**IN THE**
**SUPREME COURT OF FLORIDA**

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**CASE NO.: SC04-2375**

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**MICHAEL JOHN SIMMONS,**

**Petitioner,**

**vs.**

**STATE OF FLORIDA,**

**Respondent.**

**On Notice to Invoke Discretionary Jurisdiction**
**of the First District Court of Appeal**

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# JURISDICTIONAL BRIEF OF PETITIONER

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## STATEMENT OF THE CASE

Petitioner, Michael John Simmons, was charged by Information in Count One with violation of §847.0135, Fla. Stat. (2002), prohibiting the luring or enticing of a minor by the use of an on-line service, in Count Two with violation of §847.0138(3), Fla. Stat. (2002), prohibiting the transmission of harmful material to a minor, and in Count Three with violation of §790.01(2), Fla. Stat. (2002), prohibiting the carrying of a concealed firearm. Petitioner moved to dismiss Counts One and Two on the grounds that the statutes placed an unconstitutional burden on interstate commerce in violation of U.S. Const. art. I, §8, cl. 3, and moved to dismiss Count II on the basis that §847.0138 violated the Fla. Const. art. I, §§4 and 9; and U.S. Const. amend. I. The trial court denied the motions and Petitioner entered a plea of nolo contendere to Counts One and Two, reserving his right to appeal the motions to dismiss, with the State stipulating such motions were dispositive. The State entered a nolle prosequi as to Count Three.

On appeal, the First District held that §847.0138 was valid, finding the statute was not overbroad or vague and passed strict scrutiny under the First Amendment. The First District also held that §§847.0135 and 847.0138 did not violate the commerce clause.

## SUMMARY OF THE ARGUMENT

Section 847.0138, Fla. Stat. (2002), is a content-based restriction of speech that regulates non-obscene, sexually suggestive speech that is protected for adults. The statute applies to vast array of electronic communications as opposed to personal one on one messages. The statute creates a chilling effect on protected adult speech as those desiring to communicate over electronic mediums, such as websites and chat rooms, will have to do so in messages that are acceptable to only children. As a result, the statute is overbroad and is not narrowly tailored nor is it the least restrictive means of advancing the State's interest. The statute is also vague as it fails to discriminate between different ages of "minors." Those composing electronic messages will be forced to do so in terms that will not offend the youngest minor, or risk prosecution. In addition, the statute impermissibly burdens interstate commerce as out-of-state speakers are forced to tailor their messages to the strictures of the statute. In light of almost every other court across the nation reviewing similar legislation and declaring such statutes unconstitutional, enforcement of §847.0138 results in inconsistent state regulations impermissibly burdening interstate commerce.

## ARGUMENT

### I.

### THE FIRST DISTRICT'S OPINION EXPRESSLY DECLARES THAT SECTION 847.0138, FLA. STAT. (2002), IS VALID AND EXPRESSLY CONSTRUES PROVISIONS OF THE FEDERAL AND STATE CONSTITUTIONS.

Statutes virtually identical to §847.0138, Fla. Stat. (2002), have been declared unconstitutional by almost every other court to have examined them. *See Ashcroft v. ACLU*, ___ U.S. ___, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004) (affirming grant of preliminary injunction against enforcement of federal Child Online Protection Act as statute likely violated First Amendment); *Reno v. ACLU*, 521 U.S. 844 (1997) (declaring federal "Communications Decency Act of 1996" unconstitutional); *PSINET, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004) (declaring Virginia statute prohibiting dissemination of material harmful to minors over Internet unconstitutional); *ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999) (finding New Mexico statute criminalizing dissemination by computer of material that is harmful to a minor unconstitutional); *Bookfriends, Inc. v. Taft*, 223 F.Supp. 2d 932 (S.D. Ohio 2002) (enjoining Ohio statute criminalizing dissemination to juveniles of materials "harmful to juveniles" for violation of the First Amendment); *American Booksellers Foundation for Free Expression v. Dean*, 202 F.Supp. 2d 300 (D. Vt. 2002) (entering permanent

injunction against enforcement of a Vermont statute prohibiting distribution in an electronic format of sexually explicit materials deemed harmful to minors); *Cyberspace Communications, Inc. v. Engler*, 142 F. Supp. 2d 827 (E.D. Mich. 2001) (entering permanent injunction against enforcement of Michigan statute criminalizing dissemination by computer of sexually explicit material that is "harmful to minors" for violation of the First Amendment). However, the First District found §847.0138 constitutional in the face of Petitioner's challenge on the grounds that such statute was overbroad, vague and could not pass strict scrutiny under the First Amendment to the Constitution of the United States and Article I, §4 of the Florida Constitution.

Section 847.0138 prohibits the transmission[1] of material that is "harmful to minors." Section 847.001(6), Fla. Stat. (2002), defines "harmful to minors" as:

> [A]ny reproduction, imitation, characterization, description, exhibition, presentation or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:
>
> (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

[1] Transmit is defined as: "to send to a specific individual known by the defendant to be a minor via electronic mail." §847.0138(1)(b), Fla. Stat. (2002).

scientific value for minors.

Because §847.0138 is a content-based restriction of speech, it is presumed invalid and the government bears the burden of showing it is constitutionally permissible. *Ashcroft v. ACLU*, 124 S.Ct. 2788 (2004). In order to withstand strict scrutiny review, the statute must: "(1) serve a compelling interest; (2) be narrowly tailored to achieve that interest; and (3) be the least restrictive means of advancing that interest." *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). The majority opinion of the First District, although questioning whether strict scrutiny applied to this statute, nevertheless found §847.0138 withstood such scrutiny under the First Amendment as the statute in no way burdened protected adult speech. The court found the statute was narrowly tailored because "electronic mail" is limited to personal one on one communications. *See* Appendix at 10 ("We agree with the State that for 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.")

However, neither § 847.0138, nor any other Florida Statute, defines "electronic mail," and a plain reading of the term, assuming one can do so, encompasses a vast array of electronic communications, not just one on one, personal messages. The dictionary defines "electronic mail" as "e-mail" and "e-mail" is defined as: "1: a means

or system for transmitting messages electronically (as between computers on a network); 2a: messages sent and received electronically through an e-mail system; b: an e-mail message." *See* Merriam-Websters Collegiate Dictionary (11th ed.) (2003) at 401, 405. Thus, by giving the statute a limiting construction so as to apply only to one on one personal communications, the First District has impermissibly rewrote the statute. *See State v. Globe Communications Corp.*, 648 So.2d 110, 113 (Fla. 1994) (refusing to give a narrowing construction of §794.03, Fla. Stat. (1989), as it would amount to rewriting of statute); *ACLU v. Johnson*, 194 F.3d 1149, 1158 (10th Cir. 1999) (failing to give narrowing construction of New Mexico statute criminalizing dissemination by computer of material deemed "harmful to a minor" so as to apply solely to one on one communications with a single minor as such narrowing construction "really amounts to a wholesale rewriting of the statute"). In light of the broad scope of the term "electronic mail," the statute applies to a vast array of electronic communications, such as chat rooms, newsgroups, mail exploders, and Internet websites. Protected adult speech in such forums is chilled by operation of §847.0138, as those wishing to communicate will be forced to do so in a manner deemed non-offensive to minors. As a result, the statute provides for censorship in the form of a "heckler's veto" for any person who finds distasteful the subject matter of an individual's message by merely informing the speaker that a minor is receiving

the message. *See Reno v. ACLU*, 521 U.S. 844, 880 (1997) (finding broad sweep of CDA provided for censorship in the form of a "heckler's veto").

The statute regulates not just obscene communications, but communications considered "harmful to minors." Accordingly, the statute reaches "non-obscene, sexually suggestive speech that is otherwise protected for adults." *ACLU v. Ashcroft*, 322 F.3d 240, 252 (3d Cir. 2003), *aff'd* 124 S.Ct. 2783 (2004). The threat of criminal prosecution for transgression of the statute impermissibly chills protected adult speech. *See ACLU v. Ashcroft*, 124 S.Ct. at 2788 ("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"). As a result, §847.0138 is overbroad and unconstitutionally restricts adult speech to that which is suitable solely for minors.

Furthermore, the statute is impermissibly vague as it makes no distinction between the different ages of minors. As a result, those engaging in electronic communications must tailor their messages to be suitable for the youngest minor. As observed by Judge Browning in his dissent: "[t]he statute would reduce message content to the lowest common denominator, that of the youngest minor, and thereby 'chill' free speech in an unconstitutional manner." *See* Appendix at 22. *See also*

*ACLU v. Ashcroft*, 322 F.3d at 268 n. 37[2]. By requiring the authors of electronic messages to guess as to what age group for which they must compose their messages so as not to violate §847.0138, the statute chills an even wider range of constitutionally protected speech, rendering the statute unconstitutionally vague.

Additionally, §847.0138 impermissibly burdens interstate commerce by restricting out-of-state speakers communicating via electronic means to the strictures of the statute, as "[i]ndividuals who wish to communicate [material] that might fall within the [statute's] proscriptions must thus self-censor or risk prosecution, a Hobson's choice that imposes an unreasonable restriction on interstate commerce." *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 180 (S.D.N.Y. 1997). Section 847.0138 also subjects those communicating electronically to inconsistent state regulations. As stated above, almost every court to examine statutes similar to §847.0138 have declared such legislation unconstitutional. However, the First District has held that Florida's statute prohibiting transmission of harmful material to minors is valid. Thus, out-of-state speakers whose jurisdictions do not regulate the type of speech in question will nevertheless be required to conform to Florida's statute,

[2] The Third Circuit's decision was on remand from *Ashcroft v. ACLU*, 535 U.S. 564 (2002) (Ashcroft I) and was subsequently affirmed in *Ashcroft v. ACLU*, 124 S.Ct. 2783 (2004) (Ashcroft II).

thereby creating inconsistent state regulations on users of the Internet. Given the Internet is an instrumentality or channel of interstate commerce, it should be regulated at the national level. As with the First Amendment challenges to statutes substantially similar to §847.0138, almost every court to analyze comparable legislation under the Commerce Clause has found the statutes unconstitutional. *See PSINET, Inc.*, 362 F.3d at 239-40; *Johnson*, 194 F.3d at 1160-62; *Cyberspace*, 142 F.Supp.2d at 830-31; *American Libraries Ass'n.*, 969 F.Supp. 160.

## CONCLUSION

For the foregoing reasons, the Court should accept jurisdiction in this case.

Respectfully submitted,


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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **Charles J. Crist, Jr., Esquire, Attorney General**, 400 South Monroe Street, #PL-01, Tallahassee, Florida 32399-6536; and **Robert R. Wheeler, Esquire**, Office of Attorney General, 400 South Monroe Street, #PL-01, Tallahassee, Florida 32399-6536, by United States Mail, this 23rd day of December, 2004.

_____
ATTORNEY

## CERTIFICATE OF COMPLIANCE

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

_____
ATTORNEY

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