionary Review
From the District Court of Appeal
First District of Florida

AMENDED
ANSWER BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Case--Simmons seeks discretionary review of Simmons v. State, 886 So.2d 399 (Fla. 1st DCA 2004). The decision upheld §847.0138 against a facial First Amendment and Commerce Clause attacks; and §847.0135, Florida Statutes, against a Commerce Clause challenge. *Id*. at 407. It was issued November 15, 2004. Notice to invoke this court's discretionary jurisdiction was filed December 15, 2004.

Facts--The State accepts Simmons' statement as to the facts with the following: The culpable communications occurred in June and July, 2002, with a male deputy sheriff (Kenneth Neff). (R1:42-3). Neff's initial messages to Simmons portrayed himself as a 13-year-old-girl ("Sandi") in Lake City, Florida. (R1:43). Thereafter, Simmons repeatedly communicated with "Sandi," in a sexual manner and about sexual activities. He sent nude pictures of himself to her; asked her to send him a pair of her panties and to teach her about sex; and encouraged her to meet him. He traveled to Lake City to meet her for three days of sexual activities at a hotel. When he arrived there, he was arrested. (R1: 43-7).[1]

[1]The six-volume record is cited (R[vol. no.]:[page no.]). State-supplied emphasis is noted as [e.s.].

SUMMARY OF ARGUMENT

Issue I (First Amendment)

Based on its legislative history and specific language, §847.0138, Florida Statutes (2001) must be construed to prohibit transmission of harmful material to a person the sender knows is both a minor and in Florida; by individually-addressed computer message (email or instant). So construed, the statute is not overbroad or vague, and much narrower than the laws found overbroad in Ashcroft I, Reno v. ACLU, and ACLU v. Johnson.

Section 847.0138 employs the least restrictive means reasonably available to protect all minors against harmful, personal email--a compelling state interest. It does not violate the First Amendment.

Issue II (Dormant Commerce Clause)

No reasonable person could think that arranging to have sex with a 13-year-old would be condoned by any state. Nevertheless, Simmons sent messages which contained material harmful to minors, and messages designed to lure a putative minor into sexual activity. That he sent the messages, by computer, from Virginia is beside the point. His actions were not "commerce" at all. If deemed commerce, they were not legitimate commerce protected by the Commerce Clause.

Section 847.0138 prohibits only those computer messages individually addressed to persons already known to be minors in Florida. It does not regulate conduct wholly outside this state or extend Florida law outside this state. Florida's compelling interest in protecting all its minors outweighs any incidental burden on legitimate interstate commerce.

Section 847.0135(3) prohibits use of on-line computer services with specific intent to solicit or lure a child to commit specified illegal acts. As an express jurisdictional matter, it statute can be enforced only when the State shows the recipient child is "residing in this state." By requiring affirmative proof the victim is a Florida resident, §847.0135 does not violate the dormant Commerce Clause.

There is no commerce, much less "legitimate" commerce, involved in sending harmful material to Florida minors or in luring those minors into sexual activity. The conduct prohibited by §847.0138 and §847.0135 and is not protected from state-law burdens, inconsistent or not. The state's compelling interest in protecting its minors outweighs any incidental burden on legitimate commerce. Neither statute violates the dormant Commerce Clause.

ARGUMENT

ISSUE I

DOES §847.0138, FLORIDA STATUTES, FACIALLY VIOLATE THE FIRST AMENDMENT BY PROHIBITING COMPUTER-TRANSMISSION OF HARMFUL MATERIAL TO MINORS IN THIS STATE, THROUGH INDIVIUALLY-ADDRESSED MESSAGES? (*Restated*).

A. Standard of Review

Simmons contends §847.0138, Florida Statutes (2001), facially violates the First Amendment. Such challenges present questions of law reviewed *de novo*. *See* State v. Glatzmayer, 789 So.2d 297, 301 n.7 (Fla. 2001); Russ v. State, 832 So.2d 901, 906 (Fla. 1st DCA 2002), *rev. den.* 845 So.2d 892 (Fla. 2003) ("Issues involving constitutional challenges to . . . statutes are pure questions of law subject to de novo review.").

When reaching Simmons' First Amendment claim, "[t]his Court has an obligation to give a statute a constitutional construction where such a construction is possible . . . to adopt a reasonable interpretation of a statute which removes it farthest from constitutional infirmity." Tyne v. Time Warner Entertainment Co., L.P., 2005 WL 914193,*7 (Fla. 2005) (narrowly construing §540.08, Fla. Stat., to avoid First Amendment problems with a statute establishing a cause of action for unauthorized publication of name or likeness).

B. Merits[2]

1. Construction of §847.0138

In pertinent part, §847.0138 provides:

> (1) For purposes of this section:
>
> (a) "Known by the defendant to be a minor" means that the defendant had actual knowledge or believed that the recipient of the communication was a minor.
>
> (b) "Transmit" means to send to a specific individual known by the defendant to be a minor via electronic mail.
>
> * * *
>
> (3) Notwithstanding ss. 847.012 and 847.0133, any person in any jurisdiction other than this state who knew or believed that he or she was transmitting an image, information, or data that is harmful to minors, as defined in s. 847.001, to a specific individual known by the defendant to be a minor in this state commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> The provisions of this section do not apply to subscription-based transmissions such as list servers.
>
> [e.s.].

Crucial definitions are found in §847.001(6) & (8), Florida Statutes, respectively:

> (6) "Harmful to minors" means any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:

[2]Simmons has never argued §847.0138 separately violates the Florida Constitution. His issue statement alludes to such possibility, but alone does not fairly present it. *See* Griffin v. State, 866 So.2d 1, 7 (Fla. 2003) (observing that mere reference to arguments made below does not preserve issues).

> (a) Predominantly appeals to the prurient, shameful, or morbid interest of minors;
>
> (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
>
> (c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.
>
> * * *
>
> (8) "Minor" means any person under the age of 18 years.

The State agrees §847.0138 is a content-based restriction on speech, subject to strict scrutiny. Such scrutiny has two broad components: promotion of a compelling government interest and narrow tailoring through use of the least restrictive alternative to achieve the statute's purpose. *See* Reno v. ACLU, 521 U.S. 844, 870, 117 S.Ct. 2329, 2343 (1997); ACLU v. Johnson, 194 F.3d 1149, 1156 (10th Cir. 1999); PSINet, Inc. v. Chapman, 362 F.3d 227, 233 (4th Cir. 2004) ("Strict scrutiny requires the law in question to be 1) narrowly tailored to 2) promote a compelling government interest.").

Nowhere does Simmons contend that protection of minors from harmful material is not a compelling state interest. *See* Reno, 521 U.S. at 875, 117 S.Ct at 2346 ("[W]e have repeatedly recognized the governmental interest in protecting children from harmful materials."). To the contrary, he has expressly assumed as much. (initial brief, p.9). The State treats his assumption,

and lack of argument to the contrary, as conceding a compelling state interest is involved.

Turning to the second component, Simmons urges the statute is not narrowly tailored because it is overbroad, vague, and not the least restrictive means to achieve the State's purpose. (initial brief, p.17-19). He is wrong. Based on its legislative history and specific language, §847.0138 must be construed as making culpable only the transmission of harmful material; by computer message (email or instant); individually addressed to known minors, also known to be in Florida. So construed, the statute does not violate the First Amendment. It is the least restrictive means reasonably available to protect minors from harmful material and worse.

Legislative History

The First District did not rely on legislative history to uphold §847.0138. The State, however, will repeat the synopsis of legislative history it presented to that court, to show its suggested construction of the statute comports with the legislatively intended purpose.

Section 847.0138 originated in Senate Bill 144 (2001), which created four new criminal offenses. Two of those were: being in Florida and transmitting harmful material to a minor or person believed to be minor in this state; and being outside

Florida and doing the same. *See* Senate Staff Analysis and Economic Impact Statement for CS/SB 144 by the Criminal Justice Committee (March 27, 2001) ["staff analysis"] at p.5. [3]

The analysis said: "[T]he bill defines 'transmit' to mean the sending of an e-mail to a specified address." [e.s.]. That definition "would exempt the mere posting of otherwise constitutionally protected adult material on a website or bulletin board," and "would not prevent a minor from searching for sexual material on the Internet." *Id*. at p.6. It noted constitutional protections advanced in Reno and Johnson for material posted on web pages or bulletin boards. *Id*. at p.7.

Thus, the Criminal Justice Committee recognized the statute must be narrowly tailored to protect minors from harmful material, while not unreasonably impinging on an adult's right to view adult material. *Id*. at p.8. The committee noted the statute prohibited only the "actual transmitting of sexually explicit material to specific or known minor[s], rather than simply posting such material on the Internet[.]" *Id*. at p.8.

The Senate Judiciary Committee acknowledged a potential First Amendment challenge, but concluded the proposed statute was narrowly drawn and did not chill protected speech.

[3]SB-144 was enacted as ch. 2001-54, Laws of Fla. (2001). The Crim. Justice Comm. staff analysis is available at: http://www.flsenate.gov/data/session/2001/Senate/bills/analysis/pdf/2001s0144.cj.pdf [visited 05/20/05].

> It is indeterminate whether this law is drawn sufficiently narrow to prohibit the transmission of a sexually explicit image to a minor (or to a law enforcement officer posing as a minor for investigative purposes) without violating an adult's constitutionally protected right to view such material or without causing a chilling effect of constitutionally protected speech. The bill does require scienter in the actual transmission which would appear to exclude from criminal prosecution the mere posting of such material on the Internet and an adult's right to view it or send such material to another adult. [e.s.].

See Senate Staff Analysis and Economic Impact Statement for CS/SB 144 by the Judiciary Committee (April 18, 2001) at p.6.[4]

2. Statutory Language

Section 847.0138 emerged from the version considered by the two committees. "Harmful to minors" is defined in §847.001(6), and incorporated by reference. Section 847.0138(1)(a), defining "known to be a minor," requires a sender to have actual knowledge or believe the recipient is a minor in this state. Under §847.0138(1)(b), "'transmit' means to send to a specific individual . . . via electronic mail." Under §847.0138(3), a sender outside Florida must transmit "to a specific individual known . . . to be a minor in this state."

Read together, these provisions greatly restrict the field of §847.0138's operation; to individually-addressed, computer

[4]The Judiciary Comm. staff analysis is available at: http://www.flsenate.gov/data/session/2001/Senate/bills/analysis/pdf/2001s0144.ju.pdf [visited 05/20/05].

transmissions to persons known to be minors and in Florida. Relying on these provisions, the First DCA adopted such construction. *See* Simmons, 886 So.2d at 403. The same construction must be adopted by this court. Tyne.

Section 847.0138 in no way reaches a "large category of constitutionally protected adult speech" (initial brief, p.17) as Simmons imagines. Instead, it precisely limits its grasp, by requiring: (1) harmful material transmitted by an individually addressed computer-message; (2) to a person known by the sender to be a minor; and (3) known by the sender to be in Florida. These requirements preclude a claim that §847.0138 broadly censors internet communications. Also, the concluding language in §847.0138 expressly exempts "subscription-based transmissions such as list servers," thereby making publicly-posted internet messages (accessible to adults and minors) not culpable.

Thus, §847.0138 is far narrower than the Communications Decency Act (CDA) found overbroad in Reno. The CDA prohibited transmission of obscene or indecent communication to anyone known by the sender to be under 18. 117 S.Ct. at 2338. Most important, it regulated all forms of internet communication, including e-mail, automatic mailing list services, newsgroups, chat rooms, and the world wide web. *Id*. at 2334.

The court recognized the government had an interest in protecting children from harmful material, but that interest "did not justify an unnecessarily broad suppression of speech addressed to adults." *Id*. at 2346. In finding the CDA unnecessarily burdened constitutional communication among adults, the court focused on the statute's overreaching limitations on communication by consenting adults in forums, such as chat rooms and web sites, where a message is posted for many to view:

> In arguing that the CDA does not so diminish adult communication, the Government relies on the incorrect factual premise that prohibiting a transmission whenever it is known that one of its recipients is a minor would not interfere with adult-to-adult communication. The findings of the District Court make clear that this premise is untenable. Given the size of the potential audience for most messages, in the absence of a viable age verification process, the sender must be charged with knowing that one or more minors will likely view it. Knowledge that, for instance, one or more members of a 100-person chat group will be a minor--and therefore that it would be a crime to send the group an indecent message--would surely burden communication among adults.
>
> * * *
>
> The breadth of the CDA's coverage is wholly unprecedented.

Id. at 2347.

That the CDA prohibited internet communication intended for a person the defendant knew to be under 18 did not save it, because of the Act's "wholly unprecedented" breadth. Describing

what is the greatest difference between the CDA and §847.0138, the Reno court also said:

> The Government also asserts that the "knowledge" requirement of both §§ 223(a) and (d), especially when coupled with the "specific child" element found in § 223(d), saves the CDA from overbreadth. . . . This argument ignores the fact that most Internet forums--including chat rooms, newsgroups, mail exploders, and the Web--are open to all comers. . . . Even the strongest reading of the "specific person" requirement of § 223(d) cannot save the statute. It would confer broad powers of censorship, in the form of a "heckler's veto," upon any opponent of indecent speech who might simply log on and inform the would-be discoursers that his 17-year-old child--a "specific person ... under 18 years of age," 47 U.S.C.A. § 223(d)(1)(A) (Supp.1997)--would be present.

Id. at 2349. By comparison, §847.0138 does not permit a heckler's veto. Its specific terms preclude application to open forums such as chat rooms. Simmons did not incur culpability under the statute until he responded to "Sandi's" email specifically, with express sexual purposes.

Simmons mentions Ashcroft v. ACLU, 124 S.Ct. 2783 (2004) [Ashcroft II]. (initial brief, p.12-13). This decision involved the second appearance by the Child Online Protection Act (COPA), 47 U.S.C. §231, before the Supreme Court. The court ultimately found COPA did not survive strict scrutiny, because it did not employ the least restrictive alternative (i.e., website filters). *Id*. at 2792-5.

The court noted COPA was passed in response to the Reno decision, and parsed the provisions of the Act which regulated speech. COPA proscribed the knowing posting, on the world wide web, of harmful material available to any minor for "commercial purposes." §231(a)(1). A person acted for "commercial purposes" when "engaged in the business of making such communications." "Engaged in the business" meant:

> the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities[.] §231(e)(2).

Id., 124 S.Ct. at 2789. Other than an affirmative defense (devices for verifying age, etc.), COPA provided no relief from its sweeping operation. The narrowness of §847.0138 is extreme by comparison.

Ashcroft II sustained a preliminary injunction against enforcement of COPA because there was no showing a less restrictive alternative (filters) was not feasible. *Id*. at 2792-4. However, such alternative is not available to achieve the purpose of §847.0138.

The purpose of §847.0138 is to protect minors from harmful material sent by "personal" email. There are no pro-active filters for such email. Instead, the first harmful message

would have to be received, and then blocked by affirmative act of (presumably) an adult made aware of the message. Software that filters the content of web sites and parental controls available through internet service providers does not control the content of personal e-mail messages. A parent could block all e-mail to the minor by removing the minor's email address--a measure not less restrictive, and not something the government can do or require.

The least restrictive, yet still effective, means of preventing computer-transmission of harmful material through personal communications is to regulate the sender. Section 847.0138 does just that.

Ashcroft II does not mandate consideration of filters as a less restrictive alternative for all statutes, federal or state, however narrow. As the Court observed: ("[I]t is important to note that this opinion does not hold that Congress is incapable of enacting any regulation of the Internet designed to prevent minors from gaining access to harmful materials."). *Id*. at 2795.

In a troubling non-sequitur, Simmons notes COPA's definition of "harmful to minors" is similar[5] to the

[5]In §231(a)(1), material "harmful to minors" is defined as:
[A]ny communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that--

corresponding definition in §847.001(6). He then notes the Ashcroft II court sustained a preliminary injunction against COPA. (initial brief, p.13).

However, Simmons fails to mention that the COPA definition of "harmful to minors" was at issue in Ashcroft I (*infra*), for its failure to use all three prongs of the Miller obscenity test. That definition was not at issue in Ashcroft II, and did not draw unfavorable commentary from the court.

Ashcroft II reviewed a Third Circuit decision which had expressed other problems with the federal definition of "harmful to minors." *See* ACLU v. Ashcroft, 322 F.3d 240, 253 (3d Cir. 2003) ("[H]ere the plain meaning of COPA's text mandates evaluation of an exhibit on the Internet in isolation, rather than in context . . . fails to meet the strictures of the First Amendment."). In contrast, Simmons voices no qualm with "taken

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> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals [**699] or post-pubescent female breast; and
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." § 231(e)(6).

"Minors" are defined as "any person under 17 years of age." §231(e)(7).

as a whole" as used in §847.001(6). The Third Circuit's cribbed reading of the federal law is not binding and should not be emulated, especially as to statutory language not at issue.

Dissenting in Ashcroft II, Justice Scalia agreed with Justice Breyer's conclusion (in dissent) that COPA was constitutional. *Id*., 124 S.Ct. at 2797. Justice Breyer observed: "The Act's definitions limit the material it regulates to material that does not enjoy First Amendment protection, namely legally obscene material, and very little more." *Id*. at 2798 (Rehnquist, C.J., & O'Connor, J., concurring in dissent).

Given Ashcroft II did not adopt the Third Circuit's decision and did not address the definition of "harmful to minors" in substance, and four justices would have found COPA constitutional; this Court should find Florida's definition of "harmful to minors" is neither overbroad nor vague.

Simmons next relies on Johnson. (initial brief, p.13-16). There, the Tenth Circuit affirmed a preliminary injunction against enforcement of a New Mexico statute. That law made criminal the use of a computer system to knowingly communicate with a person under 18, when such communication depicted nudity or sexual conduct. *Id*. at 1152. Analyzing Reno at length, the court found the similarities between the New Mexico statute and the CDA compelled the same result. *Id.*, 194 F.3d at 1158.

New Mexico argued the statute must be narrowly construed so that it "does not apply to group communications which include both adults and minors in the group, or where a fact situation presents a mere probability that minors may be part of the receiving group." *Id*. However, the appellate court found that this proposed narrowing amounted to a wholesale rewriting of the statute. *Id*. at 1159.

> Defendants argue section 30-37-3.2(A) only applies where the recipient is "solely and exclusively an individual minor recipient." Aplts.' Br. at 21. As plaintiffs point out, the statute nowhere uses those limiting words, nor is it readily susceptible to such a limiting construction. The statute criminalizes "knowingly and intentionally initiat[ing] or engag[ing] in communication with a [minor]." § 30-37-3.2(A). It does not limit such communication to one-on-one situations where the only recipient is a single minor. Indeed, as plaintiffs note, defendants' interpretation would lead to the absurd result that no violation of the statute would occur if someone sent a message to two minors, or a chat room full of minors, or a minor and an adult.

Id.

Here, the First DCA did not re-write §847.0138. Instead, it relied on specific language to construe the statute as limited to individually addressed communications. *See* Simmons, 886 So.2d at 404-5 (agreeing with the State "that for the electronic mail to be sent to a specific individual, it must be specifically addressed to the individual, whether in instant messaging or e-mails sent and read at different times"). Such

construction does not preclude application of the statute when more than one minor is individually-addressed in a single transmission, and avoids the absurdity noted in Johnson.

The New Mexico statute in Johnson was not sufficiently narrowed by its intent clause:

> But the statutory definition of "knowingly" only requires "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of ... the age of the minor." N.M. Stat. Ann. § 30-37-1(G). . . . Thus, virtually all communication on the Internet would meet the statutory definition of "knowingly" and potentially be subject to liability under section 30-37-3.2(A).

Id., 194 F.3d at 1159. In contrast, §847.0138 suffers no such infirmity. Culpability arises only when harmful material is sent by individually addressed message to someone actually known, or reasonably believed, to be a minor and in Florida.

The First DCA's narrowing construction eliminates concern that §847.0138 chills constitutionally protected speech between adults. The statute prohibits individually addressed computer transmissions from an adult to a known minor only. Postings and messages in chat rooms, bulletin boards and web sites are not reached. Adult communication between consenting adults on public forums is not prohibited, even if a minor is present. The overbreadth concerns expressed in Reno and Johnson are not present. Section 847.0138 is narrowly drawn to reasonably

achieve its purpose. It is not overbroad and does not violate the First Amendment.

Simmons observes: "Numerous other courts have stricken statutes similar to §847.0138 on First Amendment grounds." (initial brief, p.13). He is wrong again. Those statutes, similar to the statutes in Reno and Johnson, regulated internet communications in all forums--a flaw not found in §847.0138, and one not amenable to a narrowing construction. *See* Bookfriends, Inc. v. Taft, 223 F. Supp. 2d 932, 937 & 943 (D. Ohio 2002) (observing that one provision of the challenged Ohio statute "made it illegal to display [harmful] materials . . . at a commercial establishment, in a manner which can be viewed by juveniles as part of the invited general public" and rejecting suggested narrowing construction because "no one could reasonably read that statute in that manner"); American Booksellers Foundation for Free Expression v. Dean, 202 F.Supp.2d 300 (D. Vt. 2002)), *aff'd. & injunction modified*, 342 F.3d 96 (2d Cir. 2003) (invalidating Vermont statute prohibiting the dissemination of indecent material to a known minor on all internet forums); PSINet v. Chapman, 108 F.Supp.2d 611 (W.D. Va. 2000) (invalidating Virginia statute that prohibited display of materials harmful to juveniles on all forums of the internet because it eliminated access for adults); Cyberspace

Communications, Inc. v. Engler, 55 F.Supp.2d 737 (E.D. Mich. 1999) (holding Michigan statute which prohibited dissemination of sexually explicit material to minors through all internet forums was not narrowly tailored, as it banned protected adult speech when less restrictive means were available to prevent children from accessing such material).

Simmons relies on the dissent in Ashcroft v. ACLU, 535 U.S. 564, 122 S.Ct. 1700 (2002) [Ashcroft I]; to urge §847.0138 "prohibits a large amount of protected speech." (initial brief, p.17-18). However, the definition of "harmful to minors" incorporated by §847.0138(3) does employ the "prurient interest" and "serious value" prongs of the obscenity test announced in Miller v. California, 413 U.S. 15, 93 S. Ct. 2607 (1973). *See* 847.001(6)(a) & (c), Florida Statutes. Simmons' reliance on Ashcroft I is unavailing. *Cf. id.*, 535 U.S. at 580, 122 S.Ct. at 1710 ("When the scope of an obscenity statute's coverage is sufficiently narrowed by a "serious value" prong and a "prurient interest" prong, we have held that requiring a speaker disseminating material to a national audience to observe varying community standards does not violate the First Amendment.").

Simmons asserts §847.0138 is vague for not distinguishing among minors of different ages. (initial brief, p.18-19). He relies solely on Judge Browning's dissent in Simmons. *See id.,*

886 So.2d at 409 (remarking that the definition of "minor" is not narrowly tailored because "a message to a five-year-old is treated the same as a message to a 17-year-old"). Judge Browning took his view from the Third Circuit's decision on remand from Ashcroft I. *See* ACLU v. Ashcroft, 322 F.3d at 254-6 (remarking that "minor . . . applies in a literal sense to an infant, a five-year old, or a person just shy of age seventeen" and concluding the term, used several times in COPA, was not narrowly tailored).

This Court should not be persuaded by Judge Browning's dissent and the Third Circuit's position, that "minor" is not narrowly tailored. In the guise of narrow tailoring, the two would require a level of statutory precision verging on perfection; something the courts have always declined to do.

Age thresholds exist throughout the law. For example, the U.S. Supreme Court very recently held execution of persons under 18 amounts to cruel and unusual punishment. *See* Roper v. Simmons, 125 S.Ct. 1183, 1200 (2005) ("The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."). The Court used "18" as a bright-line threshold, but observed:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against

> categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn.

Id., 125 S.Ct. at 1197-8.

It may seem that drawing the "line" at 18 for death-penalty purposes would have little bearing on using 18 to define "minor" as part of a statute imposing criminal penalties based on "harmful" speech. However, as Roper involved the death penalty, it received heightened juridical concern. *Cf. id.* at 1194 ("Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force."). Here, because content-based regulation of speech is involved, §847.0138 also receives heightened judicial concern; that is, strict scrutiny. If "[d]rawing the line at 18 years of age" constitutionally establishes the minimum age at which a person can receive the death penalty, then drawing the same line constitutionally establishes the recipient's maximum age for culpability to attach under the statute.

Section 847.0138 represents the minimal level of protection the legislature extended to all minors. *See* Simmons, 886 So.2d at 405-6 ("The Legislature has the responsibility and authority to protect all of our children, even the older ones."), *citing with approval*, People v. Hayne, 2002 Cal. App. Unpub. LEXIS 2650

*15 (Cal. App. 5th Dist. 2002) ("Appellant's argument that matter may be harmful to a five year old but not to a 17 year old has no merit. It is within the Legislature's power to determine that certain matter is harmful for all minors."). The statute constitutionally applies to the "oldest" of minors; that is, someone 17 to 18 years old. If it can apply to those minors, it plainly can apply to younger children; as the law has always extended its greatest protection to the youngest in society.

The Third Circuit's condemnation of "minor" was not even mentioned Ashcroft II, despite the Supreme Court's direct quotation of the statutory definition of that term. *See id.,* 124 S.Ct. at 2789 (noting: "'Minors' are defined as any person under 17 years of age. §231(e)(7)".). As a decision by an intermediate federal court, the Third Circuit's opinion is not binding on this Court. Even more, its impossibly high standard for narrow tailoring is not persuasive.

The Third Circuit found the 17-year-old threshold for minority too broad because website developers must guess at their potential audience, and the lone threshold did not account for differences in "prurient interests" within that group. Such reasoning, already suspect, does not apply here.

Individually addressed messages are personal, "one-on-one" communication. Under §847.0138, the sender is not uncertain as

to the recipient's age, and need not guess which state's law applies. That minors can be any age under 18 is not important, as the Legislature can constitutionally extend the protection afforded by §847.0138 to all minors. Similarly, that prurient interests can vary is irrelevant. The legislature extended the same, minimal level of protection to all minors, making compliance with the statute uniform.

Curiously, Simmons urges infirmity in §847.0138's failure to address different-aged minors as a vagueness claim. (initial brief, p.18). His position must be rejected. The definition of "minor" is not vague--as a numerical value, it could not be more clear. A person of ordinary intelligence readily understands the difference between "18" and any other number. *See* Cashatt v. State, 873 So.2d 430, 435 (Fla. 1st DCA 2004) (upholding §847.0135 and observing: "A statute is unconstitutionally vague if it fails to provide a person of ordinary intelligence with a reasonable opportunity to know what is prohibited, and is written in a manner that encourages or permits arbitrary or discriminatory enforcement.").

Section 847.0138 prohibits computer-delivery of harmful material by individually addressed message, in order to protect minors against sexual exploitation. It is the least restrictive alternative which will achieve this compelling interest. It is

narrowly tailored, and must be upheld against Simmons' First Amendment claims.

ISSUE II

DO §847.0138 AND §847.0135, FLORIDA STATUTES, FACIALLY VIOLATE THE DORMANT COMMERCE CLAUSE BY DEFINING CRIMINAL ACTS BASED ON CONTENT AND PURPOSE, RESPECTIVELY, OF COMPUTER MESSAGES RECEIVED IN THIS STATE? (*Restated*).

A. Standard of Review

Simmons argues that §847.0138 and §847.0135 violate the dormant Commerce Clause,[6] again raising questions of law reviewed *de novo*. Glatzmayer, Russ.

B. Merits

As argued in Issue I, §847.0138 properly establishes the criminal offense of sending harmful material to Florida minors by computer message. As argued in this issue, §847.0135

[6]Very recently, the U.S. Supreme Court has described the working of the dormant Commerce Clause:

> Thus, this Court has consistently held that the Constitution's express grant to Congress of the power to "regulate Commerce ... among the several States," Art. I, § 8, cl. 3, contains a further, negative command, known as the dormant Commerce Clause, that create[s] an area of trade free from interference by the States. This negative command prevents a State from jeopardizing the welfare of the Nation as a whole by plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear. [internal cites & quotes omitted].

American Trucking Associations, Inc. v. Michigan Public Service Com'n, 2005 WL 1421164,*3 (2005).

properly makes it a crime to use computer services with specific intent to entice children into committing sexual acts. Both statutes define criminal conduct; there is a strong presumption both are within Florida's prerogative to enact:

> Under our federal system, the States possess primary authority for defining and enforcing the criminal law. [cites & internal quote omitted]; *see also* Screws v. United States, 325 U.S. 91, 109, [], 65 S. Ct. 1031 (1945) (plurality opinion) ("Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States").

United States v. Lopez, 514 U.S. 549, 561, 115 S.Ct. 1624, 1631 at n.3 (1995).

Simmons sent messages which contained harmful material, and messages designed to lure a putative minor into sexual activity. That he used the internet is beside the point The messages were not "commerce" at all. Alternatively, they are not "legitimate" commerce, and enjoy no protection under the Commerce Clause:

> [C]riminals . . . are not legitimate subjects of commerce. They may be attendant evils, but they are not legitimate subjects of traffic and transportation, and therefore, in their exclusion or detention, the state is not interfering with legitimate commerce, which is the only kind entitled to the protection of the Constitution. [internal quote omitted].

Compagnie Francaise de Navigation a Vapeur v. Board of Health of State of Louisiana, 186 U.S. 380, 391, 22 S.Ct. 811, 816 (1902).

In Sligh v. Kirkwood, 237 U.S. 52, 35 S.Ct. 501 (1915), the Court rejected a dormant Commerce Clause challenge to a Florida statute making it unlawful to sell, etc. citrus fruit unfit for consumption. It observed that such "impure foods" or "articles" are "not the legitimate subject of trade or commerce, nor within the protection of the commerce clause." *Id.*, 237 U.S. at 57 & 60, 35 S.Ct. at 501-2.

Just as an old Florida statute properly made unlawful the sale, etc. of fruit unfit for consumption; §847.0138 and §847.0135 properly make unlawful computer messages whose content or purpose make them unfit for consumption by minors. This Court need go no further to reject Simmons' argument.

Nevertheless, Simmons claims §847.0138 and §847.0135 violate the dormant Commerce Clause by (1) regulating conduct occurring wholly outside Florida, (2) unreasonably burdening interstate commerce, and (3) subjecting interstate use of the internet to inconsistent state regulation. (initial brief, p.22). The State will answer in order.

1. Conduct *Wholly* Outside Florida Not Affected

Section 847.0138 requires, as an element of the crime, that the recipient minor be "in this state." §847.0138(3). A crime begun by transmission of a culpable message from outside Florida must be completed by its receipt here. Section 847.0135(5)

requires, as a jurisdictional matter, that the enticed "child" to be "residing" in this state. Neither statute operates against conduct wholly outside this state. Simmons' first claim ignores this, and must be disregarded.

2. No Unreasonable Burden or Inconsistent Regulation

No reasonable person could think that arranging to have sex with a 13-year-old is condoned by any state. Under his facts, Simmons' claims of unreasonable burden and inconsistent regulation stumble from the start. Continuing, his second and third claims are better addressed by distinguishing between the two statutes at issue.

§847.0138[7]

Simmons claims §847.0138 unreasonably burdens interstate commerce, and subjects interstate use of the internet to inconsistent state regulation. To uphold the statute against these claims, the First DCA followed Cashatt, which rejected the same claims against §847.0135. *See* Simmons, 886 So.2d at 406. As Cashatt observed:

> Where a state statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it

[7]Simmons sent messages from Virginia, and was culpable under subsection (3) of §847.0138. Subsection (2) applies when the sender and recipient are in this state. Not affected by subsection (2), Simmons cannot challenge it under the Commerce Clause. *See* Sancho v. Smith, 830 So.2d 856, 864 (Fla. 1st DCA), *rev. den.* 828 So.2d 389 (Fla. 2002).

> will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits.

Id. at 435, *citing* Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S. Ct. 844 (1970).

Simmons makes no claim §847.0138 fails to regulate even-handedly. To the contrary, he complains precisely because §847.0138 applies to otherwise culpable messages originating outside Florida--to "impose the law of Florida upon each and every state in the union." (initial brief, p.29). On its face, the statute does not treat messages originating outside Florida differently from messages originating within this state. It is even-handed.

In Issue I, Simmons concedes that protecting minors against sexual exploitation is a compelling state interest. He cannot reasonably contend the same interest is not "legitimate" for purposes of Commerce Clause analysis. Not disputing the State's interest is legitimate, he focuses solely on whether any burden on legitimate commerce is commensurate to the nature of the state's interest, and whether that interest could be furthered with less intrusion on commerce. *See* Pike, 397 U.S. at 142, 90 S.Ct. at 847 ("If a legitimate local purpose is found, then the question becomes one of degree . . . depend[ing] on the nature of the local interest involved, and on whether it could be

promoted as well with a lesser impact on interstate activities.").

Protecting minors from sex crimes has to be among a state's most compelling interests. It follows that any incidental burden on legitimate interstate commerce will be more readily tolerated than would the same burden in other contexts. Section 847.0138 operates against communications neither comprising nor attending legitimate commerce. The State's interest in protecting minors is very great. The sender's interest in sending harmful material to minors is not only legally non-existent, but criminal. This much of the Pike balancing test weighs not just heavily, but totally, in favor of upholding the statute.

As to the last Pike consideration, any burden on legitimate commerce imposed by §847.0138 is not excessive--much less clearly excessive--in relation to the local benefit. In this regard, the State's analysis from Issue I about "least restrictive alternative" works quite well.

All that is made criminal are individually addressed messages to minors known to be in Florida. People such as Simmons are unrestricted by §847.0138 to post publicly accessible, sexual material on the internet, without regard to who might see it. They are free to communicate with other adults, or minors not in this state. In contrast, the state's

benefit is formidable. Section 847.0138 protects minors against harmful material in messages that cannot reasonably be blocked or filtered prospectively, because they are individually addressed and sent.

Against this backdrop, Simmons relies heavily on American Libraries Ass'n v. Pataki, 969 F.Supp. 160 (S.D.N.Y. 1997). (initial brief, p.23-8). His reliance is badly flawed, because it does account for the much narrower focus of §847.0138 compared to the statute at issue there.

In Pataki, a New York statute made it a crime for an individual to intentionally use a computer communication system to initiate or engage in communication that is harmful to a minor with a minor. *Id*. at 163. The statute regulated all internet forums, including e-mail, mail exploders, newsgroups, chat rooms, and the world wide web. *Id*. at 165. The plaintiffs challenged the statute on First Amendment and Commerce Clause grounds. *Id*. at 161. The court found that the New York Act contravened the Commerce Clause for three reasons:

> First, the Act represents an unconstitutional projection of New York law into conduct that occurs wholly outside New York. Second, the Act is invalid because although protecting children from indecent material is a legitimate and indisputably worthy subject of state legislation, the burdens on interstate commerce resulting from the Act clearly exceed any local benefit derived from it. Finally, the Internet is one of those areas of commerce that must be marked off as a national preserve to protect

> users from inconsistent legislation that, taken to its most extreme, could paralyze development of the Internet altogether.

Id. at 169. Construed as suggested at the outset, §847.0138 is so much narrower in scope that the Commerce Clause problems found in Pataki do not arise.

Simmons' last objection to §847.0138 claims the statute subjects interstate use of the internet to inconsistent state regulation; implicitly, when the laws of non-Floridians' home states are different from §847.0138. He is wrong, because unlike any challenged statute, §847.0138 requires prior knowledge the individually-addressed minor is in Florida.

In contrast, the Pataki court concluded the statute imposed New York law on conduct that occurred wholly outside New York:

> The nature of the Internet makes it impossible to restrict the effects of the New York Act to conduct occurring within New York. An Internet user may not intend that a message be accessible to New Yorkers, but lacks the ability to prevent New Yorkers from visiting a particular Website or viewing a particular newsgroup posting or receiving a particular mail exploder. Thus, conduct that may be legal in the state in which the user acts can subject the user to prosecution in New York and thus subordinate the user's home state's policy--perhaps favoring freedom of expression over a more protective stance--to New York's local concerns. . . . This encroachment upon the authority which the Constitution specifically confers upon the federal government and upon the sovereignty of New York's sister states is per se violative of the Commerce Clause.

Id. at 177. *See* American Booksellers, 202 F.Supp.2d at 320 (statute prohibiting dissemination of indecent material to minors via any forum on the internet); Cyberspace, 55 F.Supp.2d at 750 (statute regulating dissemination of sexually explicit material to minor regulating all internet speech, including speech wholly outside Michigan).

Culpability arises under §847.0138 only when harmful material is received through personal message to a known minor, also known to be "in this state." The same messages sent to minors outside Florida or to minors not known to be here, are not criminal. The statute does not prohibit an internet user inside or outside Florida from posting material on a public website accessible to Floridians generally. Limited to personal e-mail that must be received by a minor known to be in Florida, §847.0138 does not impose its strictures wholly outside Florida.

Because it applies to criminal conduct which must occur at least partially in Florida, with the sender's prior knowledge, §847.0138 does not subject internet users to inconsistent state laws. The concern in Pataki, that the statute regulated conduct wholly outside of New York, is not present. There is no violation of the Commerce Clause.

Pataki also found that while the New York statute protected children from indecent material, a legitimate interest, the

resultant burden on interstate commerce exceeded local benefit. *Id*. at 177. The burden did so because it was extreme; as the statute operated worldwide, chilling the speech of all internet users. *Id*. at 179.

Here, Florida's legitimate interest in protecting children against pedophilia is unquestioned. Unlike the burden imposed by the statute in Pataki, the burden here is minimal and does not spill over into legitimate commerce. Upon being informed the recipient was a 13 year old girl in Lake City, Simmons repeatedly communicated with "her" in a sexual manner and about sexual activities, and sent nude pictures of himself to her. He asked her to send him a pair of panties, to teach her about sex, and encouraged her to meet him for sexual activities. He drove to Lake City, entering this state's jurisdiction, in an unsuccessful attempt to commit more crimes by having sex with her at a hotel. When he arrived, he was arrested. (R 42-7).

The local benefit was plain. Section 847.0138 empowered law enforcement authorities to stop Simmons' attempt to have sex with a minor, and the injury it would have caused. Any burden on interstate commerce was just as plainly minimal, as shown by Simmons' inability to identify a non-speculative example.

Pataki concluded the New York law resulted in inconsistent legislation among the States. *Id*. at 181-83. The statute's

far-reaching grasp effectively reached purely out of state conduct, potentially conflicting with other state laws regulating the same conduct within those states. However, because of its narrow scope, the possibility of inconsistent legislation does arise with §847.0138. The statute does not affect conduct occurring wholly outside Florida. Internet users posting on publicly accessible or subscription websites cannot be culpable under the statute. Users sending messages containing harmful materials cannot be liable, unless they know or reasonably believe the minor is in Florida. The statute does not conflict with any other state law regulating conduct occurring wholly in that state.

Section 847.0138 is narrowly drawn. It regulates personal email or messages received by a known minor, known to be in Florida. There is a great benefit to the State, protection of children against pedophilia, with no burden on legitimate interstate commerce. The statute reaches only conduct completed in Florida by a minor's receipt of a culpable message. As urged in part 4, it arguably regulates conduct wholly <u>within</u> this state; if a person is deemed to enter Florida cyberspace by sending harmful material to a minor already known to be here. Either way, the statute does not violate the Commerce Clause.

§847.0135

Simmons' Commerce Clause attack on §847.0135 is more of the same, and does not focus on the relevant differences between it and §847.0138. The State will do so.

In pertinent part, §847.0135 provides:

> (3) Certain uses of computer services prohibited.--Any person who knowingly utilizes a computer on-line service, Internet service, or local bulletin board service to . . . entice, or attempt to . . . entice, a child or another person believed by the person to be a child, to commit any illegal act described in chapter 794, relating to sexual battery; . . . commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
>
> * * *
>
> (5) STATE CRIMINAL JURISDICTION.--A person is subject to prosecution in this state pursuant to chapter 910 for any conduct proscribed by this section which the person engages in, while either within or outside this state, if by such conduct the person commits a violation of this section involving a child residing in this state, or another person believed by the person to be a child residing in this state. [e.s.].

The first difference between §847.0138 and §847.0135 is readily apparent. The former is a "dissemination" statute hinging on content, not purpose, of the communication; the latter, a "luring" statute hinging on specific purpose, not content. The next difference is more subtle. Section 847.0138 requires the sender's prior knowledge the recipient is in this state. Section 847.0135 requires the State to prove the recipient resides here, but as a jurisdictional matter.

As to the first difference, other, similar state laws[8] have been challenged as violating the Commerce Clause but upheld. In Hayne, a California statute (§288.2) prohibited the distribution of harmful material to a minor through the internet, with the intent of seducing the minor. Specifically, §288.2 provided:

> Every person who, with knowledge that a person is a minor, knowingly distributes . . . by electronic mail, the Internet, as defined in Section 17538 of the Business and Professional Code, or a commercial online service, any harmful matter, as defined in Section 313, to a minor with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of a minor, and with the intent, or for the purpose of seducing a minor, is guilty of a public offense and shall be punished by imprisonment in the state prison or in a county jail.

Id. at *16. Relying on Pataki, the appellant argued that the statute violated the Commerce Clause because it imposed regulation on interstate commerce in an area that requires national and uniform regulation. *Id*. at *23.

Finding Pataki distinguishable, Hayne recognized the statute there was otherwise similar to the California's law, "but lacked the intent to seduce element." *Id*. at *26-8. The court held that "[t]his is a significant difference in that the intent to seduce requirement greatly narrows the scope of the

[8]Simmons cites some cases he advanced in Issue I, in which statutes were invalidated on Commerce Clause grounds. (initial brief, p.28-9). The State relies on its description, in Issue I, of the differences between those statutes and §847.0138. The differences illustrate why §847.0138 does not violate the Commerce Clause.

law and its effect on interstate commerce." *Id*. at *26. The court could not conceive of any legitimate commerce involved in the sending of graphic images to minors in an attempt to lure them into sexual activity. *Id*. It observed that "Pataki's concern regarding cohesive regulations is inapplicable to section 288.2 because of the law's narrow scope. *Id*. at 27.

Also, the California statute did not regulate conduct wholly outside of the state:

> [S]ection 288.2, in the context of the Penal Code as a whole, only penalizes acts that occur within the state. . . . [T]here is no reason "to assume California prosecutors will attempt to stifle interstate commerce by filing charges for acts committed in other jurisdictions, or where only 'de minimis' acts, such as those hypothesized in Pataki, are committed within this state. [cite omitted].

Id. at *27-8. Hayne then held §288.2 did not place an undue burden on interstate commerce and did not violate the Commerce Clause. *Id*. at *28.

In Hatch v. Superior Court, 94 Cal.Rptr.2d 453 (Cal. 4th DCA 2000), Hatch challenged the same statute under the Commerce Clause. He relied on Pataki. The Hatch court acknowledged that internet communications passed along interstate lines, but declared this circumstance should not "insulate pedophiles from prosecution simply by reason of their usage of modern technology." *Id*. Instead, it focused on the "intent to seduce" language to distinguish Pataki:

> [Pataki] is not controlling here because the intent to seduce element in section 288.2 is a distinction of the utmost significance. While a ban on the simple communication of certain materials may interfere with an adult's legitimate rights, a ban on communication of specified matter to a minor for purposes of seduction can only affect the rights of the very narrow class of adults who intend to engage in sex with minors. We have found no case which gives such intentions or the communications employed in realizing them protection under the dormant Commerce Clause.

Id. at 472.

The Hatch court found Pataki's second assumption, that the statute would impose itself on other states, was not relevant:

> [T]here is no reason to suppose California would attempt to impose its policies on other states in light of the relevant California penal statutes covering jurisdiction over public offenses . . . [which] generally bar punishment for wholly extraterritorial offenses. Thus there is no reason at all to assume California prosecutors will attempt to stifle interstate commerce by filing charges for acts committed in other jurisdictions, or where only "de minimis" acts, such as those hypothesized in Pataki, are committed within this state. [cites omitted].

Id at 473. The court summed its holding:

> In short, given the requirement that those charged must intend to seduce and the additional requirement that they must commit at least an attempt here, no rational analysis supports the proposition section 288.2 imposes any burden on interstate commerce, as (1) such burdens as may exist are not upon any protected right of commerce at all, and (2) enforcement of the statute is not likely to significantly, or at all, burden interstate commerce.

Id.

In People v. Hsu, 99 Cal.Rptr.2d 184, 189 (Cal. 1st App. Dist.), *rev. den.* 2000 Cal. LEXIS 9303 (Cal. 2000), Hsu facially challenged California statute §288.2 under the Commerce Clause. The court acknowledged that the internet is an incident of interstate commerce, but observed:

> [T]he fact that communication thereby can affect interstate commerce does not automatically cause a state statute in which Internet use is an element to burden interstate commerce. Absent conflicting federal legislation, states retain their authority under their general police powers to regulate matters of legitimate local concern, even if interstate commerce may be affected.

Id. at 190.

Applying the balancing test found in Pike, the court held §288.2 did not violate the Commerce Clause:

> Under the Pike test, section 288.2, subdivision (b) does not violate the commerce clause. Statutes affecting public safety carry a strong presumption of validity, and the definition and enforcement of criminal laws lie primarily with states. States have a compelling interest in protecting minors from harm generally and certainly from being seduced to engage in sexual activities. Conversely, it is difficult to conceive of any legitimate commerce that would be burdened by penalizing the transmission of harmful sexual material to known minors in order to seduce them. To the extent section 288.2, subdivision (b) may affect interstate commerce, its effect is incidental at best and far outweighed by the state's abiding interest in preventing harm to minors. [cites omitted].

Id.

Hsu also held the California law did not subject internet users to inconsistent state regulation due to its narrow scope:

> The knowledge and intent elements missing from the New York statute but present in section 288.2, subdivision (b) significantly distinguish the two statutes. The New York statute broadly banned the communication of harmful material to minors via the Internet. The scope of section 288.2, subdivision (b) is much narrower. Only when the material is disseminated to a known minor with the intent to arouse the prurient interest of the sender and/or minor and with the intent to seduce the minor does the dissemination become a criminal act. The proscription against Internet use for these specifically defined and limited purposes does not burden interstate commerce by subjecting Internet users to inconsistent regulations.

Id. at 191.

The court dismissed another concern from Pataki, that the statute violated the Commerce Clause by regulating behavior wholly outside California. *Id*. It held California's penal scheme limited prosecutions to criminal acts that occur wholly or partially within the state. *Id*. Consequently, enforcement of §288.2 did not burden interstate commerce. *Id*. at 192.

In People v. Foley, 709 N.Y.S.2d 467, 470 (N.Y. Ct. App. 2000), *cert. den.,* 531 U.S. 875, 121 S.Ct. 181 (2000), the appellant challenged a New York statute (penal law 235.22) that made criminal the use of sexually explicit communications via the computer to lure children into harmful conduct. Rejecting a Commerce Clause challenge, the court held the statute did not

burden interstate commerce because of the additional "luring" prong:

> Penal Law § 235.22 does not discriminate against or burden interstate trade; it regulates the conduct of individuals who intend to use the Internet to endanger the welfare of children. Although Penal Law §§ 235.22 contains some of the same language as the provision in Penal Law §§ 235.21(3) struck down in American Libs., the statute challenged here contains the additional "luring" prong. We are hard pressed to ascertain any legitimate commerce that is derived from the intentional transmission of sexually graphic images to minors for the purpose of luring them into sexual activity. Indeed, the conduct sought to be sanctioned by Penal Law §§ 235.22 is of the sort that deserves no "economic" protection. Thus, we conclude that Penal Law §§ 235.22 is a valid exercise of the State's general police powers. [cites omitted].

Id. at 476-77.

Here, §847.0135(3) is a specific intent statute. It makes criminal the use of a computer on-line service to solicit or lure a child to commit sexual acts. The luring or soliciting element of the crime greatly narrows the statute's scope, to criminal act that could not be legitimate commerce. The statute cannot reach conduct wholly outside Florida, because subsection (5) requires the "child" to be "residing in this state."

As in Hsu, other state law limits the reach of Florida prosecutions. *See* §910.005, Florida Statutes (2002) (requiring an offense to be committed wholly or partly in this state,

etc.). Therefore, prosecutions under §847.0135 are limited to when the recipient-minor resides in Florida.

The Commerce Clause concerns set forth in Pataki are not applicable to §847.0135. Although the internet can touch on interstate activity, the intent to seduce element limits the effect of the statute to that very narrow class of adults who specifically intend to have sex with children. Communications by these adults do not command national regulation and are not protected under the Commerce Clause. Based on the statute's express language and other Florida jurisdictional statutes, there is no extraterritorial enforcement.

The State has a compelling interest in protecting minors from being seduced. No legitimate interstate commerce is burdened; any incidental effect on such commerce is far outweighed by the state's interest. There is no risk of burdening commerce, because deliberate use of the internet to entice minors into sexual activities simply is not "commerce" protected by the Commerce Clause. Under the Pike test, §847.0135 does not violate the Commerce Clause.

Section 847.0135(5) expressly makes "child residing in this state" a matter of jurisdiction. The Legislature could have relied on the generally applicable jurisdictional limits codified in §910.005, Florida Statutes, but did not. The only

reasonable inference is that the legislature intended the State to affirmatively prove jurisdiction, and thus at least partial occurrence of the crime in Florida, by showing the "child" being enticed or lured resides in Florida.

Given this, and the fact §847.0135 prescribes a specific intent crime which cannot possibly be characterized as legitimate commerce, §847.0135 does not facially violate the Commerce Clause. *Cf*. Lopez, 514 U.S. at 561, 115 S.Ct. at 1631 (invalidating the Gun Free School Zones Act as beyond Congress' Commerce Clause power; and rejecting the possibility that the Act regulated activity which substantially affected interstate commerce, in part because the Act contained "no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce"). Here, Florida does the reverse. It requires, as a jurisdictional element, that the prosecution prove the crime was not wholly outside this state.

Simmons concludes his argument with lengthy and sole reliance on a law review article: Pann, *The Dormant Commerce Clause and State Regulation of the Internet [etc.],* 2005 Duke L. & Tech. Rev. 8 (March 31, 2005) {hereinafter *Pann*]. The article contends various state courts' analyses of dormant Commerce Clause challenges to state "luring" statutes are wrong:

> [An internet user] is not able to ascertain another Internet user's age and geography unless that information is truthfully volunteered. This leaves an Internet user whose conduct is criminal under [another state's] statute but legal in his or her home state to be faced with the Hobson's choice of either forgoing conduct acceptable in his home state or exposing himself to possible criminal liability . . . . It is this dilemma that the federal courts in the state dissemination cases have uniformly declared a projection of state policy extraterritorially in violation of the Dormant Commerce Clause. [e.s.; footnotes omitted].

Id. at p.35.

This language fails to consider any statutory requirements, such as those in §847.0138, that the defendant have prior knowledge the recipient is in a particular state. It also fails to recognize any statutory requirements, such as those in §847.0135, that the prosecuting state meet statute-specific jurisdictional limits. *Pann* is not persuasive.

3. Congress has Deliberately Declined to Regulate "Personal" Computer Messages

Very recently, the U.S. Supreme Court issued Gonzales v. Raich, 2005 U.S. LEXIS 4656 (June 6, 2005); a case starkly illustrating the breadth of Congress' affirmative power under the Commerce/Necessary and Proper clauses. By comparison to the dormant Commerce Clause challenges Simmons mounts here, this new decision shows Congress deliberately declined to regulate personal computer messages in COPA; thereby implying the states have great latitude to do so.

Raich held the federal Controlled Substances Act (CSA) was a proper exercise of Commerce Clause power by Congress; and the Necessary and Proper Clause allowed the CSA to supercede California's Compassionate Use Act. *See id.* at *56-7 (concluding the CSA and the Wickard decision foreclose the claim that "a locally cultivated product that is used domestically rather than sold on the open market is not subject to federal regulation").

As parsed by the Court, the CSA is a:

> closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA. 21 U.S.C. §§841(a)(1), 844(a). The CSA categorizes all controlled substances into five schedules. §812. . . . Each schedule is associated with a distinct set of controls regarding the manufacture, distribution, and use of the substances listed therein. §§821-830. The CSA and its implementing regulations set forth strict requirements regarding registration, labeling and packaging, production quotas, drug security, and recordkeeping. *Ibid*. 21 CFR §1301 et seq. (2004). [e.s.].

Raich, 2005 U.S. LEXIS 4656 at *23.

In contrast, Congress has been silent on use of the internet to send non-commercial email. It deliberately limited the preeminent federal law, COPA, to "commercial purposes." That statute--First Amendment infirmities notwithstanding--makes unlawful the knowledgeable posting, on the world wide web, of harmful material available to any minor for "commercial

purposes." §231(a)(1). A person acts for "commercial purposes" when "engaged in the business of making such communications."

In pertinent part, "[e]ngaged in the business" means:

> the person who makes a communication . . . by means of the World Wide Web, that includes any material that is harmful to minors . . . as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities[.] [e.s.].

§231(e)(2). Thereby, COPA does not address non-commercial computer messages, such as individually-addressed email which posit culpability under §847.0138. It does not address non-commercial email which would lure a child into sexual activity, thus culpable under §847.0135. In short, it far from the "closed regulatory system" established by the CSA.

Congress has done more than remain silent as to conduct regulated by the laws at issue. Instead, it has deliberately left open the field of personal email, by limiting COPA to "commercial purposes," and through the definition of "[e]ngaged in the business." Similarly, the far-reaching exercise of power upheld in Raich is not present here. Sections 847.0138 and .0135 do not implicate the Commerce Clause or impede Congress' exercise of power under that Clause.

4. "Florida Cyberspace"

To this point, the State has tacitly accepted Simmons' assumption that an internet user remains in his "home" state

despite sending messages to a known destination. The State now asks this court to abandon such assumption, and announce a legal fiction reflecting the pervasive nature of cyberspace: When an internet user knows the location of the recipient before sending a culpable message, the user does not remain in his "home" state. Instead, the user voluntarily enters cyberspace of the message's known destination; here, "Florida cyberspace."

If so, then Simmons' messages were the legal equivalent of intrastate messages made criminal by a facially neutral law. The dormant Commerce Clause is not violated. *Cf*. American Trucking, 2005 WL 1421164,*3 (upholding state law imposing $100 fee only upon intrastate transactions, when statute not facially discriminatory and observing: "Nothing in our case law suggests that such a neutral, locally focused fee or tax is inconsistent with the dormant Commerce Clause.").

Return to Simmons' claim that §847.0138 and §847.0135 export Florida law. By resting, implicitly, on the assumption he remained in Virginia, he would export that state's law all over the country; escaping culpability unless his conduct were criminal under Virginia law. Even this possibility seems remote, however, as it is difficult to fathom Virginia's interest in protecting minors who live in other states.

Simons cannot have it both ways. The same internet which put "Sandi" at his fingertips also put Florida law at his fingertips. He did not have to guess at criminal liability. By sending a culpable message after learning "Sandi" was a 13-year-old-girl in Lake City, Florida; he entered this state and was subject to its laws.

The Commerce Clause does not protect rampant crime-—often, sexual exploitation of children--simply because computers are used to transmit speech. The conduct prohibited by §847.0138 and §847.0135 is not legitimate commerce. Neither statute reaches conduct wholly outside this state, unduly burdens legitimate commerce, or subjects internet users to inconsistent regulation. Neither violates the dormant Commerce Clause.

CONCLUSION

Simmons' constitutional challenges to sections 847.0138 and 847.0135, Florida Statutes, must be rejected; thereby affirming the decision of the First District Court of Appeal.

CERTIFICATES OF SERVICE AND COMPLIANCE WITH RULE 9.210

I certify a copy of this AMENDED ANSWER BRIEF has been sent by U.S. mail to Simmons' attorneys: **WILLIAM J. SHEPPARD., D. GRAY THOMAS & MATTHEW R. KACHERGUS**, Sheppard et al., P.A., 215 Washington Street, Jacksonville, Florida 32202; on June ___, 2005. I certify this brief complies with Fla.R.App.P. 9.210.

Respectfully submitted,

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