IN THE
SUPREME COURT OF FLORIDA

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CASE NO.: SC04-2375

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MICHAEL JOHN SIMMONS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court, Third Judicial Circuit in and for Columbia County, Florida

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INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

This criminal appeal challenges the trial court's denial of Michael John Simmons' two motions to dismiss the information filed against him, challenging the facial constitutionality of statutes under which he was charged. In an information filed July 26, 2002, Simmons was charged in count one with luring or enticing a child by use of an on-line service, in violation of §847.0135, Fla. Stat. (2002); in count two with transmission of materials harmful to a minor, in violation of §847.0138, Fla. Stat. (2002); and in count three with carrying a concealed firearm, in violation of §790.01(2), Fla. Stat. (2002). [R. I. 1-2].

Simmons moved to dismiss count one of the information, alleging that §847.0135, Fla. Stat. (2002), imposes an unconstitutional burden on interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution. [R. I. 76-77]. He moved to dismiss count two on the grounds that §847.0138, Fla. Stat. (2002), violates the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 4 and 9 of the Florida Constitution, as well as imposing an unconstitutional burden on interstate commerce

in violation of Article I, Section 8, Clause 3 of the United States Constitution. [R. I. 58-63]. Following hearings, the trial court entered orders denying Simmons' motions. [R. I. 88, 104]. Simmons pled no contest to counts one and two of the information, reserving his right to appeal the denial of his motions to dismiss, which were stipulated and found to be dispositive.[1] [R. I. 101]. Simmons was sentenced to two concurrent terms of probation for five years. [R. I. 111]. Thereafter, Simmons timely filed his notice of appeal. [R. I. 122-23].

On appeal, the First District affirmed. *Simmons v. State,* 886 So.2d 399 (Fla. 1st DCA 2004). The court below first held, in light of one of its prior decisions, that §847.0135 does not violate the Commerce Clause of the United States Constitution. 886 So.2d at 401, *citing Cashatt v. State,* 873 So.2d 430 (Fla. 1st DCA 2004). The court also held that §847.0138 does not violate First Amendment principles, is not unconstitutionally vague and does not violate the Commerce Clause. 886 So.2d at 402-07. Judge Browning concurred on the constitutionality of §847.0135 but dissented as to the remaining issues, concluding that §847.0138 is not narrowly tailored to a compelling state interest, is void for vagueness and overbreadth, and violates the Commerce Clause, rendering that statute facially unconstiutional. 886 So.2d at 407-14.

[1] Count three was dismissed by the State. [R.V. 184].

Simmons filed a timely notice to invoke this Court's jurisdiction to review the First District's decision. The Court accepted jurisdiction, and this brief follows.

The facts giving rise to this appeal are as follows. In the early morning hours of July 1, 2002, Columbia County Sheriff's Deputy Kenneth Neff entered an Internet chat room, titled "I like older men," posing as a 13-year old girl. [R. I. 17-18]. An on-line conversation ensued between Deputy Neff and Simmons, who was located in the Commonwealth of Virginia. [R. I. 18]. During their on-line conversation, Simmons sent photographs to Deputy Neff. [R. I. 19]. Over the next two weeks, Simmons and Deputy Neff had several more on-line conversations. [R. I. 24-25]. On July 15, 2002, members of the Columbia County Sheriff's Office arrested Simmons in Lake City, Florida, and Simmons was prosecuted for the above-described offenses. [R. I. 10-11]. *See also, Simmons,* 886 So.2d at 400-01.

SUMMARY OF THE ARGUMENT

The Court should quash the First District's decision in this case and hold that §847.0138, Fla. Stat. (2002), is unconstitutional. While only the First District has addressed the constitutionality of §847.0138, every federal court to have addressed similar statutes has found that such statutes violate the First Amendment. Section 847.0138 abridges First Amendment freedoms because the statute is not narrowly tailored to serve the State's interest in protecting minors from sexually explicit materials. In seeking to prohibit Internet communications that are "harmful to minors," the statute prohibits adults from engaging in constitutionally protected speech and so is overbroad. In addition, the ambiguity inherent in determining what may or may not be "harmful to minors" renders the statute unconstitutionally vague. Furthermore, there exist far less intrusive measures to protect minors from sexually explicit material than suppressing large amounts of constitutionally protected adult speech. Accordingly, §847.0138 violates the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 4 and 9, of the Florida Constitution.

The Court also should quash the First District's holding in this case and find that both §847.0135 and 847.0138 violate the Commerce Clause of the United

States Constitution. In so doing, the Court also should disapprove the holding in *Cashatt v. State*, 873 So.2d 430 (Fla. 1st DCA 2004), that §847.0135 does not violate the Commerce Clause. The statutes unconstitutionally project Florida law upon other states, thereby encroaching on the sovereignty of the other states.

The burdens the statutes impose upon interstate commerce far exceed any local benefit derived from the statutes. Enforcement of the statutes will pose unreasonable burdens on interstate commerce as those communicating on-line will be forced to censor their constitutionally protected speech in order to avoid the statutes' prohibitions. The statutes' chilling effect on protected speech places an undue burden on interstate commerce. Furthermore, the statutes can have no effect on communications originating overseas, and, therefore children will still be exposed to vast amounts of sexually explicit materials and to those desiring to engage in sexual conduct on the geographically boundless internet.

The statutes also violate the Commerce Clause because they subject an instrumentality or channel of interstate commerce, the Internet, to inconsistent state regulations. The Internet, by its very nature, is an instrumentality or channel of interstate commerce that requires cohesive national treatment. Florida's attempt to regulate the Internet subjects it to inconsistent state regulations which inhibit the

growth of the Internet. Accordingly, §§847.0135 and 847.0138 violate the Commerce Clause.

ARGUMENT

I.

SECTION §847.0138, FLA. STAT. (2002), VIOLATES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 4 OF THE FLORIDA CONSTITUTION.

Appellate review of the constitutionality of a statute is *de novo,* because it presents a pure question of law. *See State v. J.P.*, ___ So.2d ___, 30 F.L.W. S331, S332 (Fla. May 5, 2005); *City of Miami v. McGrath*, 824 So.2d 143, 146 (Fla. 2002). When a statute impairs a fundamental right, the reviewing court must apply the strict scrutiny standard in its review. *See, e.g., Reno v. Flores*, 407 U.S. 292, 302 (1993); *Mitchell v. Moore,* 786 So.2d 521, 527 (Fla. 2001).

Section 847.0138, Fla. Stat. (2002), violates the First and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 4 and 9 of the Florida Constitution because the statute is not narrowly tailored to serve a compelling state interest, is vague and is overbroad. The statute restricts access of both adults and minors to material considered "harmful to minors," and, therefore,

places an unconstitutional burden on protected adult speech. In essence, the statute limits communications on the Internet to those which would only be suitable for children, thereby depriving adults of their constitutional right to engage in protected speech. As a result, the statute is impermissibly overbroad.

Section 847.0138(3)[2] provides:

> 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[3] 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 definition of "harmful to minors" is set forth in §847.001(6), Fla. Stat. (2002), which provides:

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[2] The information charged Simmons with violating subsection (3) of the statute in Count II, as such count alleged that Simmons, "being a person in a jurisdiction other than this state," committed the offense. [R. I. 1].

[3] Section 847.0138(1)(b), Fla. Stat. (2002), provides the following definition for transmit: "Transmit' means to send to a specific individual known by the

> "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:
>
> (b) Predominantly appeals to the prurient, shameful, or morbid interest minors;
>
> (b) Is patently offensive to prevailing standards in the adult community a whole with respect to what is suitable material for minors; and
>
> (c) Taken as whole, is without serious literary artistic, political, or scientific va for minors.

Thus, §847.0138 regulates communications based upon the content of such communications; communications over the Internet deemed "harmful to minors" are prohibited. Because §847.0138 is a content based restriction on expression protected by the First Amendment, it is presumptively invalid and can only be upheld if it survives strict scrutiny. *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000).

The United States Supreme Court has emphasized that strict scrutiny applies to content-based regulation of Internet speech. *See Reno v. ACLU,* 521 U.S. 844, 870 (1997). To satisfy strict scrutiny, a law must be narrowly tailored to promote a

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defendant to be a minor via electronic mail."

compelling government interest. *See Playboy,* 529 U.S. at 813; *In Re Adoption of Proposed Local Rule 17 of Criminal Division of Circuit Court of Eleventh Judicial Circuit,* 339 So.2d 181, 184 (Fla. 1976). To be narrowly tailored, a law must employ the least restrictive means to achieve the state interest, and a nexus must exist between the compelling state interest and the restriction. *See PSINet, Inc. v. Chapman,* 108 F.Supp.2d 611, 623 (W.D. Va. 2000) *(citing City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989)). *See, also, Florida Bar v. Brumbaugh,* 355 So.2d 1186, 1192 (Fla. 1978) (finding State may not choose the way of greater interference with constitutionally protected activity and, if it acts at all, it must choose the less drastic means). Assuming *arguendo* that the State has a compelling interest in prohibiting sexually explicit materials from reaching minors, §847.0138 is not sufficiently narrowly tailored to promote such interest, and, therefore, fails to pass muster under strict scrutiny analysis.

As the court in *PSINet, Inc.*, 108 F.Supp.2d at 623, noted:

> Every court to address a [statute comparable to §847.0138, Fla. Stat. (2002)], has held that the statute violates either the First Amendment or the Commerce Clause, or both, and all of these courts have enjoined the enforcement of the particular State statute, just as the plaintiffs seek to do in the present case.

The Third Circuit of Appeals, affirming in *PSINet,* has since held unconstitutional

the Virginia statute prohibiting Internet dissemination of material harmful to minors. *PSINet, Inc. v. Chapman,* 362 F.3d 227 (4th Cir. 2004).

In *Reno v. ACLU*, 521 U.S. 844 (1997), the Supreme Court granted certiorari to review a decision declaring the "Communications Decency Act of 1996" ("CDA") unconstitutional.[4] In *Reno*, plaintiffs challenged the CDA as facially

[4] The CDA had two statutory provisions similar to §847.0138 which were challenged. The first, 47 U.S.C. §223(a), known as the "indecent transmission" provision imposed liability on anyone who:

> (B) by means of a telecommunications device knowingly
>
> (i) makes, creates, or solicits, and
> (ii) initiates the transmission of,
>
> * * *
>
> Any communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age.....

The second provision of 47 U.S.C. §223(d), the "patently offensive display" provision, imposed liability on anyone who knowingly:

> (b) uses an interactive computer service to send to a specific person or persons under 18 years of age, or
> (B) uses any interactive computer service to display in a manner available to a person under 18 years of age,
>
> * * *
>
> any communication that, in context, depicts or describes,

overbroad in violation of the First Amendment and vague in violation of the Fifth Amendment. *Id.* at 862-62. The Court held the statutes were impermissibly overbroad and vague in violation of the First Amendment without reaching the Fifth Amendment vagueness issue. *Id.* at 864.

In declaring the CDA unconstitutional, the Court considered both the language and breadth of the act, as well as the nature and function of the Internet.[5] The Court found that the CDA was a content-based regulation of speech that was subject to strict scrutiny analysis. *Id.* at 870-71. Employing such analysis, the Court found the CDA impermissibly vague, stating: "[t]he vague contours of the coverage of the statute...unquestionably silences some speakers whose messages would be entitled to constitutional protection." *Id.* at 874. The Court also found the statutes to be overly broad, noting: "[t]he breadth of the CDA's coverage is wholly unprecedented," as it "applies broadly to the entire universe of cyberspace." *Id.* at 868, 877.

> in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.... *See Reno,* 521 U.S. at 858-60.

[5] For extensive descriptions of the contours of the Internet, *see Reno,* 521 U.S. at 849-57, and *Cyberspace Communications, Inc. v. Engler,* 55 F.Supp.2d 737, 740-44 (E.D. Mich. 1999).

The Court rejected attempts by the Government to salvage the statute by arguing that the prohibition of the transmissions in question to recipients known to be minors would not interfere with adult-to-adult communications. *Id.* at 876. The Government further argued that the Act's "knowledge" requirement, especially when coupled with the "specific child" element, saved the CDA from being overbroad. *Id.* at 880. The Court concluded otherwise, stating:

> This argument ignores the fact that most Internet forums - including chat rooms, news groups, mail exploders, and the Web - are open to all comers. The Government's assertion that the knowledge requirement somehow protects the communications of adults is therefore untenable. 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," would be present.

Id. (citation omitted).

The Court held that the CDA violated the First Amendment by impermissibly suppressing a large amount of speech that adults have a constitutional right to receive and address to one another. *Id.* at 874. The Government's interest in protecting children from harmful materials, while laudable, did not justify an unnecessarily broad suppression of speech addressed to adults. *Id.* at 875.

"[R]egardless of the strength of the government's interest in protecting children, '[t]he level of discourse reaching a mail box simply cannot be limited to that which would be suitable for a sandbox.'" *Id.* (*quoting*, *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 74-75 (1983)). *See also*, *Ashcroft v. ACLU*, ___ U.S. ___, 124 S.Ct. 2783, 2788 (2004) ("content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people").

Following the Supreme Court's holding in *Reno* that the CDA abridged free speech rights under the First Amendment, Congress passed the Child Online Protection Act ("COPA") in an effort to regulate speech on the Internet. COPA also seeks to prohibit communications which are "harmful to minors." *See* 47 U.S.C. §231(a)(1). The statute defines "harmful to minors" in a fashion similar to §947.001(3), Fla. Stat. (2002), both drawing from the three-part test for obscenity established in *Miller v. California*, 413 U.S. 15 (1973). *See* 47 U.S.C. §231(e)(6). The Supreme Court has affirmed a preliminary injunction against enforcement of COPA on the ground that the statute likely violates the First Amendment. *Ashcroft v. ACLU*, ___ U.S. ___, 124 S.Ct. 2783, 159 L.Ed. 2d 690 (2004).

Numerous other courts have stricken state statutes similar to §847.0138 on

First Amendment grounds. In *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999), the court struck a New Mexico statute criminalizing dissemination by computer of material that is harmful to a minor. The statute challenged in *Johnson* provided:

> Dissemination of material that is harmful to a minor by computer consists of the use of a computer communications system that allows the input, output, examination or transfer of computer data or computer programs from one computer to another, to knowingly and intentionally initiate or engage in communication with a person under eighteen years of age when such communication in whole or in part depicts actual or simulated nudity, sexual intercourse or any other sexual conduct. Whoever commits dissemination of material that is harmful to a minor by computer is guilty of a misdemeanor.

Id. at 1152. The statute defined "harmful to minors" in a manner nearly identical to the definition set forth in §847.001(6), Fla. Stat. (2002); the New Mexico statute defined the term as material "which (1) predominantly appeals to the prurient, shameful or morbid interest of minors, and (2) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (3) is utterly without redeeming social importance for minors." *Id.* at 1155, n.3. Plaintiffs sought to enjoin enforcement of the statute as facially invalid under the First Amendment. *Id.* at 1153.

The court began its analysis by noting that "[s]exual expression which is

indecent but is not obscene is protected by the First Amendment." *Id.* at 1156 *(quoting, Sable Communications, Inc. v. FCC,* 492 U.S. 115, 126 (1989)). With this premise in mind, the Tenth Circuit Court of Appeals to applied strict scrutiny to the statute in question as it was a content-based regulation of speech. *Johnson*, 194 F.3d at 1156. As required by the Supreme Court's ruling in *Reno, id.* at 1158, the court found that the New Mexico statute violated the First Amendment.

In an attempt to save the statute, the State urged the court to narrowly construe the statute to reach only the following situations: (1) communications using a computer system in which (2) the sender deliberately ("knowingly and intentionally") (3) sends a message which is "harmful to minors" (4) to a specific individual recipient who the sender knows to be a minor. *Id.* The court refused to apply a narrowing construction, finding that such construction "amount[s] to a wholesale rewriting of the statute." *Id.* at 1159. The court refused to construe the statute as applying to only one-on-one communications with a minor because the statute did not limit its scope to such one-on-one communications. *Id.*

The State also asserted that the intent clause ("knowingly and intentionally initiate or engage in communication with a person under eighteen") limited the breadth of the statute so as to render it constitutional. *Id.* The statute defined

"knowingly" in terms strikingly similar to the knowledge element contained in §847.0138(1)(a);[6] "knowingly" was defined as "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." *Id.* The court found that the intent clause did not sufficiently narrow the scope of the statute, relying on the Supreme Court's finding in *Reno* that "[g]iven the size of the potential audience for most messages [on the Internet], 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." *Id.* (*quoting Reno,* 521 U.S. at 876).

The court concluded that the statute unconstitutionally burdened otherwise protected adult communication on the Internet and was not susceptible to the narrowing construction advanced by defendants. *Id.* at 1160. As a result, the court upheld the injunction against enforcement of the unconstitutional statute. *Id.* at 1164. *See also, Bookfriends, Inc. v. Taft,* 223 F.Supp.2d 932 (S.D. Ohio 2002) (enjoining Ohio statute criminalizing dissemination to juveniles of materials defined in statute as "harmful to juveniles" for violation of the First Amendment); *American Booksellers Foundation for Free Expression v. Dean,* 202 F.Supp.2d 300 (D. Vt.

[6] Section 847.0138(1)(a), defines "[k]nown by the defendant to be a minor" as "mean[ing] that the defendant had actual knowledge or believed that the recipient

2002) (entering permanent injunction against enforcement of a Vermont statute criminalizing distribution in an electronic format of sexually explicit materials that are harmful to minors); *PSINet, Inc. v. Chapman*, 108 F.Supp.2d 611 (W.D. Va. 2000) (entering preliminary injunction against enforcement of Virginia statute criminalizing dissemination by computer of material that is harmful to minors because the statute violates the First Amendment); *PSINet v. Chapman*, 167 F.Supp.2d 878 (W.D. Va. 2001) (entering permanent injunction); *PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004) (affirming permanent injunction and holding Virginia statute unconstitutional); *Cyberspace Communications, Inc. v. Engler*, 55 F.Supp.l2d 737 (E.D. Mich. 1999) (entering preliminary injunction against enforcement of Michigan statute criminalizing dissemination by computer of sexually explicit material that is "harmful to minors" because the statute violates the First Amendment); *Cyberspace Communications, Inc. v. Engler*, 142 F.Supp.2d 827 (E.D. Mich. 2001) (entering permanent injunction).

Just as numerous courts across the nation have declared unconstitutional statutes prohibiting the dissemination over the Internet of material deemed "harmful to minors," this Court should find that §847.0138 violates the First Amendment. The statute is not narrowly tailored to serve a compelling State interest, but rather is

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of the communication was a minor."

substantially overbroad. By prohibiting communications on the Internet deemed "harmful to minors," the statute brings within its ambit a large category of constitutionally protected adult speech. Adults desiring to communicate on the Internet must censor their communications so as to tailor them to the requirements of §847.0138. As the Supreme Court observed: "The Government may not 'reduc[e] the adult population...to...only what is fit for children." *Reno,* 521 U.S. at 875, *(citing Denver Area Ed. Telecommunications Consortium, Inc. v. FCC,* 518 U.S. 727, 759 (1996)).

Furthermore, the requirement that material which is "harmful to minors" appeal to the prurient interest of minors does not substantially narrow the scope of §847.0138. As Justice Stevens observed in his dissent in *Ashcroft v. ACLU,* 122 S.Ct. at 1725, "[a]rguably every depiction of nudity – partial or full - is in some sense erotic with respect to minors." The serious value prong likewise fails to adequately minimize the statute's overbreadth, as this prong of the *Miller* standard adds to the distinctive qualifying phrase "for minors." In adding this qualifier to the *Miller* standard, the legislature reasonably concluded there exist a substantial number of literary, artistic and educational works that have serious value for adults but not children. Although this prong of the definition somewhat narrows the scope

of the statute's sweep, it nevertheless prohibits a large amount of protected speech. By criminalizing a vast amount of constitutionally protected adult speech, §847.0138 is unconstitutionally overbroad.

In addition, the statute is impermissibly vague. In defining what material is harmful to minors, §847.001(6), Fla. Stat. (2002), makes no distinction between different ages of minors. This failure to discriminate between different age groups renders the statute constitutionally infirm. What may be harmful to a 10-year old child is not necessarily harmful to a 17-year old.[7] *See Simmons*, 886 So.2d 409-10, 413 (Browning, J., concurring in part and dissenting in part). However, because the statute makes no effort to distinguish between children of different ages, those communicating on the Internet will be forced to communicate in terms acceptable to only the youngest and most naive children. The statute's chilling effect on constitutionally protected speech compels the conclusion it is impermissibly vague under the First Amendment.

In addition, §847.0138 is not narrowly tailored as it fails to employ the least restrictive means (to achieve the State's interest). Other means are available to limit a minor's ability to access sexually explicit material that do not prohibit protected

[7] Section 847.001(8), Fla. Stat. (2002), defines a "minor" as "any person under the age of 18 years."

speech. Software is available that filters the content of materials a minor can access on the Internet. *See Cyberspace Communications, Inc.*, 55 F.Supp.2d at 750. Internet service providers also provide parental controls which enable parents to set different levels of restrictions on which material can be accessed on the Internet. *Id.* Through supervision, parents can limit the material to which their children are exposed on the Internet. *Id.* at 750-51. Unlike §847.0138, all of these methods of limiting a minor's access to harmful material do not require that suppression of constitutionally protected speech. Thus, 847.0138 is not narrowly tailored to achieve the State's interest.

The overbreadth and vagueness of §847.0138 further establish that the statute is not narrowly tailored to further a compelling state interest. Assuming *arguendo,* the State has a compelling interest in prohibiting dissemination of sexually explicit materials to minors, the statute prohibits engaging in constitutionally protected adult speech to further its objectives. "Even under the guise of protecting minors, the government may not justify the complete suppression of constitutionally protected speech because to do so would 'burn the house to roast the pig.'" *Cyberspace Communications, Inc.*, 55 F.Supp.2d at 747-48 (*quoting Butler v. Michigan*, 352 U.S. 380, 383 (1957). In addition, the ambiguity inherent in the definition of what

constitutes materials that are "harmful to minors," "unquestionably silences some speakers where messages would be entitled to constitutional protection." *Reno,* 521 U.S. at 874. The overbreadth and vagueness of §847.0138 demonstrate that §847.0138 is not narrowly tailored to promote the State's interest.

The Court should adopt the appropriate analysis of Judge Browning in his partial dissent below. With respect to §847.0138, which he concludes "is not narrowly tailored to promote a compelling governmental interest, is void for vagueness, and violates the overbreadth principle under the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 4 and 9 of the Florida Constitution," and also violates the Commerce Clause. *Id.* at 407 (Browning, J., concurring in part and dissenting in part) (footnote omitted). Judge Browning concluded that the statutes was not sufficiently narrowly tailored because its reach was not confined to one-on-one email communications, rather than just "electronic mail" as the State has conceded in its brief in that court. *Id.* at 407-08. Judge Browning also observed that a heckler's veto could silence an internet chat room of adult conversation by simply advising members of a chat room of the name and minority status of a minor member of the chat room, constituting a "heckler's veto." *Id.* at 409. Judge Browning further concluded that the definition

of "minor" is not narrowly tailored because it take a "one size fits all" view of all persons ranging in age from infancy to 17 year olds. *Id.* In so doing, communications regarding basic sex education, prevention of sexually transmitted diseases, certain artistic works and other legitimate communications are criminalized by the statute if communicated to minors by way of the internet. *Id.* at 409. Judge Browning also persuasively refutes the lower court majority's distinction of federal precedent an reliance on a California decision grounded on a statute significantly different than §847.0138. *Id.* at 410-13. Judge Browning clearly demonstrates how the statute unconstitutionally burdens interstate commerce, in violation of the Commerce Clause of the United States Constitution. *Id.* at 413-14. *See Simmons*, 886 So.2d at 407-14 (Browning, J., concurring in part and dissenting in part).

Judge Browning's view is properly reasoned and clearly supported by precedent. Section 847.0138, on its face, is vague, overbroad, not narrowly tailored and burdensome of interstate commerce. Accordingly, the Court should quash the decision of the First District in this case.

II.

SECTIONS §847.0138 AND 847.0135, FLA. STAT. (2002), VIOLATE THE DORMANT COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

The Court reviews the pure legal question of the constitutionality of a statute under the *de novo* standard. *State v. J.P.*, ___ So.2d ___, 30 F.L.W. S331, S332 (Fla. May 5, 2000); *City of Miami v. McGrath*, 824 So.2d 143, 1446 (Fla. 2002).

Sections 847.0138 and 847.0135, Fla. Stat. (2002), violate the Commerce Clause[8] of the United States Constitution as such statutes are unconstitutional intrusions into interstate commerce. The statutes violate the Commerce Clause by: (1) regulating conduct occurring wholly outside the State of Florida; (2) constituting unreasonable burdens on interstate commerce; and (3) subjecting interstate use of the Internet to inconsistent state regulation.

The Commerce Clause is more than an affirmative grant of power to Congress; it contains negative or "dormant" aspects as well. "The negative or dormant implication of the Commerce Clause prohibits state...regulation that discriminates against or unduly burdens interstate commerce and thereby 'imped[es] free private trade in the national marketplace.'" *General Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997) (*quoting Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980)) (citations omitted). *See also*, *Quill Corp. v. North Dakota*, 504 U.S.

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[8] The Commerce Clause of the United States Constitution provides: "The Congress shall have power...to regulate commerce with foreign nations, and among the several States, and within the Indian Tribes." U.S. Const. Art. I, §8, cl. 3.

298, 312 (1992) (stating "Under the Articles of Confederation, state taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for these structural ills. It is in this light that we have interpreted the negative implication of the Commerce Clause."). In addition, the United States Supreme Court has long recognized that state regulation of those aspects of commere that by their unique nature demand cohesive national treatment offends the Commerce Clause. *See e.g., Wabash St. L. & P. Ry. Co. v. Illinois,* 118 U.S. 557 (1886) (holding states cannot regulate railroad rates).

In *American Libraries Ass'n. v. Pataki,* 969 F.Supp. 160, 163 (S.D. N.Y. 1997),[9] plaintiffs representing "a spectrum of individuals and organizations who use the Internet" brought an action to enjoin enforcement of a New York statute, *Penal Law,* §235.21, prohibiting communications (with minors) via computer that depicted nudity, sexual conduct, or sadomasochistic abuse that is harmful to minors. The statute defined "harmful to minors" in a manner virtually identical to the definition set forth in §847.001(6), Fla. Stat. (2002).[10] *Id.* Plaintiffs challenged

[9] In interpreting whether state regulations constitute violations of the Commerce Clause, this Court is to assess the issue in light of "the limitation established by the federal courts." *Div. of Beverage, Dept. of Bus. Reg. v. Bonanni Ship Supply, Inc.,* 356 So.2d 308, 310 (Fla. 1978).

[10] The New York statute, *N.Y. Penal law,* §235.20(6), defined harmful to minors as:

the statute on the ground that unduly burdened free speech in violation of the First Amendment and it unduly burdened interstate commerce in violation of the Commerce Clause. *Id.* at 161. The court determined that the statute violated the Commerce Clause, and, therefore, did not reach plaintiffs' First Amendment claims. *Id.* at 183.

The *Pataki* court held the statute violated the Commerce Clause in three ways, any of which was sufficient to strike the statute as unconstitutional: first, it represented a projection of New York law into conduct occurring wholly outside the state's borders; second, the burdens the statute placed on interstate commerce clearly outweighed any local benefit derived from the statute; and third, the statute attempted to regulate an instrumentality or channel of interstate commerce, *i.e.*, the Internet, that only national legislation could properly regulate so as to avoid the

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> that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:
> (a) Considered as a whole, appeals to the prurient interest of sex of minors; and
> (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) Considered as a whole, lacks serious literary, artistic, political and scientific value for minors.

problems of inconsistent state regulations. *Id*. at 169.

As an initial matter, the court found that the statute in question was "necessarily concerned with interstate communications," *id*. at 172, as "[t]he Internet is wholly insensitive to geographic distinctions." *Id*. at 170. The nature of the Internet is such that by necessity any communication posted will be accessible to anyone across the globe. *Id*. at 171 (stating "no aspect of the Internet can feasibly be closed off to users from another state"). Hence, the court reached "[t]he inescapable conclusion...that the Internet represents an instrument of interstate commerce, albeit an innovative one; the novelty of the technology should not obscure the fact that regulation of the Internet impels traditional Commerce Clause considerations." *Id*. at 173.

The court found that New York's effort to regulate the Internet violated the Commerce Clause by regulating conduct occurring in other states. Relying on a series of prior Supreme Court holdings, the court observed:

> [T]he Commerce Clause has two aspects: it subordinates each state's authority over interstate commerce to the federal power of regulation (a vertical limitation), and it embodies a principle of comity that mandates that one state not expand its regulatory powers in a manner that encroaches upon the sovereignty of its fellow states (a horizontal limitation).

Id. at 175-76 (*citing, Edgar v. MITE,* 457 U.S. 624 (1982); *Healy v. The Beer Institute,* 491 U.S. 324 (1989)). The court found New York's attempt to regulate conduct over the Internet unconstitutionally extended its sovereign powers upon other co-equal sovereigns, finding:

> New York has deliberately imposed its legislation on the Internet and, by doing so, projected its law into other states whose citizens use the Net. 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 (citation omitted).

The *Pataki* court also found that the statute's burdens on interstate commerce exceeded any local benefit the statute provided. In reaching this conclusion, the court applied the two-prong balancing test set forth in *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970), requiring courts first to examine the legitimacy of the state's interest and then weigh the burden on interstate commerce against the local benefit derived from the statute. *Id.* The court accepted that the state's interest in protecting children from pedophilia was legitimate, however, it concluded that such benefit was exceeded by the "extreme" burden the statute imposed on interstate commerce. *Id.* at 177-79. The court correctly observed that the statute

could have no effect on communications originating outside the United States, and, therefore, a large amount of sexually explicit material would still be available to minors on the Internet despite the statute's prohibitions. *Id.* at 178. Additionally, prosecution of individuals outside of the state was "beset with practical difficulties," further reducing the effectiveness of the statute. *Id.*

Against the minimal local benefits the statute purported to provide, the court weighed the burden imposed on interstate commerce, a burden the court characterized as "extreme." *Id.* at 179. The chilling effect on speech resulting from the statute imposed an undue burden on interstate commerce, "as Internet users will steer clear of the Act by a significant margin." *Id.* The court observed that "[i]ndividuals who wish to communicate images that might fall within the Act's proscriptions must thus self-censor or risk prosecution, a Hobson's choice that imposes an unreasonable restriction on interstate commerce." *Id.* at 180.

In addition, the court found that the statute impermissibly subjected interstate use of the Internet to inconsistent state regulations. *Id.* at 181. The Internet represents an instrumentality or channel of interstate commerce which can only be regulated at a national level because of the paralysis resulting from inconsistent state regulatory schemes. *Id.* Citing a long line of Supreme Court precedent, the court

found: "The Internet, like rail and highway traffic...requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations. Regulation on a local level, by contrast, will leave users lost in a welter of inconsistent laws, imposed by different states with different priorities." *Id*. at 182. In defining what material is "harmful to minors" by relying on the "prevailing community standard," the statute forced those communicating on the Internet to "comply with the regulation imposed by the state with the most stringent standard or forego Internet communication of the message that might or might not subject her to prosecution." *Id*. at 183. Due to the dangers of inconsistent state regulation of the Internet, the court found the statute violated the Commerce Clause.

Statutes similar to §847.0138 have been stricken as violative of the Commerce Clause by numerous other courts across America. *See Johnson*, 184 F.3d at 1160-63 (Tenth Circuit Court of Appeals striking statute criminalizing dissemination by computer of material "harmful to minors" as violative of the Commerce Clause); *PSINet*, 108 F.Supp.2d at 626-27 (United States District Court for the Western District of Virginia entering preliminary injunction against enforcement of statute prohibiting dissemination of sexually explicit material harmful to juveniles" finding statute violates Commerce Clause); *PSINet*, 167 F.Supp.2d at

890-91 (entering permanent injunction); *PSINet v. Chapman,* 362 F.3d 227 (4th Cir. 2004) (affirming permanent injunction); *Cyberspace Communications, Inc.,* 55 F.Supp.2d at 751-52 (United States District Court of the Eastern District of Michigan entering preliminary injunction against enforcement of statute criminalizing dissemination by computer of sexually explicit material that is "harmful to minors"); *Cyberspace Communications, Inc.*, 142 F.Supp.2d at 830-31 (entering permanent injunction).

Like the many statutes prohibiting dissemination by computer of material that is 'harmful to minors," §847.0138, as well as §847.0135, violates the Commerce Clause. The statutes, by applying to communications occurring on the Internet, impose the law of Florida upon each and every state in the union. Thus, the statute "has the practical effect of exporting [Florida's] domestic policies," and thereby directly interfering with interstate commerce. *Pataki,* 969 F.Supp. at 174. As the *Pataki* court observed:

> The nature of the Internet makes it impossible to restrict the effects of the [Florida statute] to conduct occurring within [Florida]. An Internet user may not intend that a message be accessible to [Floridians], but lacks the ability to prevent [Floridians] 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 [Florida] and thus subordinate the user's

> home state's policy - - perhaps favoring freedom of expression over a more protective stance - - to [Florida's] local concerns.

Id. at 177.

With respect to §847.0138, the statute unconstitutionally projects Florida's policy regarding what materials are "harmful to minors" to other jurisdictions that may have differing and perhaps less restrictive policies regarding what material is 'harmful to minors." However, due to unique features of the Internet, one communicating on-line in a state taking a different, less-restrictive stance would not know that he or she is committing an offense in Florida, as "[t]he Internet is wholly insensitive to geographic distinctions." *Id.* at 170. Section 847.0135 statute also impermissibly regulates conduct occurring in other states and in the course of interstate communication. In light of the Supreme Court's finding that due to the size of the potential audience on the Internet, those communicating on-line must be charged with knowledge that one or more minors will likely view it, *see Reno*, 521 U.S. at 876, and adults in other jurisdictions engaging in consensual sexual banter would nevertheless be subject to prosecution in Florida under §847.0135 because of a Florida minor's ability to access such communications in a chat room or otherwise.

Florida's attempt to regulate conduct occurring in other states, thereby encroaching upon such other state's sovereignty, is a *per se* violation of the Commerce Clause. *See Pataki*, 969 F.Supp. at 170 ("This encroachment upon the authority which the Constitution specifically confers upon the federal government and upon the sovereignty of [Florida's] sister states is *per se* violative of the Commerce Clause").

In addition, the burdens §847.0138 and 847.0135 impose upon interstate commerce far exceed any local benefit to Florida. Despite the statutes' prohibitions, they cannot reach communications originating outside the United States. As the federal district court that preliminarily enjoined enforcement of the CDA observed:

> [The Act] will almost certainly fail to accomplish the Government's interest in shielding children from pornography on the Internet. Nearly half of Internet communications originate outside the United States, and some percentage of that figure represents pornography. Pornography from, say, Amsterdam, will be no less appealing to a child on the Internet than pornography from [Florida], and residents of Amsterdam have little incentive to comply with the [Act].

ACLU v. Reno, 929 F.Supp. 824, 882 (E.D. Pa. 1996) (footnote omitted). The argument applies with equal force to those who attempt to solicit minors from

overseas.

Apart from the inability to regulate communications emanating overseas, the State has other less-restrictive laws available to protect children. Through vigorous enforcement of existing laws, the State is able to fulfill its interest in protecting children from sexually explicit materials and those who solicit them to perform unlawful sexual acts. Weighed against the minimal local benefits provided by §§847.0138 and 847.0135 is the "extreme" burden the statutes place on interstate commerce. The statutes extend to all communications on the Internet, not just those sent and/or received in Florida. Those wishing to communicate on-line must censor constitutionally permissible speech from their communications to satisfy the statutes' prohibitions. The statutes undoubtedly create a chilling effect on otherwise protected speech as those communicating on-line will steer clear of the statute's proscriptions by a wide margin. Thus, the statutes constitute an invalid indirect regulation of interstate commerce as any local benefit derived from the statutes are greatly exceeded by the extreme burden the statutes impose on interstate commerce.

Furthermore, §§847.0138 and 847.0135 unconstitutionally subject interstate use of the Internet to inconsistent state regulations. As noted earlier,

communications over the Internet, by necessity, implicate interstate commerce. *See, supra,* p. 27. By its very nature, the Internet is a channel or instrumentality of interstate commerce that requires a national regulatory scheme. *See* Fla. AGO 95-70 (opining "[t]he Internet is the first truly global communications network, utilizing both interstate and international wire communications to link users around the world. Therefore, any effort to regulate use of the Internet is better suited to federal regulation than to patchwork attention by the individual states"). As the Supreme Court observed when it initially addressed the problems associated with the various states attempting to regulate instrumentalities or channels of interstate commerce:

> Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in the terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. For the regulation of commerce, as thus defined, there can be only one system of rules, applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. Action upon it by separate states is not, therefore, permissible.

Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U.S. 557, 574-75 (1886) (striking state statute attempting to establish interstate railway rates). *See also, So. Pac. Co. v. Arizona ex rel. Sullivan,* 325 U.S. 761 (1945) (striking state statute attempting to limit the length of trains within the state as the statute placed an undue burden on

interstate commerce); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (striking state statute requiring contour mudguards on trucks within the state as such regulation imposed an undue burden on interstate commerce).

Practically all Commerce Clause challenges to state statutes regarding the Internet dissemination of material deemed harmful to minors have been brought in federal courts, which have uniformly stricken the statutes for violating the Commerce Clause. *See* Pann, *The Dormant Commerce Clause and State Regulation of the Internet: Are Laws Protecting Minors From Sexual Predators Constitutionally Different Than Those Protecting Minors from Sexually Explicit Materials?*, 2005 Duke L. & Tech. Rev. 8, *2-*3 (March 31, 2005). Challenges to statutes regarding Internet luring of minors have occurred in the context of state court criminal cases, in which the statutes have been upheld. *Id.* The state court cases, including those upon which the court below relied, have failed to give adequate consideration to the fact of varying state standards for prohibited conduct and for determination of which minors are in the class sought to be protected by such statutes. *Id.* at *4. The court below fell into a similarly flawed analysis regarding the issue of inconsistent state regulation by veering off on an inapplicable rationale, concluding that the Commerce Clause is not violated because of the

absence of congressional action to preempt the field of legislation regarding such conduct. *Id.* at *27 & n. 83, *citing, Simmons,* 886 So.2d at 406-07. The discussion by the court below in *Simmons* "of direct conflict and preemption are confusing as each are distinct constitutional limitations upon the ability the states to regulate and the absence of conflict or preemption should not have had an effect upon a Dormant Commerce Clause challenge." *Penn,* 2005 Duke L. & Tech. Rev. 8 at *27 n. 83.

The court below has overstated the absence of both burdens on interstate commerce and inconsistent state regulations. *Id. at* *29. One example relates to varying state laws regarding the age for consent to sexual activity. For example, in a number of states, no legal prohibition exists against a 19 year old engaging in sexual relations with a 16 year old, Other examples of such interstate variations are that it is lawful to engage in consensual sexual conduct with persons 14 years of age or older in Hawaii or 15 years of age or older in Colorado. *Id.* at *29, *quoting,* Alex C. McDonald, *Dissemination of Harmful Matter to Minors Over the Internet,* 12 Seton Hall Const. L. J. 163, 217 (Fall, 2001). As a result, conduct that is legal in one state may be unlawful in another, and the analysis of the court below of an absence of any burden on lawful Internet communication "fails to recognize the

Internet's global reach and the inability of Internet users to prevent their communications from reaching a certain state that may prohibit conduct that is lawful in the user's state." *Pann*, 2005 Duke L. & Tech. Rev. 8, *30.

Furthermore, the local benefit of such statutes is minimal given the availability of other criminal laws against the harms criminalized by the statutes at issue in this case, rendering the benefit of the statutes neither nonexistent or otherwise insufficient to counterbalance the burdens on interstate communication and commerce. *Id.* at *31-*32, *quoting*, *Pataki,* 969 F.Supp. at 179.

An Internet user engaging in activity legal in the state where he sits at his computer may be unlawful in another state, residents of which cannot be excluded by the computer user from his Interstate communications because of the design of the internet, which carries no geographic boundaries, and so such statutes constitute an extraterritorial projection of state policy in violation of the Commerce Clause. *Id.* at *34-*35. State courts, including the court below in this case, "have failed to properly consider the implications raised by the variance among states regarding the scope of prohibited conduct in defining who constitutes a minor on the *Pike* balancing of local benefits against burdens on interstate commerce, the extraterritorial effects of the luring statutes, and the specter of an inconsistent

patchwork of state internet regulation." *Id.* at *38. Upon such a closer analysis, this Court should hold that both statutes involved in this case violate the Commerce Clause.

Like railroads and highways, the Internet is an instrumentality or channel of interstate commerce that is only susceptible to regulation at a national level. Uncoordinated efforts at the state level to regulate the Internet leave Internet users lost in a sea of inconsistent law promulgated by states with different policy considerations. The practical effect of such an inconsistent regulatory scheme is that Internet users will be forced to comply with the laws "imposed by the state with the most stringent standard or forego Internet communication of the message that might or might not subject her to prosecution." *Pataki,* 969 F.Supp. at 183. Inconsistent state regulations of the Internet violate the Commerce Clause as this channel or instrumentality of interstate commerce can only be regulated at a national level. Accordingly, §§847.0138 and 847.0135 must be stricken for violating the Commerce Clause.

CONCLUSION

For all of the foregoing reasons, the First District's decision in this case should be quashed and its decision in *Cashatt* disapproved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **James W. Rogers, Esquire,** Assistant Attorney General, The Capitol, Suite PL-01, Tallahassee, Florida 32399, by United States Mail and Electronically, this 16th day of May, 2005.

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ATTORNEY

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the size and style of type used in this brief is 14 point Times Roman.

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ATTORNEY

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