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

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REPLY BRIEF OF PETITIONER

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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.

The entire premise for the First District's majority opinion finding and the State's contention on appeal that §847.0138, Fla. Stat. (2002), is constitutional derives from a statutory construction which cannot be found from a plain reading of the statute, legislative history or any prior case law interpreting the statute. The First District's majority opinion and the State's brief attempts to defend the constitutionality of §847.0138, Fla. Stat. (2002), by erroneously construing the statute as applying only to individually-addressed computer messages, constituting personal, "one-on-one" communications. *Simmons v. State*, 886 So.2d 399, 404 (Fla. 1st DCA 2004); Amended Answer Brief of Respondent ("AB") at 2, 7, 10, 23. The definition of transmit, which the State contends and the majority found to apply solely to individually-addressed computer messages, merely provides: "'transmit' means to send to a specific individual known by the defendant to be a minor via electronic mail." Section 847.0138(1)(b), Fla. Stat. (2002).

Neither §847.0138, nor any other Florida statute, defines "electronic mail." As a result, to support its position that §847.0138 only applies to personal, one-on-one communications, the State is left to cite to a purported legislative history of the statute, citing to Florida Senate committees' staff analyses. *See* AB at 7-9.

However, at the time the Senate Criminal Justice Committee staff analysis and the Senate Judiciary Committee staff analysis were prepared, Senate Bill 144 (2001) ("SB 144") did not contain any legislation creating §847.0138. At the time the staff analyses were prepared, SB 144 proposed legislation prohibiting transmission of child pornography and other images deemed harmful to minors. *See* SB 144. Thus, the staff analyses have no bearing on legislative intent as it pertains to §847.0138, as such enactment involves a much broader category of governmental regulation encompassing speech.

Furthermore, reference to the staff analyses as a source of legislative intent is misplaced, as the staff analyses on their face state: "[T]his Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate." *See* Senate Staff Analysis and Economic Impact Statement for CS/SB 144 by the Criminal Justice Committee (March 27, 2001) at p. 9; Senate Staff Analysis and Economic Impact Statement for CS/CS/SB 144 by the Judiciary Committee (April 18, 2001) ("Judiciary Committee Staff Analysis") at p. 7. In

addition, the Senate Judiciary Committee Staff Analysis cited by the State acknowledged that it was "indeterminate" whether the proposed legislation was drawn sufficiently narrow to be constitutional in light of adults' constitutionally protected right to view images deemed harmful to a minor and the likelihood of a chilling effect on constitutionally protected speech. *See* Judiciary Committee Staff Analysis at p. 6.

An even more fundamental problem with the State's reference to the staff analyses as a source of legislative intent is: (1) that the definition of "transmit" contained in the analyses is different than the one eventually enacted in §847.0138, and (2) that §847.0138 was created by House Bill 203. Originally, SB 144 provided for a definition of transmit to be included in the general definitions section of Chapter 847, Florida Statutes. *See* SB 144. That definition provided: "'Transmit' means to send an electronic communication <u>to a specified electronic mail address or addresses</u>." *Id.* at Section 1 (emphasis added).

However, the bill was amended on the floor of the Senate on April 30, 2002, whereby the previous definition of "transmit" was abandoned and the Senate adopted the House definition of the word to mean "send to a specific individual known by the defendant to be a minor via electronic mail," and included such definition in the newly created §847.0138. *See* Journal of the Senate, 2001 Session

at 584-87. That definition, therefore, was never analyzed by the Senate committees, and so those committee staff analyses have no relationship to the legislative intent underlying the definition that became law. In changing the definition of the term transmit, the Senate deleted the reference "to a specified electronic mail address or addresses." As a result, the transmission prohibited need not target a specified address but only be sent via electronic mail.

However, the majority opinion and the State would have this Court construe the definition to incorporate language specifically abandoned by the legislature, to wit: "to a specified electronic mail address or addresses." By abandoning the above-quoted language, the legislature specifically chose the statute to have a broader reach than that urged by the State and adopted by the majority below (i.e., individually-addressed computer transmissions). Furthermore, the majority below and the State bring within the sweep of §847.0138 such transmissions as "instant messages." *See* AB at pp. 2, 7, 17. However, the term "instant message" can nowhere be found within the text of the statute.

The Legislature's failure to define "electronic mail" renders §847.0138 unconstitutionally vague. In a vagueness challenge, any doubt as to a statute's validity should be resolved in favor of the defendant and against the State. *See Dufresne v. State*, 826 So.2d 272, 274 (Fla. 2002); *State v. Brake*, 796 So.2d 522,

527 (Fla. 2001). "This policy emanates from the concern that citizens should be put on reasonable notice of conduct proscribed by the State when the proscription utilizes criminal sanctions for its breach." *Dufresne*, 826 So.2d at 274. A statute must provide persons of common intelligence and understanding adequate notice of the proscribed conduct. *Id.* at 275.

Additionally, the statute must define the offense in a manner that does not encourage arbitrary and discriminatory enforcement, *see State v. Marks Marks P.A.*, 698 So.2d 533, 537 (Fla. 1997), and the medium of communication proscribed by §847.0138 is not fully defined by the statute. "In the absence of a statutory definition, resort may be made to case law or related statutory provisions which define the term, and where a statute does not specifically define words of common usage, such words are construed in their plain and ordinary sense." *State v. Hagan*, 387 So.2d 943, 945 (Fla. 1980). Under even that analysis, §847.0138 fails constitutional scrutiny.

In the instant case, there exists no statutory definition for electronic mail or e-mail and no Florida case has ever attempted to define the term other than the First District opinion in this case. The term is incapable of being construed in a plain and ordinary sense. Webster's Collegiate Dictionary defines "electronic mail" as "E-mail." *See* Merriam-Webster's Collegiate Dictionary (11th ed.) (2003) at 401.

Webster's defines "e-mail" as "1: a means or system for transmitting message electronically (as between computers on a network) 2a: messages sent and received electronically through an e-mail system b: an e-mail message." *Id.* at 405. Black's Law Dictionary 539 (7th ed. 1999) defines e-mail as "a communication exchanged between people by computer, either through a local area network or the Internet." There is nothing contained in any of the definitions of electronic mail or e-mail which would suggest that such communications are solely limited to individually-addressed computer transmissions. As a result, §847.0138 fails to provide adequate notice to persons of common intelligence and understanding of the proscribed conduct and, therefore, is unconstitutionally vague.[1]

Although the State urges this Court to construe the term "electronic mail" to encompass only individually-addressed computer transmissions, it provides no authority for such construction. The definition of "transmit" initially considered by the Senate arguably would have resulted in criminalizing solely one-on-one personal communications by requiring the communication to be directed to a specified

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[1] The majority opinion below relied on Black's Law Dictionary and the Merriam-Webster's Collegiate Dictionary to define "mail." *See Simmons*, 886 So.2d at 404. By using the broader term, mail, rather than the specific term, e-mail, or electronic mail, the majority has engaged in the reverse exercise for proper statutory construction. The idea is to narrowly limit the definition not expand it to suit your position.

electronic mail address, but the legislature abandoned such definition in favor of a broader one not limited to a specified address. Such definition allows for prosecution based upon communications that are not solely one-on-one, but which may also entail conversations in chat rooms or a variety of other Internet fora where numerous others, including adults, may be present. By prohibiting such communications, in which adults have a constitutional right to engage, §847.0138 is overbroad and not sufficiently narrowly tailored.

The narrowing definition of "transmit" urged by the State amounts to a wholesale rewriting of the statute, a matter to be addressed by the legislature, not the courts. *See ACLU v. Johnson*, 194 F.3d 1149, 1159 (10th Cir. 1999). While courts should endeavor to construe statutes so as not to conflict with the constitution, such construction must be consistent with legislative intent evident in the statute itself or its common sense meaning. *State v. Cronin*, 774 So.2d 871, 874-75 (Fla. 1st DCA 2000), *approved*, 801 So.2d 94 (Fla. 2001). Like the State of New Mexico in *Johnson*, the State here invites this Court to interpret "transmit" to reach communications "where the recipient is 'solely and exclusively an individual minor recipient.'" *Johnson*, 194 F.2d at 1159. However, "the statute nowhere uses these limiting words, nor is it readily susceptible to such a limiting construction." *Id.*

Perhaps the most troubling aspect of the First District's majority opinion and the State's argument on appeal is the utter failure to engage in any meaningful analysis of whether there exist lesser restrictive alternatives (i.e. filters) to enforcement of §847.0138. In finding that §847.0138 is narrowly tailored, the court below failed to consider the ability of parents to utilize filters on their families' computers to reduce the amount of "harmful" material to which their children may be exposed. In the State's Answer Brief, it contends, without any citation to the record or to any authority, that:

> 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.

AB at pp. 13-14.

The State is wrong. As observed by the Supreme Court of the United States in *Ashcroft v. ACLU*, 124 S.Ct. 2783, 2792 (2004) [Ashcroft II]: "Finally, filters also may be more effective because they can be applied to all forms of Internet communication, including e-mail, not just communications available via the World Wide Web." (emphasis added). Thus, filters are available as a less restrictive

alternative to §847.0138. Furthermore, the Court in Ashcroft II found the government's argument that Congress cannot require the use of filtering software "carries little weight, because Congress undoubtedly may act to encourage the use of filters," including use by parents. *Id*. at 2793. The Court concluded that "[b]y enacting programs to promote use of filtering software, Congress could give parents [the ability to monitor what their children see] without subjecting protected speech to severe penalties." *Id*. Thus, the fact that the legislature cannot require use of filters is of no moment. The majority opinion and the State err in concluding that §847.0138 is sufficiently narrowly tailored to survive strict scrutiny in light of at least one less restrictive alternative.

The State's reliance, and that of the majority below, on *People v. Hayne*, 2002 W.L. 470853 (Cal. App. 5 Dist. 2002) is grossly misplaced.[2] On the face of that opinion, the California court referenced Rule 977 of the California Rules of Court, forbidding courts or parties from citing to or relying on unpublished California appellate opinions. The Rule provides that California appellate decisions (other than by that state's supreme court) "must not be cited or relied on by a court or a party in any other action" unless certified for publication or ordered published.

[2] It should be noted the case was first cited by the State in its Answer Brief in the First District Court of Appeal.

California Rule of Court 977(a). (emphasis added). The only exceptions to this Rule arise when an unpublished opinion is relevant to an issue of law of the case, *res judicata* or *collateral estoppel*, or relevant to a criminal or disciplinary action involving the same defendant or respondent as in the unpublished opinion. California Rule of Court 977(b)(1), (2). Accordingly, the decision in *Hayne* cannot properly even be asserted as any pertinent authority.

Accordingly, §847.0138 is unconstitutional as it proscribes communication using a vast array of electronic fora in which adults have a constitutional right to engage. Contrary to the majority opinion and the argument of the State, the statute applies to far more than "individually-addressed computer messages," as "electronic mail" encompasses a wide variety of electronic communications. The breadth of the electronic messages covered by "electronic mail" renders the statute unconstitutional because of the chilling effect it has on protected adult speech, as would-be discoursers using such media are forced to tailor their communications so as not to offend anyone under 18 years of age. The infringement upon protected adult speech caused by §847.0138 renders the statute unconstitutional as it is vague, overbroad and not narrowly tailored to achieve a compelling government interest. Accordingly, the decision below should be reversed.

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II.

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

The State argues that the Commerce Clause is not implicated by enforcement of §§847.0135 and 847.0138 because the communications at issue were not "commerce" or, alternatively, not "legitimate commerce." AB at 26. Whether or not the communications at issue themselves may be deemed commerce, they are subject to the Commerce Clause because they were transmitted using an instrumentality and/or channel of interstate commerce. The Internet is an instrumentality and/or channel of interstate commerce. *See United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004). As a result, it is the proper subject of regulation at the national level as the Commerce Clause empowers Congress to legislate regarding three things: (1) the use of channels of interstate commerce; (2) instrumentalities and persons or things in interstate commerce; and (3) intrastate activities that substantially affect interstate commerce. *See United States v. Lopez*, 514 U.S. 549, 558-59 (1995). Accordingly, the Commerce Clause affords protection to the communications at issue, as they are instrumentalities traveling in channels of interstate commerce.

Although the Commerce Clause outlines the power of Congress, it also contains a "dormant" or " negative" aspect as well that serves as a substantive restriction on permissible state regulation of interstate commerce. *See Bank West, Inc. v. Baker*, 2005 W.L. 1367795 (11th Cir. June 10, 2005). The dormant Commerce Clause serves to prevent states from venturing excessively into the regulation of interstate commerce and trespassing upon national interests. *Id.* (*citing Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 669 (1981)). Sections 847.0135 and 847.0138 impermissibly encroach upon national interests and impose inconsistent state regulation upon the instrumentalities and channels of interstate commerce.

With respect to §847.0138, the State argues that there are no lesser restrictive alternatives to enforcement of the statute because there is no ability to filter the messages. *See* AB at p. 31. However, for the reasons set forth in Argument section I, the State is incorrect. Furthermore, the State contends that there is no Commerce Clause protection because the messages at issue are criminal. However, such argument assumes that the statute regulates individually-addressed computer transmissions. In light of the broad sweep of computer transmissions encompassed by the term "electronic mail," it is unreasonable to construe the statute in such a manner. Rather, the statute includes within its sweep protected adult communications entitled to First Amendment protection. Given the chilling

effect the operation of §847.0138 has on protected speech, the local benefit derived in comparison to the excessive burden on interstate commerce is minimal and, therefore, the statute violates the dormant Commerce Clause.[3]

With respect to §847.0135, the operation of the statute subjects the Internet, an instrumentality and/or channel of interstate commerce, to inconsistent state regulation. As noted in Petitioner's Initial Brief, states around the nation have varying laws with respect to the age of majority for sexual conduct. Through enforcement of §847.0135, Florida is projecting its policy as to what is appropriate upon residents of other jurisdictions, which may have more lenient laws. As a result, §847.0135 unconstitutionally projects state law upon the other states.

The State's reliance upon *Gonzales v. Raich*, 2005 W.L. 1321358 (June 6, 2005) and its contention that Congress' failure to preempt the field implies state regulation of the subject matter is appropriate is misplaced. The *Raich* decision dealt with Congress' ability to affirmatively regulate intrastate activities that have a substantial effect on interstate commerce. Congress is uniquely suited to regulate interstate commerce at the national level, unlike the Florida legislature. The line of cases addressing Congress' affirmative power to regulate interstate commerce do

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[3] Also, the State's reliance and that of the court below, on an unpublished California decision is improper as to this issue as well as that in Argument I. *See, supra*, at 9-10.

not implicate the dormant Commerce Clause analysis of state regulation which encroaches upon national interests. The mere fact that Congress may have elected not to preempt the field does not mean that states are free to enact any legislation affecting an area of interstate commerce not preempted. Hence, Congress' failure to preempt the field does not mean that§§847.0135 and 847.0138 do not violate the dormant Commerce Clause.

The State also urges this Court to accept its proposed legal fiction that when an Internet user sends a communication into cyberspace, the sender does not remain in his or her "home" state, but rather enters the cyberspace of the recipient's jurisdiction ("teleportation theory"). *See* AB at pp. 47, 48. Under the State's teleportation theory, the communication is not deemed interstate, but rather is an intrastate message, and, therefore, state regulation of such communication does not implicate the Commerce Clause. *Id.* Such a legal fiction is untenable. Although a creative theory, such legal fictions are exactly what the dormant Commerce Clause seeks to prevent. By deeming anyone across the globe communicating with a Florida resident to be present in the state, the teleportation theory unlawfully exports Florida law not just around the country, but around the globe. The sea of inconsistent regulations to which a user of the Internet would be subjected if he were deemed to have entered the jurisdiction of every person with whom he or she communicates over the Internet is unfathomable. Furthermore, in light of the

geographically boundless nature of the Internet, it will quite often be impossible for authorities to know from what jurisdiction an alleged offender teleported into Florida, making enforcement impracticable. Accordingly, the Court should reject "teleportation theory" and reverse the decision below.

CONCLUSION

For all of the foregoing reasons, the First District's decision in this case should be quashed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **Robert E. Wheeler, Esquire,** Assistant Attorney General, and **Charlie McCoy, Esquire**, Senior Assistant Attorney General, The Capitol, Suite PL-01, Tallahassee, Florida 32399-1050, by United States Mail and Electronically, this 18th day of July, 2005.

ATTORNEY

CERTIFICATE OF COMPLIANCE

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

ATTORNEY

kc[simmons reply brief]